66 FLRA No. 95

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1804
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
OFFICE OF PUBLIC HOUSING
DETROIT, MICHIGAN
(Agency)

0-AR-4762

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DECISION

February 23, 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 Philip W. Parkinson filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied a grievance alleging that the Agency failed to properly compensate employees for overtime work. For the reasons set forth below, we dismiss the Union's exceptions in part and deny them in part.

II. Background and Arbitrator's Award

The Union filed a grievance on behalf of ten grievants alleging, among other things, that the Agency violated the Fair Labor Standards Act (FLSA) by failing to: pay the grievants proper overtime compensation; provide them with a choice between compensatory time off or overtime; and pay them "suffer or permit" overtime. *See* Award at 1. The grievance was unresolved and submitted to arbitration.

As an initial matter, the Arbitrator determined that the FLSA's two-year statute of limitations applied because the Agency's actions were not "willful." *Id.* at 2. He also found with regard to all of the grievants that: the grievants performed most of the claimed overtime hours unsupervised in their homes, *id.*; the grievants' supervisors believed that the work could be completed without working overtime and informed employees that no unauthorized overtime would be permitted, *id.* at 2-3; it was "difficult to accept with any degree of certainty that the Agency knew of these thousands of hours of alleged [o]vertime," *id.* at 3; and the grievants did not request overtime compensation prior to filing the grievance, *id.*

The Arbitrator considered each of the grievants' specific overtime claims. He denied all of the grievants' "suffer or permit" overtime claims, but awarded travel hours to two of the grievants. *Id.* at 8-9, 20, 22.

As to the specific evidence provided by the Union, the Arbitrator found that emails provided by the Union were unpersuasive in demonstrating that the grievants worked overtime hours. *See, e.g., id.* at 6 (finding grievant A's emails "unpersuasive in establishing any basis" for overtime); *id.* at 11 (discounting grievant D's emails as "not indicative of work-related subjects nor of work per se, nor do they generally equate to the claimed hours"); *id.* at 21 (finding that each of grievant J's emails would have to constitute "36.5 work hours" to support her claim). The Arbitrator also determined that the grievants could not prove that they performed compensable Agency work on off-duty time, even when they were in the office. *See, e.g., id.* at 6 (finding it unclear that grievant A performed any work when he stayed at the office from the end of his tour of duty until he caught the bus home); *id.* at 9 (finding no proof of work accomplished or documentation sufficient enough to conclude that grievant C worked the claimed hours of overtime); *id.* at 20 (finding that "there [wa]s simply no proof that [grievant J] sat at her desk to do Agency work" during the claimed time periods).

As to the Union's testimonial evidence, the Arbitrator did not credit the grievants' testimony regarding the number of hours they claimed to be in the office and, instead, credited supervisors' testimony. *See, e.g., id.* at 10 (crediting testimony that grievant D "ha[d] been known to come in late"); *id.* at 12 (crediting testimony that grievant E "[wa]s usually in and out of [the office] waiting at the curb to fill up [his commuter] van"); *id.* at 14-15 (crediting testimony that grievant F took "excessive smoke breaks"); *id.* at 17 (crediting testimony that grievant H "always left the office on time" and had to pick her daughter up from daycare); *id.* at 19 (crediting testimony that grievant I "promptly left work on time" to carpool with a friend in the building).

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

The Arbitrator also did not credit the grievants because their work was often late or incomplete even though they claimed that overtime was necessary to finish it. *See, e.g., id.* at 8 (despite claimed overtime, grievant B "consistently failed to complete her work assignments and appeared to exhibit poor job performance"); *id.* at 12 (crediting testimony that "it would take someone a week to write what it takes [grievant E] a month to write"); *id.* at 16 (finding that grievant G had been known to hide mail, play computer games, and be missing from her desk).

Finally, the Arbitrator found that several of the grievants were not the type of employees who would work overtime without informing a supervisor or requesting overtime pay. *See id.* at 12 (finding that grievant E "would not be the type to have been quiet or timid about asking for compensation for weekend work hours"); *id.* at 17 (finding that grievant H "would be the type that would request compensation"); *id.* at 18 (crediting testimony that grievant I was a "forceful, independent person" who wouldn't have "suffered" overtime without compensation); *id.* at 20 (finding grievant J was "not the type of person to work hours without being compensated").

Based on the foregoing, the Arbitrator concluded that the grievants "greatly exaggerated" and "could not credibly or convincingly establish" their claims that the Agency "suffered or permitted" them to work overtime. *Id.* at 22. Accordingly, he denied the grievance as to all of those claims.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the award is deficient because the Arbitrator "failed to address the Union's claims for damages for the difference between the rate of overtime pay and compensatory time" for all of the grievants. Exceptions at 10; *see also id.* at 10-14.

The Union also claims that the award is contrary to the FLSA because the Arbitrator "failed to set forth his basis for concluding that [the grievants] were not entitled to [overtime] compensation." *Id.* at 15. The Union asserts that the Arbitrator applied the wrong burden of proof in determining that the Agency had not "suffered or permitted" the grievants to work overtime. According to the Union, under the FLSA, government-wide regulations, and case law, the grievants were only required to prove by a "just and reasonable inference" that they worked the claimed overtime. *Id.* at 19.

In addition, the Union contends that the Arbitrator "failed to properly apply regulations and case precedent" when he did not consider whether the Agency had "actual and/or constructive knowledge that overtime work was being performed." *Id.* at 40; *see also id.* at 30. According to the Union, the Agency did not enforce its policy against working overtime but, rather, "controlled and required" the grievants to work overtime because of "the workload assigned." *Id.* at 34-35. The Union argues that the Agency did not make an effort to stop the grievants from working unauthorized overtime, keep track of their work hours, or discipline them for working overtime. *Id.*; *see also id.* at 36-54. The Union asserts that the Agency also had actual and/or constructive knowledge that the grievants were working outside their normal tours of duty because, among other things, supervisors viewed emails the grievants sent during non-work hours, knew of workload and staffing issues, and were aware of a similar, earlier grievance. *Id.* at 41-42.

Further, the Union claims that the award is contrary to law because the Arbitrator: failed to address the Agency's alleged failure to maintain proper time and attendance records, *id.* at 23; erroneously denied eight of the ten grievants' claims for work that they performed while in a travel status, *id.* at 29-30; misapplied the standard for willful violations of the FLSA, *id.* at 55; and disregarded the FLSA's presumption of an entitlement to liquidated damages, *id.* at 59.

As a remedy, the Union requests that the Authority set aside the award and remand the matter to a different arbitrator. *Id.* at 61-63.

B. Agency's Opposition

The Agency argues that the Authority should uphold the award because the Arbitrator found that the Union's witnesses lacked credibility, Opp'n at 2, 4, and he provided a "well reasoned" denial of each grievant's claim, *id.* at 3. As to the Union's claim that the Arbitrator failed to grant the grievants a choice between overtime and compensatory time, the Agency asserts that the grievants did not request compensatory time, so there is no overtime to convert, and, as such, the Union's claim is moot. *Id.* at 5. The Agency further asserts that, as the Arbitrator "fully articulated" the reasons for his decision, there is no need to remand the case to a different arbitrator. *Id.* at 5-6.

IV. Analysis and Conclusions

A. The Union's contention that the Arbitrator failed to address one of the Union's claims does not raise a ground under § 2425.6 of the Authority's Regulations for reviewing the award.

The Authority's Regulations specifically enumerate the grounds that the Authority currently recognizes for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). In addition, the Regulations provide that, if exceptions argue that an arbitration award is deficient based on private-sector grounds not currently recognized by the Authority, then the excepting party "must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions." 5 C.F.R. § 2425.6(c).

Further, § 2425.6(e)(1) of the Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support" the grounds listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award." 5 C.F.R. § 2425.6(e)(1). Thus, an exception that does not raise a recognized ground is subject to dismissal under the Regulations. *AFGE, Local 1738*, 65 FLRA 975, 975 (2011) (*Local 1738*) (Member Beck concurring in the result); *AFGE, Local 738*, 65 FLRA 931, 932 (2011) (*Local 738*); *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 889 (2011) (*Local 3955*) (Member Beck dissenting in part).

The Union alleges that the award is deficient because the Arbitrator "failed to address the Union's claims for damages for the difference between the rate of overtime pay and compensatory time" for all of the grievants. Exceptions at 10, 14. This exception fails to raise a ground currently recognized by the Authority for reviewing awards. *See* 5 C.F.R. § 2425.6(a)-(b). As the Union does not raise a recognized ground or cite legal authority to support a ground not currently recognized by the Authority, we dismiss this exception.[2] *See Local 1738*, 65 FLRA at 975; *Local 738*, 65 FLRA at 932.

B. The award is not contrary to law.

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.*

In addition, in reviewing legal conclusions de novo, the Authority consistently denies exceptions when the arbitrator applies the correct standard of law and makes factual findings that support the disputed legal conclusions. *See, e.g., AFGE, Local 4044*, 65 FLRA 264, 266 (2010) (*Local 4044*) (finding award consistent with FLSA where arbitrator's factual findings regarding whether supervisor knew or had reason to believe grievants had been working overtime supported his legal conclusions); *AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 723 (2006) (*Local 3614*) (finding award consistent with law where arbitrator's factual findings supported his legal conclusions regarding "suffer or permit" overtime); *NATCA*, 55 FLRA 765, 768 (1999) (finding award consistent with applicable law in view of the arbitrator's factual findings); *U.S. Dep't of Veterans Affairs, Central Tex. Veterans Health Care Sys., Waco Integrated Clinical Facility*, 55 FLRA 626, 628 (1999) (same).

The Union claims that the Arbitrator's conclusion that the Agency did not "suffer or permit" the grievants to work overtime award is contrary to the FLSA because the Arbitrator "failed to set forth his basis" for concluding that the grievants were not entitled to overtime compensation. Exceptions at 15. The Union also asserts that the Arbitrator erred in failing to apply a "just and reasonable inference" burden of proof, *id.* at 19, and "erred" when he concluded that the grievants "did not show the amount and extent of overtime work," *id.* at 24. In addition, the Union claims that the award is contrary to law because the Arbitrator failed to address the Agency's alleged failure to maintain proper time and attendance records, *id.* at 23, as well as eight of the ten grievants' claims for weekend travel, *id.* at 29-30.

"Suffer or permit" work is "overtime work performed for the benefit of an agency that management has not ordered in advance, but which management

[2] In Member DuBester's view, a party's exception can raise a recognized ground for finding an award deficient in either of two ways. First, as indicated in the text, an exception is reviewable if it expressly raises a ground recognized by the Authority for reviewing awards. Second, an exception, while not expressly raising one of the grounds recognized by the Authority for finding an award deficient, is nevertheless reviewable if it expressly raises one of the well-established standards constituting a ground recognized by the Authority for finding an award deficient. *See AFGE, Local 3627*, 65 FLRA 1049, 1051 n.2 (2011). The Union's argument discussed in the text does neither. Dismissal of the Union's exception is therefore appropriate.

knows or has reason to know is being performed, and which management does not prevent." *AFGE, Council 220*, 65 FLRA 596, 599 (2011) (*Council 220*) (citation omitted). However, "[n]othing in the FLSA requires the Agency to pay employees for voluntary activity that does not qualify as compensable work." *AFGE, Local 1741*, 62 FLRA 113, 119 (2007).

Here, the Arbitrator determined that the Union failed to establish that the grievants worked any overtime. *See* Award at 22. As set forth above, in reaching this conclusion, the Arbitrator explicitly considered, and rejected, the Union's testimonial and email evidence. *See, e.g., id.* at 6 (finding grievants' emails "unpersuasive in establishing any basis" for overtime); *id.* at 9 (concluding that he "could not find any proof of work accomplished or documentation sufficient enough" to conclude that grievant C had worked the claimed hours of overtime); *id.* at 11 (finding emails "not indicative" of "work per se"); *id.* at 20 (determining that "there is simply no proof" that grievant D "sat at her desk to do Agency work"). As the Union does not allege that any of the Arbitrator's factual findings constitute nonfacts, we defer to his findings, which support his conclusion that the grievants did not work any "suffer or permit" overtime. *See Local 3614*, 61 FLRA at 723.

The Union also argues that the award is contrary to law because the Arbitrator "failed to properly address whether the Agency had actual and/or constructive knowledge that overtime work was being performed." Exceptions at 30. Specifically, the Union contends that, if the Arbitrator had "properly" applied Authority and judicial precedent to the facts here, he would have concluded that the Agency had the requisite knowledge because, among other things, supervisors viewed emails sent during non-work hours, knew of workload and staffing issues, and were aware of an earlier grievance. *Id.* at 40-42.

Even if the Arbitrator had found that the grievants worked overtime hours, "suffer or permit" work requires a showing that management knew, or had reason to know, that the work was being performed. *See Council 220*, 65 FLRA at 599. The Authority has repeatedly held that a "determination of whether a supervisor knows or has reason to believe that work is being performed is a factual finding." *NFFE, Local 858*, 66 FLRA 152, 154 (2011) (*Local 858*). Thus, an arbitrator's assessment of whether supervisors knew, or had reason to know, that grievants were performing overtime work is a factual finding to which the Authority must defer absent a claim that it constitutes a nonfact. *Local 4044*, 65 FLRA at 266.

Here, the Arbitrator found that there was "little and/or no communication or reason" for supervisors to know that the grievants were working while off-duty. Award at 2. And the Arbitrator made specific findings that supervisors were not aware that the grievants were working overtime hours. *See, e.g., id.* at 18 (finding that supervisor would have no way of knowing that work was performed because grievant H did not communicate it to her supervisor); *id.* at 21 (concluding that grievant J never called extra hours to the attention of her supervisor). As the Union does not allege that the Arbitrator's factual findings are nonfacts, we defer to the Arbitrator's conclusion. *Local 4044*, 65 FLRA at 266.

The Union further argues that the award is contrary to law because the Arbitrator "failed to address the Agency's failure to maintain proper time and attendance records." Exceptions at 23. However, an agency is not required to maintain records for overtime that is not worked. *See AFGE, Local 801, Council of Prison Locals 33*, 58 FLRA 455, 457 (2003) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)). As discussed above, the Arbitrator's finding that the Agency did not "suffer or permit" overtime is not deficient. Thus, the Agency could not have violated the FLSA by failing to maintain records for overtime that was not worked. *Id.*

Additionally, the Union argues that the award is contrary to law because the grievants were not sufficiently compensated for their travel claims. Exceptions at 28-29. But the Arbitrator addressed the grievants' travel claims and awarded travel hours to two grievants. Award at 8-9, 20, 22. As the Union does not contend that the Arbitrator's conclusions are based on nonfacts or that the Arbitrator exceeded his authority by failing to address those claims, the Union provides no basis for finding the award deficient. *See, e.g., IFPTE, Local 386*, 66 FLRA 26, 31-32 (2011); *Local 4044*, 65 FLRA at 266.

Accordingly, we deny the Union's contrary-to-law exceptions.[3]

V. Decision

The Union's exceptions are dismissed in part and denied in part.

[3] Having found that the Arbitrator did not err in denying the grievants' claims for "suffer or permit" overtime, we find it unnecessary to resolve the Union's exceptions addressing overtime remedies. That is, we do not address the Union's claims that the Arbitrator "misappl[ied] the standard for willful violations of the FLSA," Exceptions at 55, and "fail[ed] to address the presumption of entitlement to liquidated damages," *id.* at 59. *See Local 858*, 66 FLRA at 155 n.4. It is also unnecessary to address the Union's request for a remand to another arbitrator. *Id.*

Member Beck, dissenting in part:

I agree with the majority that the Arbitrator's denial of the grievants' "suffer or permit" claims is not contrary to law. However, for the reasons stated in my separate opinions in *AFGE, Local 1738*, 65 FLRA 975, 977 (2011) (Member Beck concurring in the result) (Concurring Opinion of Member Beck) and *AFGE, Local 3955, Council of Prison Locals 33*, 65 FLRA 887, 891 (2011) (Member Beck dissenting in part) (Dissenting Opinion of Member Beck), I disagree that the Union has failed to raise a recognized ground under § 2425.6.

The Union argues that the Arbitrator's award is deficient because the Arbitrator "failed to address the Union's claims for damages" regarding compensatory time. Exceptions at 10. The Union also claims that, "[c]ontrary to clear Authority precedent," the Arbitrator "failed to address the issue at all." *Id.* at 14. This argument is substantively indistinguishable from the Union's claim in *AFGE, Local 3627*, 65 FLRA 1049 (2011). In that case, the Authority found that the Union's argument – that the Arbitrator "did not resolve the issue submitted to him" – raised an exceeds-authority exception. *Id.* at 1050. Therefore, I would conclude, consistent with this recent Authority precedent, that the Union has raised an exception that the Arbitrator exceeded his authority.

Addressing the merits of the Union's claim, I would grant the Union's exception and find that the Arbitrator exceeded his authority because he failed to address the Union's claim regarding compensatory time.

It is well established that arbitrators exceed their authority when, among other things, they fail to resolve an issue submitted to arbitration. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). The issue of compensatory time was plainly before the Arbitrator. In its exceptions, the Union states that the parties agreed to the following issue: "Did the Agency fail to provide appropriate compensation (either *compensatory time*, overtime or other wages) for nonexempt employees relative to this grievance?" Exceptions at 8 (emphasis added). Further, neither the Arbitrator nor the Agency dispute the Union's characterization of the issue presented. *See* Award at 1; Opp'n at 5.

Although the Arbitrator denied the grievants' claims for "suffer or permit" overtime, he did not address their claims regarding compensatory time. *See* Award at 22. A successful compensatory time claim would require the Union to show that: (1) the Agency forced the grievants to work overtime; (2) the Agency forced the grievants to accept compensatory time rather than overtime; and (3) the grievants have not used already the compensatory time they received. *See AFGE, AFL-CIO, Local 3614*, 60 FLRA 601, 604-05 (2005). The Arbitrator did not make findings as to any of these three requirements. Therefore, his statement that the grievants' claims were denied cannot be read to have resolved properly the claim regarding compensatory time. *See AFGE, Local 1547*, 65 FLRA 91, 95 (2010) (finding that the arbitrator exceeded his authority by failing to address an issue not resolved by his award).

Accordingly, I would grant the Union's exception that the Arbitrator exceeded his authority because he did not address the issue of compensatory time and would remand the award to the parties for resubmission to the Arbitrator. *See U.S. Dep't of Def., Def. Contract Audit Agency, Cent. Reg., Irving, Tex.*, 60 FLRA 28, 30 (2004) (then-Member Pope dissenting in part) (granting an exceeds-authority exception because the arbitrator "failed to directly resolve the issue submitted to arbitration"). Finally, because the Union has failed to demonstrate that the Arbitrator could not be impartial on remand, I would deny the Union's request that the matter should be remanded to a different arbitrator. *See U.S. Dep't of the Treasury, Internal Revenue Serv., Wage & Investment Div., Austin, Tex.*, 65 FLRA 939, 945 (2011) (denying the request to remand to a different arbitrator where the excepting party did not adequately support its request).