

73 FLRA No. 52

UNITED STATES
DEPARTMENT OF THE INTERIOR
UNITED STATES PARK POLICE
(Agency)

and

FRATERNAL ORDER OF POLICE
UNITED STATES
PARK POLICE LABOR COMMITTEE
(Union)

0-AR-5712

DECISION

September 29, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

In the merits award, Arbitrator David P. Clark found that the Agency violated the Fair Labor Standards Act (FLSA)¹ by failing to timely pay the grievants their regular and overtime wages as a result of the government shutdown in 2018. Consequently, the Arbitrator granted the Union's grievance and awarded liquidated damages for any regular and overtime wages that were not paid timely. Thereafter, the parties disputed the amount of liquidated damages owed to the grievants. The Arbitrator then issued a remedial award and found that any liquidated damages owed to the grievants – for work on regular time – should be based on their regular rate of pay.

The Agency argues that the remedial award is contrary to law because the FLSA only requires the Agency to use the federal minimum wage for determining the amount of liquidated damages owed for non-overtime work. Because an award of liquidated damages merely doubles the amount of wages that a claimant is owed under the FLSA,² we find that arbitrators can only award liquidated damages for non-overtime wages at the FLSA's minimum wage.³ Therefore, we find that the remedial award is contrary to law, in part.

II. Background and Arbitrator's Award

During a federal government shutdown, certain employees are "except[ed]" – and may still be required to work – if they provide services involving the "safety of human life or the protection of property."⁴ Because the grievants are excepted employees, the Agency required them to work during the government shutdown in 2018 without pay. The Union filed a grievance alleging that the Agency violated the FLSA by failing to timely pay the grievants their regular and overtime wages during the shutdown. The Union claimed that the Agency was required to pay liquidated damages due to the untimely payments.

In the merits award, the Arbitrator found that the FLSA requires agencies to timely pay its employees. Furthermore, the Arbitrator noted that the United States Court of Federal Claims has found that an agency's obligation to timely pay its employees persists during a government shutdown.⁵ As a result, the Arbitrator held that the Agency violated the FLSA by failing to timely pay the grievants, found that the Agency failed to establish a good-faith defense under the FLSA, and concluded that the Agency was required to pay liquidated damages to the Union. Neither party filed exceptions to the merits award.

Following the merits award, the parties disputed the amount of liquidated damages owed to the grievants. Specifically, the Agency argued that the FLSA does not require agencies to pay wages – or liquidated damages – above the federal minimum wage for work on regular time. Additionally, the Agency argued that it was not liable for liquidated damages on December 22, 2018 – the first day of the shutdown and the very last day of a pay period. Because the wages paid to the grievants for the remainder of that pay period surpassed the requisite minimum wage for the workweek, the Agency argued that "it is mathematically impossible for the bargaining unit's regular pay to sink below the [minimum wage] requirements of the FLSA" based on one day's lost wages.⁶ In accordance with the merits award, the dispute was referred back to the Arbitrator for resolution.

The Arbitrator issued the remedial award and found that any liquidated damages owed to the grievants for regular time work should be based on their regular rate of pay. According to the Arbitrator, various guides promulgated by the Department of Labor (DOL) state that all liquidated damages should be based on the grievants' regular rate of pay and not the FLSA's minimum-wage provisions. Lastly, the Arbitrator noted that the Agency is

¹ 29 U.S.C. §§ 201-219.

² *Id.* § 216(b).

³ *Id.* § 206.

⁴ Merits Award at 1 n.2 (quoting 31 U.S.C. § 1342).

⁵ *Id.* at 7-8 (citing *Martin v. United States*, 117 Fed. Cl. 611 (2014) (*Martin*)).

⁶ Exceptions, Ex. D, Agency's Pre-Hearing Br. at 6.

required to pay for all hours worked during a workweek. Therefore, the Arbitrator found that the Agency was required to pay liquidated damages for any overtime or regular work performed on December 22, 2018, consistent with the merits award.

On February 25, 2021, the Agency filed exceptions to the Arbitrator's remedial award. On April 12, 2021, the Union filed its opposition to the Agency's exceptions.⁷

III. Preliminary Matter: The Agency's exceptions are timely, in part.

Under 5 C.F.R. § 2425.2(b), the time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award. The time limit may not be extended or waived by the Authority.⁸ When an arbitrator issues a supplemental award that addresses the original award, exceptions filed within thirty days of the supplemental award are timely only to the extent that they challenge alleged deficiencies that arose in the supplemental award.⁹

Here, the question is whether the Agency's exceptions challenge determinations that arose in the merits award or the remedial award. Any exceptions challenging the merits award are untimely, but exceptions challenging arbitral findings that first appeared in the remedial award are timely. The Union argues that all of the Agency's exceptions are untimely because the exceptions pertain to issues that were fully resolved by the merits award.¹⁰ The Union argues that the remedial award did not modify the merits award and that the Agency's exceptions should have been filed within thirty days of the merits award.¹¹

The remedial award addressed issues relating to the amount of liquidated damages owed to the grievants as a result of the remedy ordered by the merits award.¹² Here, the Agency's contrary-to-law exceptions partly challenge alleged deficiencies that arise only from the remedial award.¹³ While the merits award stated that the Agency was liable for liquidated damages arising from "the Agency's failure to pay [affected member officers] straight time and overtime on their regularly scheduled paydays,"¹⁴ the merits award did not address how much liquidated damages were owed to each grievant based on their wages. In fact, the merits award ordered the Agency "to calculate the amount due to each of the [g]rievants individually, and within 30 days of this arbitration decision, submit those calculations to the Union."¹⁵ Because the alleged deficiency in calculating liquidated damages arose only in the remedial award, the Agency's argument that the remedial award is contrary to the FLSA because arbitrators cannot award liquidated damages at a rate above the minimum wage is timely.¹⁶

The remainder of the Agency's contrary-to-law exceptions challenge its liability for work performed on December 22, 2018. Although, the Arbitrator clarified in the remedial award that the Agency was liable for any wages that were not timely paid for work completed on December 22, 2018, this was not a modification.¹⁷ The merits award *already* noted that the grievant's regular and overtime wages for December 22, 2018 were not timely paid,¹⁸ and ordered the Agency to pay liquidated damages for work performed on that date.¹⁹ Because the remedial award did not modify this finding, we dismiss as untimely the Agency's contrary-to-law exceptions

⁷ Because the Union was given an extension of time to file its brief, its brief is timely filed.

⁸ 5 C.F.R. § 2425.2(b); see 5 U.S.C. § 7122(b) ("If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding."); *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 71 FLRA 338, 339 (2019) (then-Member DuBester concurring).

⁹ *U.S. Dep't of the Army, U.S. Army Dental Activity Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 62 FLRA 70, 71 (2007) (*Army Dental*) (for exceptions filed within thirty days of supplemental award – but not original award – to be timely, "the supplemental award must modify or address the original award 'in such a way as to give rise to the deficiencies alleged in the exceptions'" (quoting *NAGE, Loc. R4-45*, 55 FLRA 789, 793 (1999)); see also *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 71 FLRA 240, 241 n.9 (2019) (*Naval Shipyard*) (then-Member DuBester concurring).

¹⁰ Opp'n at 9.

¹¹ *Id.* at 9-10.

¹² Remedial Award at 5-6.

¹³ Exceptions at 5-11.

¹⁴ Merits Award at 8.

¹⁵ *Id.* at 10.

¹⁶ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1174 (2020) (then-Member DuBester dissenting in part) (where exceptions filed within thirty days of remedial award, Authority considered only exceptions that alleged remedial deficiencies, but dismissed exceptions challenging the merits award as untimely); *Army Dental*, 62 FLRA at 71 (where asserted deficiencies did not arise until the supplemental award, exceptions filed within thirty days of that award were timely).

¹⁷ Remedial Award at 6.

¹⁸ Merits Award at 4 ("Four pay periods were directly impacted by the government shutdown of December 22, 2018 until January 25, 2019: Pay Period 2018-27 (December 9 - 22, 2018) . . .").

¹⁹ *Id.* at 9 ("All other wages not received by the Grievants on their regularly scheduled paydays are subject to liquidated damages.").

challenging its liability for liquidated damages relating to work performed on December 22, 2018.²⁰

IV. Analysis and Conclusion: The award is contrary to the FLSA.

The Agency argues that the remedial award is contrary to law because it requires the Agency to pay liquidated damages for non-overtime wages that are above the federal minimum wage.²¹ Specifically, the Agency notes that the FLSA only protects the nonpayment of the federal minimum wage²² and overtime.²³ Because liquidated damages merely double the amount of damages that are required by the FLSA, the Agency notes that “courts have dismissed claims” where “a plaintiff sought liquidated damages for the failure to timely pay contractual wages that were higher than the minimum wage.”²⁴ 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.²⁵

Regarding liquidated damages, § 216 of the FLSA states in relevant part:

[a]ny employer who violates the provisions of [§] 206 or [§] 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.²⁶

While the Union argues that the FLSA’s reference to “their unpaid minimum wages” means each claimant’s regular wage,²⁷ this argument is inconsistent with the FLSA’s plain wording. Rather, § 216 states that a claimant is owed damages only if their employer violates the FLSA by not paying them either the requisite statutory minimum wage, or overtime at the claimant’s regular rate of pay.²⁸

As a result, courts have noted that the FLSA’s “statutory language simply does not contemplate a claim for wages other than minimum or overtime wages.”²⁹ Furthermore, the Union does not cite any cases where a court applied the FLSA to justify awarding liquidated damages for non-overtime wages at a rate above the federal minimum wage under the circumstances presented by this case.³⁰ Therefore, the cases that the Union cites do not support its arguments.

²⁰ See *Naval Shipyard*, 71 FLRA at 241 n.9 (where arbitrator’s clarification did not give rise to the deficiencies challenged on exceptions, exceptions filed more than thirty days after the original award were untimely).

²¹ Exceptions at 6-8.

²² 29 U.S.C. § 206.

²³ *Id.* § 207; see Exceptions at 6-7.

²⁴ Exceptions at 5.

²⁵ *AFGE, Loc. 1633*, 70 FLRA 752, 753 (2018).

²⁶ 29 U.S.C. § 216.

²⁷ Opp’n at 13 (emphasis omitted).

²⁸ 29 U.S.C. § 216.

²⁹ *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201–02 (2d Cir. 2013) (*Nakahata*); *Coffen v. Wash. Convention & Sports Auth.*, 271 F. Supp. 3d 211, 214 (D.D.C. 2017) (quoting *Nakahata*, 723 F.3d at 201-02).

³⁰ Opp’n at 15-18, 21 (citing *Biggs v. Wilson*, 1 F.3d 1537, 1544 (9th Cir. 1993) (“Paychecks are due on payday. After that, the minimum wage is ‘unpaid.’” (emphasis added)); *Lamon v. City of Shawnee, Kan.*, 754 F. Supp. 1518, 1521 n.1 (D. Kan. 1991), *aff’d in relevant part*, 972 F.2d 1145, 1155 (10th Cir. 1992) (finding a “requirement that plaintiffs be paid compensation at their regular hourly rate” for hours worked between 160 and the overtime threshold for their 28-day work period under 5 U.S.C. § 207(k) “to be implicit in the framework of the FLSA”

(emphasis added)); *Martin v. United States*, 130 Fed. Cl. 578, 587-88 (2014) (awarding liquidated damages for non-overtime work at “minimum wage”); *Carazani v. Zegarra*, 972 F. Supp. 2d 1, 23 (D.D.C. 2013) (“An employer violates § 206 by failing to pay an employee in domestic service \$7.25 per hour.” (emphasis added)); *Donovan v. U.S. Postal Serv.*, 530 F. Supp. 894, 903-04 (D.D.C. 1981) (ordering the parties to calculate the employees’ regular rate of pay for purposes of calculating overtime compensation); *Hayes v. Bill Haley & His Comets, Inc.*, 274 F. Supp. 34, 37 (E.D. Pa. 1967) (awarding FLSA damages “for the plaintiff at the regular rate for non-overtime hours work” without analyzing the pertinent statutory wording); *U.S. Capitol Police Bd.*, Case No. 01-ARB-01(CP), 2002 WL 34461687 (C.A.O.C. Feb. 25, 2002) (awarding liquidated damages without specifying the employees’ rate of pay)). The Union relies on *Barwinczak v. United States*, Case No. 11-426C (Fed. Cl. 2013) (*Barwinczak*) to assert that an agency paid liquidated damages in an amount equal to the amount of unpaid wages without any reference to the federal minimum wage. *Id.* at 21. The Union also submitted a stipulation of facts from *Barwinczak* to the Arbitrator. See Exceptions, Ex. C (Ex. C) at 27; see also Exceptions at 11. However, that stipulation specifies that the claim in that matter was for overtime wages. Ex. C at 27. Thus, the Union’s reliance on *Barwinczak* does not support its arguments.

Accordingly, because the FLSA implicitly states that it does not provide for a claim of non-overtime wages that are above the statutory minimum wage, it follows that a claimant also cannot recover non-overtime wages at their regular rate of pay as liquidated damages.³¹ Moreover, the Agency correctly notes that the Arbitrator failed to cite to any legal authority which states that non-overtime wages above the statutory minimum wage are available as liquidated damages.³² Rather, the DOL guidance cited by the Arbitrator only states that *overtime hours* “must be paid at a rate of at least one and one-half times the employee’s regular rate of pay.”³³

We grant the Agency’s remaining contrary-to-law exception and find that the Arbitrator erred by finding that the grievants are owed liquidated damages for non-overtime hours worked at a rate of pay above the FLSA’s minimum wage. Consequently, we modify the remedial award to state that the grievants are owed liquidated damages for non-overtime work *only* in the amount of any wages recovered at the FLSA’s relevant statutory minimum-wage rate.

V. Decision

We dismiss the Agency’s exceptions in part, grant them in part, and modify the award in accordance with the determinations above.

³¹ See *Martin*, 117 Fed. Cl. at 624 (dismissing any plaintiff whose wage was above the FLSA’s minimum wage provisions).

³² See Remedial Award at 5-6.

³³ *Id.* at 6 (quoting U.S. DOL, *Handy Reference Guide to the Fair Labor Standards Act* (2016), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh1282.pdf>).