66 FLRA No. 70

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY GARRISON
FORT DRUM, NEW YORK
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R2-61
(Union)

0-AR-4683

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DECISION

December 6, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Thomas J. Maroney filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.[1]

The Arbitrator found that the Agency violated the parties' collective-bargaining agreement when it denied overtime compensation to the grievants, and ordered the Agency to compensate the grievants for all overtime previously worked, as well as prospective overtime. For the reasons that follow, we deny the Agency's exceptions and reject the Union's request for attorney fees.

II. Background and Arbitrator's Award

A. Background

The Agency unilaterally created two new full-time Motor Vehicle Operator (MVO) positions and hired two persons to fill them. Award at 3. These individuals eventually left the positions and were replaced by two new persons. All four individuals are the grievants in this matter. *Id.*

An MVO's primary duty is to drive a passenger bus to shuttle military personnel to and from the dining facilities on the base during the breakfast and dinner hours on weekends. *Id.* at 3-4. They also transport military personnel on and off post. *Id.* at 3. An MVO's work schedule consists of a forty-hour work week in four days. MVOs work twelve hours on Saturdays and Sundays and eight hours on two other days during the week. *Id.*

When the Agency unilaterally created the MVO positions, the Union did not contest its right to do so. *Id.* at 4. But when the Agency announced the MVOs' work schedule, the Union contended that the parties' agreement entitled the MVOs to time-and-a-half overtime pay for four hours every Saturday and Sunday beyond their eight-hour work day. *Id.* The Union based its position on Article 13, Section 1 of the parties agreement, which states that "[e]xcept as otherwise provided by law, regulations, instruction, or this agreement, overtime work is work performed in excess of [eight] hours in a day or [forty] hours in a workweek." *Id.* (emphasis omitted).

Initially, the Agency agreed to pay the grievants overtime, but advised that it needed to make an adjustment to the payroll computer. *Id.* at 5. The Agency sought advice from the Civilian Human Resources Agency and the Defense Finance and Accounting Service regarding the applicable law. Both advised the Agency that the grievants were not entitled to overtime pay for the additional four hours of work on Saturdays and Sundays. *Id.* Consequently, the Agency changed its position and denied the grievants overtime pay. *Id.* at 5-6. The Union filed a grievance. The parties did not resolve the grievance and submitted it to arbitration. *Id.* at 6.

[1] In its opposition the Union "requests that the grievants be awarded interest on their lost overtime compensation" in accordance with the Back Pay Act, 5 U.S.C. § 5596. Opp'n at 8. To the extent this request seeks to modify the award, and thus relates to the validity of the underlying award, it constitutes an exception to the award. *See, e.g., AFGE, Local 3627*, 63 FLRA 116, 116 n.1 (2009); *SSA, Office of Labor Mgmt. Relations*, 60 FLRA 66, 67 (2004) (*SSA*); *Fort McClellan, Educ. Ass'n*, 56 FLRA 644, 645 n.3 (2000); *Picatinny Arsenal, U.S. Army Armament Research & Dev. Command, Dover, N.J.*, 7 FLRA 703, 703 n.2 (1982). As the Union's exception was filed beyond thirty-five days after the award was served on the parties by mail, it was not timely. *See* 5 C.F.R. §§ 2425.2 (b), 2429.22, 2429.27(d). Accordingly, we dismiss the Union's exception. *See Fort McClellan Educ. Ass'n*, 56 FLRA at 645 n.3 (dismissing as untimely agency exception first raised in its opposition).

B. Arbitrator's Award

The parties stipulated the issue for arbitration as follows: "Did the [Agency] violate Article 13 (OVERTIME), Section 1 of the [parties' agreement] when it denied [the grievants] overtime pay . . . ?" Award at 1-2.

The Agency argued that Article 13, Section 1 of the parties' agreement was ambiguous. *Id.* at 6. Therefore, the Agency contended, the Arbitrator had to consult the Fair Labor Standards Act (FLSA) and its implementing regulations, as well as the Federal Employees Flexible and Compressed Work Schedules Act (FCWSA), 5 U.S.C. § 6121, and 5 C.F.R. § 550.501(a)(6).[2] *Id.* at 6-7. The Union argued that the language in Article 13, Section 1 was unambiguous and had been used by the parties for many years. *Id.* at 2, 6.

The Arbitrator agreed with the Union. The Arbitrator found that the grievance was a matter of contract interpretation and that Article 13, Section 1 was unambiguous. *Id.* at 6-7. The Arbitrator noted that Article 13, Section 1 clearly states that overtime work is work performed in excess of "[eight] hours in a day *or* [forty] hours in a workweek." *Id.* at 7. The Arbitrator therefore concluded that the Agency violated the parties' agreement when it denied the grievants overtime pay for their work in excess of eight hours on Saturdays and Sundays. *Id.* at 6.

Furthermore, because Article 13, Section 1 references laws and regulations, the Arbitrator considered the FLSA and its implementing regulations and determined that the grievants were also covered by their protections. *Id.* at 7. In contrast, however, the Arbitrator, citing an Agency manager's concession that "the [g]rievants' schedule 'is NOT a compressed work[] schedule' established in accordance with the [FCWSA]," found that the FCWSA did not govern.[3] *Id.* As to how compressed work schedules are established under the FCWSA, the Arbitrator found that "[w]here there is a union in place, the establishment of such a schedule is subject to negotiation." *Id.* at 3. The Arbitrator also had found that the MVO position, with its associated four-day work schedule, "was established unilaterally by the [Agency]." *Id.* at 4. Accordingly, the Arbitrator concluded that the FCWSA was inapplicable. *Id.* at 7.

As a remedy, the Arbitrator ordered the Agency to compensate the grievants at the rate of time-and-a-half for all the hours they had worked beyond eight hours on Saturdays and Sundays. *Id.* at 8. The Arbitrator also found that the grievants currently working as MVOs should receive time-and-a-half for these hours on an ongoing basis. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency claims that the award is contrary to law because it violates the FCWSA, 5 U.S.C. § 6121. Exceptions at 5, 7. The Agency asserts that the grievants work a compressed work schedule pursuant to § 6121(5)(A) of the FCWSA.[4] *Id.* at 5-6. The Agency contends that the grievants' weekly work schedule of two twelve-hour days and two eight-hour days compresses an eighty-hour biweekly work schedule into eight days rather than ten. Therefore, the Agency argues, the grievants' eighty-hour work schedule is, "by definition," a compressed work schedule under the FCWSA, "regardless of how it was characterized by the parties." *Id.* at 6, 7. Consequently, the Agency claims, pursuant to § 6128(b) of the FCWSA, the grievants are not entitled to overtime pay because they do not work in excess of eighty-hours biweekly.[5] *Id.* at 6. Furthermore, the Agency alleges, awarding the grievants overtime pay for the four "extra hours" they work on Saturdays and Sundays would reduce their basic work to thirty-two hours a week, in effect rendering them part-time employees. *Id.*

The Agency also contends that the award is contrary to an FLSA-implementing regulation that states that employees who work more than eight hours in a day or forty hours in a week are entitled to compensation at the rate of time-and-a-half, "except that an employee shall not receive overtime compensation under this part . . . [f]or hours of work that are not 'overtime hours' as defined in 5 U.S.C. [§] 6121, for employees under . . . compressed work schedules." 5 C.F.R. § 551.501(a)(6).[6] *See also id.* at 7. The Agency argues that because the grievants work a compressed work schedule, eighty hours in eight days, the FCWSA prevents them from receiving

[2] The relevant provisions of the FCWSA and 5 U.S.C. § 550.501(a) are set forth *infra* section IV.A.

[3] The concession cited by the Arbitrator echoed his earlier finding that "it is agreed that the schedule worked by the [g]rievants here is not a 'compressed' schedule within the contemplation of the [FCWSA]." Award at 3.

[4] 5 U.S.C. § 6121(5)(A) provides that a "compressed schedule" work schedule for full-time employees is "an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays."

[5] 5 U.S.C. § 6128(b) provides, in pertinent part, that "[i]n the case of any full-time employee, hours worked in excess of the compressed schedule shall be overtime hours and shall be paid for as provided by the applicable provisions referred to in subsection (a) of this section." Subsection (a) provides that "[t]he provisions of sections 5542(a) and 5544(a) of this title, section 7453(e) of title 38, section 7 of the [FLSA] or any other law, which relate to premium pay for overtime work, shall not apply to the hours which constitute a compressed schedule."

[6] In its exceptions, the Agency mistakenly cites 5 C.F.R. § 550.501(a)(6) where it appears to mean § 551.501(a)(6).

overtime under the FLSA for four of the twelve hours scheduled on Saturdays and Sundays. *Id.*

B. Union's Opposition

The Union argues that the Arbitrator correctly applied Article 13, Section 1 of the parties' agreement to find that the grievants are entitled to overtime. Opp'n at 2. The Union further argues that the FCWSA is not applicable because the grievants do not work a compressed work schedule. *Id.*

The Union also claims that "any Agency intent or desire to create a compressed work schedule . . . was never . . . negotiated in any way with the Union," as required by 5 U.S.C. § 6130.[7] *Id.* at 3. The Union further claims that this fact was "uncontested by the Agency's sole witness." *Id.* at 4. Consequently, the Union argues, the Arbitrator correctly found that 5 C.F.R. § 551.501(a)(6) does not apply because there is no statutory bar to an employee receiving overtime compensation for hours worked beyond eight hours in a day when the employee does not work a compressed work schedule. *Id.* at 5. Therefore, the Union asserts, the Arbitrator's finding that the grievants are entitled to such overtime payment is not deficient. *Id.*

Citing the Back Pay Act, the Union requests that the Authority grant the Union attorney fees to compensate the Union for costs it has incurred in connection with its response to the Agency's exceptions. *Id.* at 7. The Union also asks that the grievants be awarded interest on the overtime compensation the Arbitrator ordered the Agency to provide. *Id.* at 8.[8]

IV. Analysis and Conclusions

A. The award is not contrary to law, rule, or government-wide regulation.

The Agency argues that the FCWSA applies to the grievants because the grievants' work schedule is, "by definition," a compressed work schedule under the statute. Exceptions at 6. The Agency further claims that the award is contrary to the FCWSA because overtime is only available when an employee works hours in excess of an eighty-hour compressed biweekly work schedule. *Id.* Because the grievants did not do so, the Agency asserts, they are not entitled to such overtime compensation. Exceptions at 5-6.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Arbitrator concluded that the grievants' work schedule was not governed by the FCWSA. The FCWSA provides that bargaining unit employees can be assigned a compressed work schedule only when authorized by a collective-bargaining agreement between the agency and the union. 5 U.S.C. § 6130(a)(2);[9] *see U.S. Dep't of Veterans Affairs, VA Pittsburgh Healthcare Sys.*, 60 FLRA 516, 518 (2004) (agency unlawfully imposed compressed work schedule on employees where agency instituted such schedule without first reaching agreement with union). The Arbitrator based his conclusion that the FCWSA does not apply on his uncontested factual finding that the Agency established the MVO positions and work schedule unilaterally, rather than through negotiations with the Union. *See* Award at 4. The Agency does not except to this finding as a nonfact. Therefore, based on the Arbitrator's factual finding, to which we defer, his legal conclusion that the FCWSA does not apply is consistent with the FCWSA. Consequently, the Agency fails to demonstrate that the award is contrary to law. Accordingly, we deny the Agency's exceptions.[10]

B. The Authority is not the appropriate authority to award attorney fees in this case.

Citing the Back Pay Act, the Union requests that the Authority award the Union attorney fees to

[7] The relevant provisions of 5 U.S.C. § 6130 are set forth *infra* note 9.

[8] *See supra* note 1.

[9] 5 U.S.C. § 6130(a)(2) states that "[e]mployees within a unit represented by an exclusive representative shall not be included within any program under this subchapter except to the extent expressly provided under a collective bargaining agreement between the agency and the exclusive representative."

[10] The Agency further alleges that the award is contrary to 5 C.F.R. § 551.501(a)(6), which exempts from overtime compensation "hours of work that are not 'overtime hours' as defined in 5 U.S.C. [§] 6121, for employees under flexible or compressed work schedules." Because we find that the FCSWA does not apply, 5 C.F.R. § 551.501(a)(6) is inapplicable to the grievants, and we deny this exception. Finally, although the Agency claims that the award renders the grievants part-time employees, the Agency does not provide any arguments or authority to explain why part-time employees are not entitled to overtime compensation for work in excess of eight hours in a day under the parties' agreement and the FLSA. Accordingly, we reject this claim as a bare assertion. *U.S. Dep't of the Treasury, IRS*, 66 FLRA 120, 122-23 (2011).

compensate the Union for costs it has incurred in connection with its response to the Agency's exceptions. Opp'n at 7.

Under the Back Pay Act, a request for attorney fees must be made to the arbitrator, who is the "appropriate authority" under 5 C.F.R. § 550.807(a) to render such an award in the case of an arbitration proceeding.[11] *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*,65 FLRA 1017, 1021 (2011) (*Fort Bragg*). Furthermore, it is well established that arbitrators are not required to resolve requests for attorney fees before an award becomes final and binding. *Fort Bragg*, 65 FLRA at 1021; *AFGE, Local 2054*, 58 FLRA 163, 163-64 (2002); *Phila. Naval Shipyard*, 32 FLRA 417, 421 (1988). Accordingly, as the Arbitrator, rather than the Authority, is the "appropriate authority" to award attorney fees in this case, we reject the Union's request for attorney fees.

V. Decision

The Agency's exceptions and the Union's request for attorney fees are denied.

[11] 5 C.F.R. § 550.807(a) provides, in pertinent part, that a request for attorney fees under the Back Pay Act "may be presented only to the appropriate authority that corrected or directed the correction of the unjustified or unwarranted personnel action."