66 FLRA No. 84

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

and

PROFESSIONAL AVIATION SAFETY SPECIALISTS
(Union)

0-AR-4713

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DECISION

January 25, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator M. David Vaughn (merits award) 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.[2] The Union filed an opposition to the Agency's exceptions.[3]

The Arbitrator directed the Agency to pay employees compensatory and liquidated damages for miscalculated overtime under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, and interest under the Back Pay Act (BPA), 5 U.S.C. § 5596. For the reasons that follow, we deny the exceptions in part, and set aside the merits award in part.

II. Background and Arbitrator's Award

The parties' dispute concerns two ways in which the Agency did not correctly calculate the overtime payments it made to employees under the FLSA. Merits Award at 14-16. First, when the Agency switched payroll providers, the new provider notified the Agency that its former payroll provider had not been including "holiday premium pay in the overtime calculation[s], as required by . . . [Office of Personnel Management (OPM)] regulations." *Id.* at 15. When the new payroll provider issued its first set of paychecks on October 15, 2005 (payroll-implementation date), those paychecks – and all paychecks thereafter – correctly included holiday premium pay in overtime payments. *Id.* However, as of the payroll-implementation date, the Agency had made no attempt to make employees whole for its past holiday-pay-overtime underpayments.

Second, on April 4, 2006, OPM notified the Agency's payroll provider that it was incorrectly computing overtime pay for employees who were receiving non-foreign cost of living allowances (COLA), and advised the payroll provider that it should make employees whole for the two-year recovery period under the FLSA.[4] *Id.* at 15-16. Specifically, OPM instructed the Agency's payroll provider that affected employees should be made whole for COLA-overtime underpayments retroactive to April 4, 2004 (COLA-accrual date) – i.e., two years prior to the date on which OPM alerted the payroll provider to the COLA-underpayment issue (COLA-notice date). *Id.* at 16. In response, the Agency corrected its COLA-overtime calculations prospectively, but it made affected employees whole for only the period beginning on the payroll-implementation date, i.e., October 15, 2005. *Id.* at 17-18. Thus, the Agency did not compensate affected employees for approximately eighteen months of the two-year period identified by OPM. *See id.* In addition, the Agency did not include interest in its backpay payments.

In early 2009, the Agency assigned two employees to investigate both types of underpayments that had occurred prior to the payroll-implementation date. *Id.* at 18. Those employees worked with the Agency's former payroll provider on a formula to correct the prior miscalculations. *Id.* Because the formula corrected both the holiday-pay and COLA overtime errors that led to the underpayments, the Agency "decided to pay back pay for both types of miscalculation back to the same date – April 4, 2004" – the COLA-accrual date. *Id.* at 18-19. By using the

[1] Member DuBester's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] We note that the merits award is the Arbitrator's "Second Interim Opinion and Award." In addition, as discussed further below, the Arbitrator issued a "First Interim Opinion and Award," Merits Award at 2 n.2, in which he ruled on the arbitrability of the grievance as well as the Agency's post-hearing motion to reopen the hearing, *see id.* at 2 n.2, 46 n.16.

[3] Also, as discussed further below, both parties filed supplemental submissions.

[4] As discussed further below, the recovery period for FLSA violations is two years; the period is three years for "willful" violations. 29 U.S.C. § 255(a).

COLA-accrual date as the starting date for retroactive payments, the Agency failed to retroactively reimburse employees for holiday-pay-overtime underpayments back to October 15, 2003 – the two-year period prior to the Agency's October 15, 2005 rectification of the holiday-pay issue. These 2009 payments to redress past overtime underpayments (remedial payments) also did not include interest.

On approximately June 1, 2009, the Agency informed affected employees of the forthcoming remedial payments, and the Union responded by filing a grievance on June 12, 2009, alleging that the Agency failed to fully compensate employees for past overtime work. *See id.* at 1, 20. When the grievance was unresolved, it was submitted to arbitration, where, absent a stipulation by the parties, the Arbitrator framed the substantive issues as follows: "Did the [Agency] violate the [a]greement, applicable law, or Agency policy in the manner and duration of its voluntary attempt to remedy its . . . COLA and holiday pay [overtime] calculations? If so, what shall be the remedy?" *Id.* at 3.

Before the Arbitrator, the Union argued that the Agency violated the parties' agreements, the BPA, and the FLSA when it failed to pay employees in accordance with the FLSA's recovery period and failed to pay employees interest for its overtime underpayments. *See id.* at 22. Although the Union acknowledged that most of the overtime underpayments at issue occurred more than three years before the Union filed the grievance, it argued that the grievance was timely because it was filed shortly after the Agency notified employees of the pay discrepancies in June of 2009. *Id.* In addition to interest under the BPA, *id.*, the Union sought liquidated damages under the FLSA, *id.* at 30. Further, the Union argued that the Agency unreasonably delayed fully compensating affected employees, and that this delay constituted willful conduct that required the Arbitrator to apply the FLSA's three-year recovery period for willful violations. *Id.* at 31.

The Agency argued to the Arbitrator that "the FLSA statute of limitations bars, and the BPA does not provide, *any* recovery by the Union." *Id.* at 32 (emphasis added). Specifically, the Agency argued that the Union could not recover any lost overtime under the FLSA because it filed its grievance more than three years after any actionable Agency conduct and that, under 29 U.S.C. § 255(a) (§ 255(a)), the FLSA recovery period is limited to two or three years.[5] *See* Merits Award at 32-34, 36-37. The Agency also argued that an award of interest under the BPA would not be appropriate where the underlying claim concerned only FLSA overtime. *Id.* at 32.

After the conclusion of the arbitration hearing, but before the Arbitrator issued the merits award, the Agency submitted a "Motion to Reopen the Hearing," arguing that: (1) the Union's grievance was substantively non-arbitrable; and (2) the Union had raised the issues of liquidated damages and willfulness for the first time in its post-hearing brief, which necessitated reopening the hearing. *Id.* at 2 n.2, 46 n.16. *See also* Opp'n, Attach. 2 (First Interim Opinion and Award) at 1-2 (Preliminary Award). The Arbitrator and the parties agreed to conduct a hearing on the issue of arbitrability. Preliminary Award at 2.

Regarding arbitrability, the Arbitrator found, in a preliminary award, that the parties had stipulated that the grievance was properly before him, and that, even without a stipulation, the grievance was arbitrable. *Id.* at 23, 28. Regarding the Agency's second argument, the Arbitrator found that: (1) the Agency acknowledged in its post-hearing brief that "among the issues raised by the grievance, were the FLSA statute of limitations and questions of willfulness and liquidated damages;" and (2) "[t]hose legal arguments derive directly from the governing statute [i.e., the FLSA] and are an integral part of the remedies provided by that statute." *Id.* at 23. Accordingly, the Arbitrator rejected the Agency's claim that these issues were not raised until the Union's post-hearing brief, and denied the Agency's motion to reopen the hearing to hear additional evidence and arguments on these issues. *Id.*

In his subsequent merits award, the Arbitrator found that the Union's grievance was timely according to the parties' negotiated grievance procedure because the agreement's filing requirement "began to toll on the first day the employees and/or the Union *knew* or *should have known* that a violation occurred," which the Arbitrator determined was the date on which the Agency notified the employees that it was making the remedial payments, i.e. June 1, 2009. Merits Award at 38-39. The Arbitrator did not otherwise address the Agency's argument that the FLSA's recovery period under § 255(a) completely barred any recovery by the Union.

In addition, the Arbitrator found that the Agency violated the FLSA by failing to properly calculate overtime payments that should have included holiday pay and COLA. *Id.* at 40. Further, the Arbitrator found that although "the Agency corrected its . . . COLA mistake for the two-year period prior to the determination that there was an error," the Agency's remedial payments corrected its holiday-pay-overtime underpayments only for the period between the payroll-implementation date and the COLA-accrual date, which was insufficient under the FLSA. *Id.* at 40-41. Moreover, the Arbitrator found that the Agency's violation of the FLSA was willful and, thus, a three-year recovery period should apply for both types

[5] The pertinent wording of § 255(a) is provided below.

of overtime underpayments. *Id.* at 48-50 (citing § 255(a)).

The Arbitrator also found that the BPA was applicable, *id.* at 41-42, and that the Union was entitled to interest on all of the underpayments at issue, *id.* at 44. Additionally, the Arbitrator found that the Agency had not overcome the FLSA's presumption in favor of liquidated damages, and that liquidated damages were appropriate. *Id.* at 47-48.

As a remedy, the Arbitrator directed the Agency to make employees whole for the overtime underpayments for the entire FLSA three-year recovery periods for each type of underpayment. *Id.* at 52. For holiday-pay overtime, the Arbitrator found that: (1) the three-year recovery period was October 15, 2002 through October 15, 2005 (the payroll-implementation date); (2) the Agency's remedial payments had compensated employees for only April 4, 2004 through October 15, 2005; and, therefore, (3) the Agency must compensate affected employees for holiday-pay-overtime underpayments for October 15, 2002 through April 3, 2004. *See id.* at 51-52. For COLA overtime, the Arbitrator found that: (1) the three-year recovery period was April 4, 2003 through April 4, 2006 (the COLA-notice date); (2) the Agency's remedial payments had compensated employees for only April 4, 2004 through April 4, 2006; and, therefore, (3) the Agency must compensate affected employees for COLA-overtime underpayments for April 4, 2003 through April 3, 2004. *See id.* The Arbitrator directed the Agency to pay employees interest on these payments as well as on the remedial payments "in accordance with the requirements of the [BPA]." *Id.* at 52. The Arbitrator also directed the Agency to pay employees liquidated damages for each type of overtime underpayment for the entire, respective three-year recovery periods. *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the merits award is contrary to law in three respects. In its first and second arguments, the Agency claims, respectively, that the award is contrary to law because: (1) the Arbitrator "applied the wrong willfulness standard and erred by concluding that the Agency willfully violated the FLSA," Exceptions at 20; and (2) the award violates the FLSA's statute of limitations, *id.* at 7. The Agency argues, in connection with its second claim, that "[a] claim for overtime under the FLSA accrues on pay day," *id.*, and that the Authority has held that § 255(a) "both limits an employee's ability to bring a cause of action for a violation of the FLSA and limits the period that an employee can recover backpay for such a violation,"[6] *id.* at 8 (quoting *NTEU*, 53 FLRA 1469, 1488-89 (1998) (internal quotation marks omitted)). According to the Agency, the Authority has stated that "when the federal government is the employer, the FLSA functions as a limited waiver of sovereign immunity," *id.* at 10, and that "at least where parties have not agreed contractually to back pay periods different from those in § 255(a), . . . the statutory [recovery] periods control," *id.* (quoting *AFGE, Local 1741*, 62 FLRA 113, 117 (2007) (*Local 1741*) (internal quotation marks omitted)). By "award[ing] FLSA remedies reaching much further back in time than allowed by the FLSA – almost [seven] years prior to the time the grievance was filed," *id.* at 14, the Agency asserts that the Arbitrator improperly expanded § 255(a)'s "limited waiver of sovereign immunity," *id.* at 17.

Applying these two arguments to the holiday-pay issue, the Agency asserts that the Union filed its grievance more than three years after the last paycheck that included a holiday-pay-overtime underpayment. *Id.* at 12. Thus, the Agency claims that even if its actions were willful, all of the Union's claims concerning holiday-pay overtime are "'forever barred' by . . . § 255(a)." *Id.* (quoting § 255(a)).

Applying these two arguments to the COLA-overtime issue, the Agency contends that the Union filed its claim two years and eleven months after the last COLA-overtime underpayment. *Id.* at 13. As a result, the Agency asserts that even if its actions were willful, the Union's grievance "was capable, at most, of reaching a single month of FLSA[-]overtime underpayments related to the . . . COLA[-]FLSA [-]overtime[-]calculation issue." *Id.* The Agency also asserts that it remedied this month of COLA-overtime underpayments – from June 12, 2006 to July 12, 2006 – when it made the remedial payments. *Id.*

Third, the Agency argues that the award is contrary to law because the Arbitrator awarded interest under the BPA – as well as liquidated damages under the FLSA – to remedy an alleged FLSA violation. *Id.* at 25.

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[6] Section 255(a) provides, in pertinent part that:

> Any action . . . to enforce any cause of action for . . . unpaid overtime compensation, or liquidated damages, under the [FLSA] . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued[.]

29 U.S.C. § 255.

Similarly, the Agency argues that the Arbitrator's award of interest under the BPA is based on a nonfact, or, alternatively, that the Arbitrator exceeded his authority in this regard. *Id.* at 23-24. In addition, the Agency argues that the Arbitrator's failure to apply the substantive recovery limitations imposed by § 255(a) is based on a nonfact. *See id.* at 16.

B. Union's Opposition

The Union argues that the Agency "did not advance an argument during the arbitration process countering the finding of 'willfulness'" and, therefore, that § 2429.5 of the Authority's Regulations (§ 2429.5) bars the Agency from contesting this finding in its exceptions.[7] Opp'n at 11. Alternatively, the Union argues that the Arbitrator's finding of willfulness was correct. *Id.* at 14, 19-20.

In addition, the Union asserts that the Agency "is barred from bringing up procedural and substantive untimeliness issues," including its argument that the award is contrary to § 255(a), "when it failed to present such arguments during the arbitration proceeding." *Id.* at 17. Alternatively, the Union argues that the award does not conflict with the FLSA's statute of limitations because the Arbitrator correctly found that the grievance was timely filed, *id.* at 11-12, and correctly "rel[ied] on" § 255(a)'s recovery period "as the foundation for the decision" by awarding three years of damages to remedy the Agency's willful FLSA violation, *see id.* at 13-14. Thus, the Union argues that the Arbitrator correctly enforced § 255(a) "by way of the [parties'] negotiated grievance procedures." *Id.* at 16.

Additionally, the Union states, in a footnote and "[a]s a point of interest," that "[e]quitable tolling was not explored in the arbitration award[,]" but that the Authority could "rely on equitable tolling to find the filing timely or to remand back to the [A]rbitrator for a ruling on this particular matter." *Id.* at 12 n.20.

Finally, the Union argues that the Arbitrator's application of the BPA to the Union's FLSA claim was "legally appropriate." *Id.* at 21. Similarly, the Union argues that the Arbitrator's award of interest under the BPA was not based on a nonfact. *Id.* at 20.

[7] The pertinent wording of § 2429.5 is provided below.

IV. Analysis and Conclusions

A. Preliminary Matters

1. The Authority will consider portions of certain of the parties' supplemental submissions.

As noted previously, both parties filed supplemental submissions. Section 2429.26 of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. 5 C.F.R. § 2429.26. But the Authority generally will not consider such submissions if the filing party has not asked permission to do so. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 91, 92 (2011) (*Homeland*). In addition to requesting permission to file, a filing party must show why its supplemental submission should be considered. *See NTEU*, 65 FLRA 302, 305 (2010) (*NTEU II*). For example, the Authority has granted leave to file a supplemental submission where it responds to issues raised for the first time in an opposing party's filing. *Id.*; *Homeland*, 66 FLRA at 92-93; *U.S. Dep't of Def., Dep't of Def. Dependents Sch., Eur.*, 65 FLRA 580, 581 (2011) (*Def. Sch.*). By contrast, the Authority has denied requests to consider a supplemental submission that raises an issue that the party could have raised in a previous submission. *Homeland*, 66 FLRA at 93; *NTEU II*, 65 FLRA at 305.

The Union filed two supplemental submissions in response to the Agency's supplemental submissions. Because the Union failed to ask permission to file its supplemental submissions, we will not consider the Union's supplemental submissions. *See, e.g.*, *Homeland*, 66 FLRA at 93.

The Agency requested leave to file a "Reply to Union Opposition to Exceptions" (reply) in order to "complete and balance the record" concerning two arguments in the Union's opposition: (1) the Union's argument that the Authority should apply the equitable-tolling doctrine despite the fact that the Union never presented this argument to the Arbitrator, Reply at 2, 4; and (2) the Union's "misleading claim that the Agency never presented willfulness or . . . liquidated damages issues to the Arbitrator," *id.* at 2.

Regarding the first argument, the Authority has considered supplemental submissions that respond to issues raised for the first time in an opposing party's filing. *E.g.*, *Def. Sch.*, 65 FLRA at 581. The record does not indicate that the Union raised the issue of the applicability of equitable tolling before the Arbitrator. *Cf.* Opp'n at 12 n.20 (stating that "[e]quitable tolling was not explored in the arbitration award," but asking the

Authority to either rely on equitable tolling to uphold the merits award or to "remand back to the [A]rbitrator for a ruling on this particular matter."). Accordingly, we will consider the Agency's arguments addressing this issue in its reply. *See, e.g., Def. Sch.*, 65 FLRA at 581.

Regarding the second argument, the Agency argues that: (1) it preserved its right to challenge the alleged willfulness of its FLSA violation by filing its motion to reopen the hearing on this issue; and (2) the Authority should not "uphold the Arbitrator's erroneous ruling[]" denying that motion. Reply at 2-4. As discussed above, the Authority has denied requests to consider a supplemental submission where the submission raises issues that the party could have raised in a previous submission. *E.g.*, *Homeland*, 66 FLRA at 93. The Agency could have addressed the Arbitrator's refusal to reopen the hearing in its exceptions. As it did not do so, we will not consider the Agency's arguments concerning the Arbitrator's denial of this motion in its reply. *See, e.g., id.* With respect to the Agency's argument that it preserved its right to challenge the Arbitrator's finding of willfulness by filing its motion to reopen the hearing, for the reasons discussed below *infra* section IV.A.2.a. note 8, we find it unnecessary to determine whether this argument is properly before us.

In addition, the Agency requested leave to file its "Supplemental Exception and Supporting Brief" (supplemental exception), but, for reasons noted below *infra* section IV.B.2. note 13, we find it unnecessary to determine whether this submission is properly before us.

2. The Authority will consider certain of the parties' arguments.

a. The Authority will not consider the Agency's argument challenging the Arbitrator's willfulness finding.

Section 255(a) requires that a party seeking recovery under the FLSA bring a cause of action within two years, except that a party may bring an action arising out of a "willful violation . . . within three years after the cause of action accrued." 29 U.S.C. § 255(a). The Union asserts, and the Agency does not dispute, that the Agency failed to argue that its actions were not willful prior to the close of the arbitration hearing.[8] Rather, after the hearing, the Agency submitted a motion to reopen the hearing so that it could argue the issue of willfulness because it claimed this was a new issue raised for the first time in the Union's post-hearing brief. Merits Award at 46 n.16. The Arbitrator denied this motion because he found that: (1) the Agency acknowledged in its post-hearing brief that "among the issues raised by the grievance, were the FLSA statute of limitations and [the] question[] of willfulness;" and (2) "[t]hose legal arguments derive directly from the [FLSA] and are an integral part of the remedies provided by [the FLSA]." Preliminary Award at 23.

By denying the motion, the Arbitrator effectively found that the Agency had waived its right to argue that its actions were not willful under § 255(a). In its exceptions, the Agency does not challenge the Arbitrator's denial of this motion. Based on the Arbitrator's finding that the Agency was barred from making additional arguments on the issue of willfulness to the Arbitrator – a finding that the Agency has not shown is deficient – there is no basis for the Authority to permit the Agency to make such arguments for the first time in its exceptions to the Authority. Accordingly, we deny the Agency's exception arguing that the Arbitrator's application and finding of willfulness is contrary to the FLSA.[9]

b. Section 2429.5 bars certain of the parties' arguments.

Under § 2429.5, the Authority will not consider arguments that could have been, but were not, presented to the arbitrator.[10] 5 C.F.R. § 2429.5.

In response to the Agency's exception arguing that the merits award improperly expands § 255(a)'s recovery period, the Union argues that the Agency is "barred from bringing up procedural and substantive untimeliness issues . . . when it failed to present such arguments during the arbitration proceeding." Opp'n at 17. But it is clear from the merits award that the Agency argued to the Arbitrator that "disregarding the statute of limitations by lengthening the period of recovery" would violate the substantive rights conferred by § 255(a). Merits Award at 33 (quoting *NTEU*, 53 FLRA at 1494 (internal quotation marks omitted)). Therefore, we will consider the Agency's argument on this point.

[8] We note that, before the Arbitrator, the Agency acknowledged § 255(a)'s three-year recovery period for "willful" FLSA violations. *See* Merits Award at 32, 33.

[9] In view of this determination, we find it unnecessary to determine whether the argument in the Agency's reply on this issue is properly before us. *See supra* section IV.A.1.

[10] Section 2429.5 provides, in pertinent part, that the "Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented . . . before the . . . arbitrator." 5 C.F.R. § 2429.5.

In addition, the Agency argues that § 2429.5 bars the Union from making an equitable-tolling argument because the Union failed to make that argument at arbitration. Reply at 5. As discussed above, *see supra* section IV.A.1., the Union raised the issue of the applicability of equitable tolling for the first time in its opposition. Thus, the Union did not raise equitable tolling at arbitration, even though it could have done so. Because the Authority will not consider arguments that could have been, but were not, presented to the Arbitrator, we find that § 2429.5 bars the Union's equitable-tolling argument.

B. The award is contrary to law in part.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an 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 a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The merits award is contrary to 29 U.S.C. § 255(a) in part.

Although the requirements – including time limits – that determine the arbitrability of a grievance are procedural, *IFPTE, Local 386*, 66 FLRA 26, 30 (2011) (*IFPTE*), the recovery period for an FLSA violation set forth in § 255(a) is a question of substantive law and not a procedural issue within the discretion of the arbitrator, *Local 1741*, 62 FLRA at 117; *NTEU*, 53 FLRA at 1493-94. Accordingly, the Authority has held that, at least where the parties have not agreed contractually to backpay periods different from those in § 255(a), the statutory recovery periods control. *Local 1741*, 62 FLRA at 117. Specifically, the Authority has stated that § 255(a) "limits the period that an employee can recover backpay for [an FLSA] violation." *IFPTE*, 66 FLRA at 29 (quoting *NTEU*, 53 FLRA at 1488-89). This is especially important because "lengthening the period of recovery [would] expand[] an employer's exposure to liability for violating the FLSA," and "[w]hen the employer is a government entity, the FLSA operates as a limited waiver of sovereign immunity – specifically providing a limit on the length of recovery." *NTEU*, 53 FLRA at 1494.

As discussed above, § 255(a) sets a maximum recovery period of two years – or three years if the violation was willful. 29 U.S.C. § 255(a). As a matter of law, where an FLSA violation involves the failure to make proper overtime payments, a cause of action accrues with each deficient paycheck, and plaintiffs are entitled to recover for any violations that occurred in the two (or three) years preceding the date of the filing of their claim. *See Knight v. Columbus, Ga.*, 19 F.3d 579, 581 (11th Cir. 1994) (*Knight*); *Doyle v. United States*, 20 Cl. Ct. 495, 503 (Cl. Ct. 1990) (*Doyle*).

Here, the Arbitrator relied upon the parties' agreement to find that the grievance was timely filed under the negotiated grievance procedure. Merits Award at 38-39. But, as the Union concedes, the only recovery period relied upon by the Arbitrator was the period found in § 255(a), *id.* at 40, 48; Opp'n at 13.[11] Thus, the Arbitrator was required to apply § 255(a) to any award of backpay. *Local 1741*, 62 FLRA at 117-18; *NTEU*, 53 FLRA at 1494. Because we deny the Agency's exception challenging the Arbitrator's finding that the Agency's FLSA violations were willful, the three-year recovery period applies here. *See* 29 U.S.C. § 255(a).

Regarding the holiday-pay issue, it is undisputed that there were no holiday-pay-overtime underpayments that occurred in the three years preceding the date of the grievance, i.e. June 12, 2006 through June 12, 2009. Therefore, § 255(a) bars the recovery of any holiday-pay overtime. *See Knight*, 19 F.3d at 581; *Doyle*, 20 Cl. Ct. at 503. *Cf. IFPTE*, 66 FLRA at 30 ("the contractual time limit for initiating a grievance claiming a FLSA violation [does not] expand[] employer liability"). Accordingly, we set aside the merits award insofar as it provides compensatory and liquidated damages for the Agency's holiday-pay-overtime underpayments.

[11] It is clear that the Arbitrator expressly relied upon § 255 to determine the recovery period. *See* Merits Award at 40, 48. Indeed, the Union acknowledges that the FLSA – and § 255 specifically – provided the basis for the Arbitrator's award, *see* Opp'n at 13 (stating that "the FLSA dictated, and was relied on by the Arbitrator, to define the proper remedy," and that the Arbitrator relied on § 255 "as the foundation for the decision"), and neither of the parties disputes that he was correct to do so. Notably, the dissent cites no other applicable waiver of sovereign immunity – a required element in any arbitral award of monetary damages against a government agency. *See U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 61 FLRA 366, 370 (2005) (then-Member Pope dissenting in part as to another matter). In addition, the authorities relied upon by the dissent to argue that § 255 does not apply are distinguishable because – among other reasons – those authorities are based on the application of equitable doctrines, which, for the reasons discussed *supra* section IV.A.2.b., are not properly before us. *See Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429 (1965) (discussing equitable tolling); *Nerseth v. United States*, 17 Cl. Ct. 660, 664 (1989) (same); *United Rubber Workers v. Great Am. Indus., Inc.*, 479 F. Supp. 216 (S.D.N.Y. 1979) (applying equitable estoppel); *The Fair Labor Standards Act*, 18-65 (Ellen C. Kearns ed., 2d ed. 2010) (discussing equitable tolling and equitable estoppel).

Regarding the COLA-overtime issue, it is undisputed that the most recent COLA-related-underpayments occurred two years and eleven months before the Union filed the grievance. Exceptions at 13. As a result, for the same reasons discussed above, § 255(a) limits the recovery for COLA-overtime underpayments to that one-month period (June 12, 2006 to July 12, 2006). Ordinarily, this would warrant compensatory damages for that period as well as the possibility of an equal amount of liquidated damages. *See* 29 U.S.C. § 216(b);[12] 29 U.S.C. § 260.[13] Because the Arbitrator found, and the parties do not dispute, that the Agency has already made employees whole for COLA-overtime underpayments retroactive to the COLA-accrual date, i.e. April 4, 2004 – which includes the month of June 12, 2006 to July 12, 2006 – no compensatory damages are warranted. *See* Merits Award at 18, 40; Exceptions at 12. However, the Arbitrator found, and the Agency does not dispute, that the Agency did not overcome the FLSA's presumption in favor of liquidated damages. Merits Award at 37, 47-48. In addition, it is undisputed that the Agency has not paid employees liquidated damages for the period from June 12, 2006 to July 12, 2006. Thus, the award of liquidated damages is warranted for that month. For the reasons above, we set aside the award of compensatory damages for the Agency's COLA-overtime underpayments, and set aside the award of liquidated damages for COLA-overtime underpayments other than those from June 12, 2006 to July 12, 2006.[14]

2. The Arbitrator's award of interest under the BPA is contrary to law.

Because the FLSA is a waiver of sovereign immunity, and independently provides a statutory right to money damages, the Authority has held that FLSA violations are remedied under the FLSA, not the BPA. *NTEU*, 53 FLRA at 1485-86. Moreover, the Authority has held that an employee may not recover *both* liquidated damages under the FLSA *and* interest under the BPA. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 1001 (2011) (Member DuBester dissenting in part on unrelated grounds) (*DOJ*); *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 436 (2001).

Consistent with these principles, because the Arbitrator awarded liquidated damages under the FLSA, we find that the Arbitrator's award of interest under the BPA is contrary to law, and set aside the award of interest.[15] *See, e.g., DOJ*, 65 FLRA at 1001.

V. Decision

The Agency's exception arguing that the Arbitrator's application and finding of willfulness is contrary to the FLSA is denied. The merits award is set aside insofar as it awards: (1) compensatory and liquidated damages for the Agency's holiday-pay-overtime underpayments; (2) compensatory damages for the Agency's COLA-overtime underpayments; (3) liquidated damages for COLA-overtime underpayments other than those from June 12, 2006 to July 12, 2006; and (4) interest under the BPA.

[12] 29 U.S.C. § 216(b) provides, in pertinent part, that: "Any employer who violates the [overtime compensation] provisions of . . . this title shall be liable to the . . . employees affected in the amount of their . . . unpaid overtime compensation, . . . and in an additional equal amount as liquidated damages."

[13] 29 U.S.C. § 260 provides, in pertinent part, that:

> In any action . . . to recover . . . liquidated damages, under the [FLSA]. . . . , if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . . , the court may, in its sound discretion, award no liquidated damages . . . .

[14] In view of this determination, we find it unnecessary to reach the Agency's exception arguing that the Arbitrator's failure to apply the substantive recovery limitations imposed by § 255(a) is based on a nonfact.

[15] In view of this determination, we find it unnecessary to reach the Agency's exceptions arguing that the Arbitrator's award of interest is based on a nonfact and exceeded the Arbitrator's authority. In addition, as stated previously, the Agency filed a supplemental exception, arguing that a recent Authority decision "confirmed" that the BPA does not apply to the Agency in the circumstances of this case, which provides an additional reason for setting aside the award of interest. Supplemental Exception at 4 (citing *U.S. Dep't of Transp., Fed. Aviation Admin.*, 65 FLRA 325 (2010)). Because we have set aside the award of interest, we find it unnecessary for the Authority to consider the supplemental exception or determine whether it is properly before us.

Member DuBester, dissenting in part:

I do not agree with my colleagues that the award is contrary to 29 U.S.C. § 255(a). Treating the dispute before the arbitrator as a typical claim for overtime compensation under the FLSA, the Agency's exception is predicated on a fundamental misunderstanding of the award. Proceeding from this premise, the Agency argues that § 255(a)'s recovery period should be applied to limit the claim that the Arbitrator resolved to the period of time extending back no more than three years before the grievance was filed. Because virtually all of the Agency's payroll errors occurred before that time period, the Agency's argument renders its plan to remedy those errors immune from arbitral review.

But what was grieved and arbitrated is not a typical claim for overtime compensation under the FLSA. The grievance was filed because of the Agency's 2009 notification to employees of its erroneous payments to them resulting from payroll errors in 2005 and 2006 and of its intention to make retroactive payments to remedy the errors. As the Agency concedes, there is no limitation period issue under § 255(a). The Agency does not dispute that the grievance was timely filed by the Union as an objection to the legal correctness of the Agency's payment plan.

The Agency's statement of the issues before the Arbitrator proposed this view of the case. The Agency proposed that the Arbitrator decide whether the Agency's payment plan violated law, the CBA, or Agency policy. The Arbitrator agreed. The Arbitrator framed the issues as whether the Agency violated law, the CBA, or Agency policy "in the manner and duration of its voluntary attempt to remedy its . . . pay [mis]calculations?" Award at 3. Thus, what the parties stated they were submitting to arbitration and what the Arbitrator stated he resolved was not a grievance over events that occurred in 2005 and 2006. Rather, this is a dispute over the legal correctness of the Agency's plan that it disclosed to employees in 2009 to remedy those earlier errors.

Accepting the dates specified by the Agency, the Arbitrator calculated what amount of compensation would correctly remedy the admitted errors. The Arbitrator applied what he determined to be the applicable recovery period to those dates in calculating the correct payment. Other than argue – erroneously – that this is a typical overtime pay case under the FLSA, the Agency fails to explain how the Arbitrator's analysis of the correctness of the Agency's payment plan disclosed in 2009 is precluded by § 255(a). And neither the Agency nor the majority explains why the corrections the Arbitrator ordered to the Agency's plan would not stand on a legal foundation as firm as the Agency's original basis for taking corrective action.

Resolving the correctness of the Agency's plan to remedy its pay miscalculations, the Arbitrator properly relied on employees' lack of awareness of those miscalculations when he refused to apply the recovery period of § 255(a) to bar recovery. The Arbitrator found that it was not disputed that employees and the Union were not cognizant of the Agency's pay miscalculations until the Agency's 2009 notice. He noted that the miscalculations involved matters that were so complicated that the Agency's own compensation experts failed to notice the errors for years. Thus, he concluded, the Agency improperly focused on the dates of the original miscalculations rather than the date on which employees learned, and reasonably could have been expected to learn, about the compensation errors. The Arbitrator found that the Agency's position "makes no sense" because it would permit the Agency to miscalculate pay but avoid liability by waiting to notify employees until expiration of the recovery period. Award at 51.

Contrary to the strict application of § 255(a) suggested by the Agency, courts recognize that statutes of limitations may be equitably tolled where extraordinary circumstances prevent plaintiffs from filing their claims despite due diligence. As explained by the Supreme Court, statutes of limitations have been tolled when "a plaintiff has not slept on his rights but, rather, has been prevented from asserting them." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429 (1965). In the federal sector, the U.S. Claims Court recognizes that equitable tolling is "read into every federal statute of limitation" and applies when "a plaintiff is excusably unaware of the existence of his cause of action at the time it accrues." *Nerseth v. U.S.*, 17 Cl. Ct. 660, 664, 665 (1989). Although the Arbitrator does not mention equitable tolling (probably because he rejected application of 255(a) instead of tolling it), the Arbitrator properly relied on employees' excusable lack of awareness of the Agency's miscalculations in refusing to apply the recovery period of § 255(a) to bar recovery.

In its exception, the Agency asserts that the Arbitrator's failure to apply § 255(a)'s recovery period is deficient because ignorance of pay laws does not excuse a failure to exercise rights under the FLSA. What the Agency ignores are the Arbitrator's factual findings that the employees could not be expected to have been aware of the miscalculations when the Agency's own compensation experts were unaware of the errors. The Authority defers to an arbitrator's factual findings in assessing whether a conclusion of law is deficient unless the excepting party establishes that the findings are based on a nonfact. The Agency makes no such contention.

Finally, this case does not present any issue under §§ 2425.4 and 2429.5 of the Authority's Regulations as to whether the Union's arguments on equitable tolling are barred. The Arbitrator specifically relied on the time of the Agency's notification, and the finding that employees were excusably unaware of the Agency's miscalculations, when he resolved the grievance. One of the issues in this case is whether the Arbitrator's reliance on the time employees became aware of the Agency's miscalculations is contrary to § 255(a). Viewed from this perspective, this issue is not presented for the first time by the Union's suggestion that equitable tolling supports the award. Moreover, it is clear that as a matter of substance, the award's discussion of this topic adopts the arguments specifically presented to the Arbitrator by the Union.[*]

For these various reasons, the Agency's exception that the award is contrary to 29 U.S.C. § 255(a) should be denied. I therefore dissent from my colleagues' decision to grant the Agency's exception.

[*] The Agency's acknowledgement of its underpayments also undercuts its reliance on § 255(a). The Agency admits that it miscalculated employee compensation and owed employees backpay. In similar circumstances, courts have concluded that acknowledgment of financial liability revives a party's liability, renewing any applicable statute of limitations such that otherwise untimely claims regarding the liability are timely. For example, in *United Rubber Workers v. Great American Industries, Inc.*, 479 F. Supp. 216 (S.D.N.Y. 1979), the union filed a lawsuit alleging violations of the parties' CBA in failing to compensate employees for vacation pay. The employer asserted that the claim was barred by the statute of limitations. The court held that the union's claim was timely because the employer had sent a letter to the union acknowledging its obligations under the CBA. In the court's view, this acknowledgment revived the employer's liability and renewed the limitations period such that the statute of limitations did not bar recovery. *Id.* at 227. In view of such decisions, the editors of *The Fair Labor Standards Act* now suggest that the general doctrine regarding waiver of the statute of limitations and revival of liability by an employer's acknowledgment of liability applies to FLSA claims. *The Fair Labor Standards Act*, 18-65 (Ellen C. Kearns ed., 2d ed. 2010). Applying these principles here would provide a basis for finding the grievance timely even under the Agency's theory of the case. Specifically, the Agency's notification in 2009 acknowledging that it had miscalculated employee compensation and stating its intent to remedy the miscalculation would preclude the Agency from asserting that § 255(a) barred the recovery sought in the grievance and ordered by the Arbitrator.