

73 FLRA No. 8

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3954
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
PHOENIX, ARIZONA
(Agency)

0-AR-5676

DECISION

May 31, 2022

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

I. Statement of the Case

In a merits award, Arbitrator Patrick E. Bingham found that certain employees were entitled to overtime compensation under the Fair Labor Standards Act (FLSA).¹ Subsequently, the Arbitrator issued a damages award that determined the amount of overtime compensation, liquidated damages, and attorney fees and costs. The Union filed exceptions to the damages award on nonfact, exceeded-authority, contrary-to-law, fair-hearing, and impossible-to-implement grounds. Because the Union does not establish that the award is deficient on nonfact and exceeded-authority grounds, we deny those exceptions. We grant the contrary-to-law exception, in part, dismiss certain untimely exceptions, and find it unnecessary to address the remaining exceptions.

II. Background**A. Merits Award**

As relevant here, the Union filed a grievance over whether bargaining-unit employees (employees) should be compensated under the FLSA for certain activities outside of their scheduled shifts. The parties bifurcated the proceedings into liability and damages phases. On March 1, 2020, the Arbitrator issued an award finding, based on representative evidence, that the Agency violated the FLSA. As a remedy, the Arbitrator awarded backpay beginning two years before the Union filed the grievance and found that the Union was entitled to attorney fees and costs. The Arbitrator advised the parties that because the evidence in the merits hearing was “representational,” additional proceedings were needed for the “final monetary award . . . to include all employees of the Agency that are similarly situated in circumstance to the employees who testified at [the] hearing.”² No exceptions were filed to the merits award.

Subsequently, during a conference call to discuss the remaining issues and a possible hearing on damages, the Arbitrator asked the parties to exchange “their best effort at arriving at an amount of damages, fees and expenses to be paid to the Union as the prevailing party.”³ The parties could not agree on a settlement; therefore, the Arbitrator resolved the issues in a damages award.

B. Damages Award

On October 23, 2020, the Arbitrator issued the damages award. In deciding the amount of backpay owed to employees, the Arbitrator considered the parties’ exhibits, the arguments made in their submissions, and testimony from the merits hearing. To address the amount owed to correctional employees, the Arbitrator reviewed samples of daily assignment rosters (daily rosters), quarterly assignment rosters, and adjustments made by the Agency to the daily rosters as “evidence of the extent” of the employees’ overtime.⁴ The Arbitrator used the samples because a “full complement” of this evidence “would have amounted to approximately 4,200 such documents to cover the 5.96 years” relevant in this case.⁵

Basing the calculations on these samples, the Arbitrator averaged the amount of overtime correctional employees spent performing all compensable activities and found that it was “approximately 17.5 minutes” per shift.⁶ Using that approximation, the Arbitrator concluded

¹ 29 U.S.C. § 216.

² Exceptions, Attach. 1 at 103-52, Merits Award (Merits Award) at 49.

³ Damages Award at 4.

⁴ *Id.* at 7.

⁵ *Id.* at 8.

⁶ *Id.*

that the Agency was liable for over 5,000 hours of overtime.

The Arbitrator then adopted the Agency's recommended pay scale, finding that determining the "rate of pay for each post where overtime was incurred . . . is not possible."⁷ The adopted pay scale was based on the relevant 2020 locality pay, and the Arbitrator found that the overall amount of backpay owed was \$229,123.96. Then, by dividing the overall amount by "approximately 105" correctional employees on staff during the relevant time period, the Arbitrator concluded that the amount of backpay owed to each employee was \$2,182.13.⁸ The award stated that the Arbitrator was "not able to further refine which individual is to be paid what" amount, and concluded that this calculation was sufficiently "in line with the information that was submitted by the parties during [the merits] hearing."⁹ For non-correctional employees, the Arbitrator adopted the backpay amount the Agency proposed to the Union and, without explanation, found those employees were entitled to a total amount of \$105,758.04.

Regarding liquidated damages, the Arbitrator "reaffirm[ed]" the finding from the merits award that "there was no intentional violation of law by the Agency."¹⁰ The Arbitrator noted that the Union's failure to raise overtime issues at monthly labor-management committee meetings contributed to the delay in resolving the issues years earlier. But the Arbitrator also found that the Agency "knew it had a problem with staffing" and that there was evidence that some employees were required to remain at their posts and were "discouraged" or "rebuffed" by their supervisors from requesting overtime.¹¹ Based on these considerations, the Arbitrator awarded \$5,000 in liquidated damages.

As for the remaining monetary issues concerning attorney fees and costs, the Arbitrator reviewed a summarized statement that the Union had provided to the Agency during the parties' attempt to resolve the issue. The Union also provided the Arbitrator with "detailed

documents supporting the Union's position regarding attorneys' fees and expenses" in an August 24, 2020 submission because it alleged that the summarized statement submitted by the Agency was incomplete and inaccurate.¹² Based on this information, the Arbitrator determined that the hours, hourly rates, and costs the Union requested were excessive. And instead of the requested Washington, D.C. market hourly rate, the Arbitrator found that the applicable attorney-fee rate was that for Phoenix, Arizona, because that was the location of the Union's office and where the Union filed the grievance. The Arbitrator also found that the complexity of the case was "modest," and that the Union did not prevail on all of its overtime claims.¹³ Therefore, the Arbitrator reduced the amount of fees and costs requested by the Union.

The Union filed exceptions on November 23, 2020, and the Agency filed an opposition on January 19, 2021.¹⁴

III. Preliminary Issue: Several of the Union's arguments are untimely exceptions to the merits award.

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.¹⁵ Further, an

⁷ *Id.* at 9.

⁸ *Id.*

⁹ *Id.* at 10.

¹⁰ *Id.* at 11 (quoting Merits Award at 49).

¹¹ *Id.*

¹² Exceptions, Attach. 10 at 5, August 24, 2020 Letter Regarding Damages (Aug. 24 Letter) at 1; *see also* Exceptions, Attach. 10 at 54-92 (Fee Request).

¹³ Damages Award at 21; *see also id.* at 3 (stating that the bulk of the issues were either denied by the Arbitrator or withdrawn by the Union).

¹⁴ On December 2, 2020, the Agency requested an extension of time until January 18, 2021, to file its opposition. On December 10, 2020, the Authority's Office of Case Intake and Publication granted the requested extension. January 18, 2021, fell on a federal holiday. The Authority's regulations provide that, if the last date of the filing period falls on a federal holiday, then the due date is the next day. 5 C.F.R. § 2429.21(a). The Agency's opposition was filed on January 19, 2021. Accordingly, the opposition is timely.

¹⁵ 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 [thirty]-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) (*Pope A* (then-Member DuBester concurring)).

award is considered final for purposes of filing exceptions when it fully resolves all issues submitted to arbitration.¹⁶

In the merits award, the Arbitrator resolved the issues submitted: whether the Agency suffered or permitted bargaining-unit employees to work in excess of eight hours per day in violation of the FLSA and the parties' agreement, and if so, what would be the appropriate remedy.¹⁷ The Arbitrator found that the Agency violated the FLSA, ordered a remedy, and retained jurisdiction to assist in implementing the remedy.¹⁸ Because the only remaining issue was the amount of the remedy, the merits award constituted a final award for purposes of filing exceptions to that award.¹⁹ And the Union was required to file any exceptions to that award within thirty days after it received the award.²⁰

Here, the Union challenges, on nonfact and contrary-to-law grounds, the Arbitrator's findings in the merits award regarding which activities were compensable,²¹ and the determination that the Agency's liability for backpay was retroactive to two years before the grievance was filed.²² The Union also challenges the Arbitrator's findings in the merits award as to which activities were compensable on exceeded-authority grounds.²³ Because these arguments challenge determinations and findings that the Arbitrator made in the

merits award, which was issued in March 2020, we dismiss them as untimely.²⁴

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Union asserts that the damages award is based on a nonfact. To establish that an award is based on a nonfact, the excepting party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.²⁵ A challenge to an arbitrator's legal conclusion does not provide a basis for finding an award deficient on nonfact grounds.²⁶

The Union argues that the Arbitrator's award of attorney fees and costs is based on nonfacts²⁷ because there is no evidence that the amounts the Union requested are unreasonable.²⁸ To the extent this argument challenges the Arbitrator's legal conclusion regarding the appropriate amount of fees, it provides no basis for finding the award deficient.²⁹ Moreover, the Union's disagreement with the Arbitrator's evaluation of the evidence concerning fees and costs³⁰ does not demonstrate that the award is based on a nonfact.³¹

Accordingly, we deny the nonfact exception.

¹⁶ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Dublin, Cal.*, 71 FLRA 1172, 1174 (2020) (*BOP Dublin*) (then-Member DuBester dissenting, in part, on other grounds) (citing *U.S. Dep't of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 674 (2011) (*Kings Bay*)).

¹⁷ Merits Award at 1; *see id.* at 41-49.

¹⁸ *Id.* at 41-49.

¹⁹ *Kings Bay*, 65 FLRA at 674.

²⁰ *BOP Dublin*, 71 FLRA at 1174 (citing *Pope AFB*, 71 FLRA at 339; *U.S. DHS, U.S. Citizenship & Immigr. Servs.*, 68 FLRA 1074, 1076 (2015) (then-Member DuBester dissenting) (stating that an award is final even "where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded"); *U.S. Dep't of the Treasury, IRS*, 63 FLRA 157, 159 (2009) (finding an award final where it resolved all issues submitted to arbitration even though the arbitrator retained jurisdiction while the parties determined the amount of backpay and expenses); *OPM*, 61 FLRA 358, 361 (2005) (Member Pope dissenting in part) (award is final when it awards fees or damages, but leaves the amount of those damages to be determined)).

²¹ Exceptions at 68-74 (citing Merits Award at 43-45) (challenging the Arbitrator's conclusion that the Agency had not "suffered and permitted" pre-shift work because the Arbitrator found that the officers' early arrival was for the officers' benefit and not the Agency's); *id.* at 74 (citing Merits Award at 45-48) (picking up essential equipment pre-shift); *id.* at 78 (citing Merits Award at 44-45) (exchanging and accounting for equipment as part of shift exchange); *id.* at 90 (citing Merits Award at 49) (time spent traveling between the prison and hospital); *id.* at 82-89 (time spent being alert and vigilant).

²² *Id.* at 61-65.

²³ *Id.* at 98, 99-105 (arguing that the Arbitrator received evidence at the merits hearing showing that certain activities were in excess of the eight-hour work day but failed to resolve the issue as to whether they were compensable); *id.* at 108-09 (citing Merits Award at 42, 43, 44-45) (raising exceeds-authority argument because Arbitrator found pre-shift work was compensable where it was combined with post-shift activities but failed to address the Union's claim for damages).

²⁴ *BOP Dublin*, 71 FLRA at 1174; *see also Kings Bay*, 65 FLRA at 674.

²⁵ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 201 (2016) (*BOP Jesup*) (Member Pizzella dissenting in part).

²⁶ *Id.*

²⁷ Exceptions at 110, 113, 115-16.

²⁸ *See id.* at 115, 116.

²⁹ *BOP Jesup*, 69 FLRA at 201.

³⁰ Exceptions at 115-16.

³¹ *U.S. Dep't of the Air Force, Peterson Air Force Base, Colo.*, 72 FLRA 143, 144 (2021).

- B. The Union's exceeded-authority exception fails to establish that the award is deficient.

The Union argues that the award is deficient on exceeded-authority grounds. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to persons who are not encompassed by the grievance.³²

First, the Union argues that the Arbitrator lacked the authority to issue a decision on attorney fees before the Union had submitted its "detailed and contemporaneous billing records."³³ However, the issue before the Arbitrator was the amount that the Agency should pay to employees and the Union's attorneys, and the award is directly responsive to that issue.³⁴ Therefore, the Union's argument does not establish that the award is deficient.³⁵

The Union also argues that the Arbitrator erred by failing to determine the amount of damages for time that correctional employees spent responding to emergencies.³⁶ However, a review of the record does not indicate that the Arbitrator specifically found that employees in this case responded to an emergency for which they were not

compensated.³⁷ Thus, this argument does not establish that the Arbitrator erred.

Accordingly, we deny the exceeded-authority exception.³⁸

- C. The award is contrary to law, in part.

The Union asserts that the award is contrary to law for several reasons.³⁹ 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*.⁴⁰ 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.⁴¹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.⁴²

1. The amount of overtime awarded is contrary to law because it is based on averages.

The Union argues that the Arbitrator's use of averages to determine the amount of overtime is contrary to the FLSA and Authority precedent.⁴³ The Union further asserts that unrebutted testimony at the merits hearing,

³² *AFGE, Council of Prisons Locs. #33, Loc. 0922*, 69 FLRA 351, 352 (2016).

³³ Exceptions at 111.

³⁴ See Damages Award at 5.

³⁵ *BOP Jesup*, 69 FLRA at 200.

³⁶ Exceptions at 106-08. The Union also claims that the award is based on a nonfact for the same reason. See *id.* at 105. However, the Union does not identify any factual finding that is clearly erroneous. And contrary to the Union's assertion, the Arbitrator did not find any specific emergency had occurred that would have entitled any employee to overtime compensation. Therefore, we reject this claim. See, e.g., *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020) (rejecting nonfact exceptions that challenge alleged findings that arbitrator did not actually make); *SSA, Off. of Hearing Operations*, 71 FLRA 177, 178 (2019) (same).

³⁷ See Damages Award at 2-4; see also Merits award at 44 (noting generally that employees who worked overtime responding to an emergency would be performing a compensable activity). Although the Arbitrator noted testimony regarding emergencies, e.g., Merits Award at 13 (employee testifying she left thirty to sixty minutes late because of emergencies), 19, 25 (management testimony that employees were paid overtime for emergencies), the Arbitrator made no finding that the Agency had failed to pay overtime for such activity. To the extent that the Union challenges the Arbitrator's failure to make such a finding, that argument is an untimely challenge to the merits award and we do not consider it. See *supra*, section III.

³⁸ *U.S. Dep't of VA*, 71 FLRA 992, 993 (2020) (Member Abbott dissenting) (citing *U.S. DHS, U.S. CBP*, 66 FLRA 838, 844 (2012); *SPORT Air Traffic Controllers Org.*, 66 FLRA 552, 554

(2012)) (denying exceeded-authority exception that was based on finding arbitrator did not make).

³⁹ Exceptions at 48 (Arbitrator refused to allow the Union to present evidence on damages and instead based the decision on averages to determine backpay (citing 5 C.F.R. § 551.412; *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Tucson, Ariz.*, 70 FLRA 414 (2018) (*BOP Tucson*)); see also *id.* at 50, 52 (Arbitrator wrongly relied on averages instead of precision as required by law (citing *BOP Tucson*, 70 FLRA at 418; *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Carswell, Tex.*, 65 FLRA 960, 966 (2011) (*BOP Carswell*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Terminal Island, Cal.*, 63 FLRA 620, 624-25 (2009) (*BOP Terminal Island*)); *id.* at 55-61 (Arbitrator erred in reducing liquidated damages by application of wrong standard in deciding whether the Agency had reasonable grounds for believing that it was not in violation of FLSA); see also *id.* at 58 (Arbitrator was required to find that the Agency did not act in good faith because of factual finding that supervisors knew that employees were working overtime (citing *AFGE, Loc. 1662*, 66 FLRA 925, 927 (2012) (*Local 1662*)); *id.* at 110 (Arbitrator incorrectly determined that Union was not entitled to certain costs (citing *BOP Carswell*, 65 FLRA at 967-68; *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Greenville, Ill.*, 65 FLRA 607, 608-09 (2011) (*BOP Greenville*)); *id.* at 111-12 (damages award lacked required analysis for attorney fees and was premature).

⁴⁰ *AFGE, Loc. 3954*, 72 FLRA 403, 404 (2021) (Member Abbott concurring) (citing *U.S. Dep't of the Interior, Bureau of Land Mgmt., Eugene Dist. Portland, Ore.*, 68 FLRA 178, 180 (2015) (*Interior*)).

⁴¹ *Id.* (citing *Interior*, 68 FLRA at 180).

⁴² *Id.* (citing *Interior*, 68 FLRA at 180-81).

⁴³ Exceptions at 2-3, 48, 50-54.

“established that the amount of [overtime] expended varied based on the particular circumstances of a job assignment or post,” and that the Union could have presented specific “evidence reflecting when each employee worked a position entitled to damages pursuant to the [merits] award and the damages owed to that person for that work.”⁴⁴

Authority precedent requires an award of overtime compensation to be as precise as possible,⁴⁵ and “specifically reject[s] an arbitrator’s use of an ‘average amount of time expended per day per officer’ in calculating an award of backpay under the FLSA.”⁴⁶ Here, the Arbitrator recognized that because the evidence in the merits hearing was “representational,” additional evidence was needed for the “final monetary award . . . to include all employees of the Agency that [were] similarly situated.”⁴⁷ And there is no dispute that the amount of time employees spent performing compensable work varied.⁴⁸ But instead of considering additional evidence, the Arbitrator based the amount of overtime worked primarily on the sample evidence from the merits hearing.⁴⁹ By relying on representational evidence and not considering the “full complement”⁵⁰ of evidence, the Arbitrator was “not able to further refine which individual [was] to be paid what.”⁵¹ Consequently, because the Arbitrator could have made precise overtime determinations, but did not do so, the award is contrary to law.⁵²

The Authority has also rejected the use of averages to determine the pay rate when the rate of pay varies.⁵³ Here, the award adopted the Agency’s proposed pay rate because the Arbitrator found that deciding a rate

for each post was not possible.⁵⁴ But this finding was not based on anything in the record showing that such evidence was nonexistent or impossible to determine.⁵⁵ Where, as here, there is no finding that the Agency was unable to produce records of the precise pay rate for each post, and the award is based on an average pay rate, the award is contrary to law.⁵⁶

Consistent with Authority precedent, we reject the Arbitrator’s use of averages to calculate damages in this case.⁵⁷ Where the record is insufficient to determine the precise amount of overtime owed, and at what pay rate, the Authority will remand an award for resubmission to the arbitrator to consider specific evidence showing how much overtime compensation is owed to each employee who was denied it.⁵⁸ Accordingly, we remand the award to the parties for resubmission to the Arbitrator, absent

⁴⁴ *Id.* at 51.

⁴⁵ The Authority has rejected an arbitrator’s use of averages to calculate damages, because doing so potentially awards compensation to employees for the performance of activities that lasted ten or fewer minutes per workday. See *BOP Tucson*, 70 FLRA at 417-18; *BOP Carswell*, 65 FLRA at 966-67; *BOP Terminal Island*, 63 FLRA at 624-25. The FLSA’s implementing regulation, 5 C.F.R. § 551.412(a)(1) provides that preparatory and concluding activities that are closely related to, and indispensable to the performance of, an employee’s principal activities constitute hours of work and are compensable when the time spent in the activities exceeds ten minutes per workday.

⁴⁶ *BOP Carswell*, 65 FLRA at 966 (quoting *BOP Terminal Island*, 63 FLRA at 624-25).

⁴⁷ Merits Award at 49.

⁴⁸ See *id.* at 42-48 (describing the different amounts of time spent on post-shift work based on post); Exceptions at 51 (asserting that un rebutted testimony showed that overtime varied). The Agency does not challenge the Union’s assertion. See also Opp’n, Attach. D, Tr. at 86, 172, 244-45, 254; Opp’n, Attach. E, Tr. at 139, 142, 157.

⁴⁹ Damages Award at 5-6; see also *id.* at 8-9.

⁵⁰ *Id.* at 8.

⁵¹ *Id.* at 10.

⁵² *BOP Tucson*, 70 FLRA at 417-18.

⁵³ *BOP Carswell*, 65 FLRA at 966.

⁵⁴ Damages Award at 9.

⁵⁵ See *id.* (conclusory statement by Arbitrator that deciding an appropriate rate not possible due to the time span and the number of employees involved); but see Exceptions at 12 (asserting that the government “maintains precise records reflecting the pay rate that would have been in effect for each employee on each day of the recovery period”). The Agency does not dispute this assertion.

⁵⁶ See *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 771 (2006) (“Where an employer is unable to produce sufficient evidence of the precise amount and extent of employees’ work, damages may be awarded to employees ‘even though the result [may] be only approximate.’” (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946))).

⁵⁷ *BOP Tucson*, 70 FLRA at 417-18; *BOP Carswell*, 65 FLRA at 966-67; *BOP Terminal Island*, 63 FLRA at 624-25.

⁵⁸ See *BOP Carswell*, 65 FLRA at 966 (remanding to arbitrator for further findings regarding amount of time that employee engaged in compensable activities and their rates of pay); *BOP Terminal Island*, 63 FLRA at 625 (remanding where record does not provide sufficient information to determine which employees performed compensable activity and the amount of time engaged in such activity).

settlement, for further findings as to the amount of overtime owed to each employee.⁵⁹

2. The Arbitrator's liquidated-damages determination is based on the incorrect legal standard.

The Union argues that the award is contrary to law because the Arbitrator did not award liquidated damages in the same amount as the unpaid overtime.⁶⁰ The Union further argues that the Arbitrator failed to determine, when deciding the amount of liquidated damages, whether the Agency acted in good faith when it violated the FLSA.⁶¹

Under the FLSA, where an employer does not satisfy its "substantial burden" of proving that it acted both with good faith and with a reasonable basis for believing that it was not violating the FLSA, liquidated damages are mandatory in an amount equal to the unpaid overtime.⁶² As the Authority has explained, "to meet its burden, an employer must 'affirmatively establish' that it attempted to discern the FLSA's requirements for the specific circumstances involved and comply with those requirements."⁶³ Further, the Authority has found that the good-faith requirement is not satisfied simply because the employer "did not purposefully violate the provisions of the FLSA."⁶⁴

Here, the Arbitrator's liquidated-damages determination is based on findings that the Agency did not willfully violate the FLSA.⁶⁵ However, this finding does not satisfy the FLSA's good-faith requirement, and the

Arbitrator made no additional findings that would satisfy the legal standard.⁶⁶ Consequently, the Arbitrator's liquidated-damages determination is contrary to law.

The Union argues that the record establishes that the Agency did not act in good faith.⁶⁷ Although the award noted evidence that some officers were "discouraged" or "rebuffed"⁶⁸ by their supervisors when they intended to request overtime, the Arbitrator made no findings concerning whether the Agency took affirmative steps to discern and comply with the FLSA's requirements, and none are apparent from the record.⁶⁹ Therefore, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings and an application of the correct legal standard.⁷⁰

3. The Arbitrator's finding that the Phoenix, Arizona market hourly rate applied for attorney fees is contrary to law.

The Union argues that the Arbitrator improperly applied the Phoenix, Arizona market hourly rate for attorney fees instead of the Washington, D.C. rate.⁷¹ The FLSA provides a statutory right to attorney fees,⁷² and the Authority has found that the relevant community and appropriate market rate for determining attorney fees in an FLSA case is the community in which the attorney ordinarily practices.⁷³

It is undisputed that the Union's attorneys are based in Washington, D.C.⁷⁴ However, the Arbitrator applied the Phoenix hourly rate, where the Agency's

⁵⁹ The Union also argues that the Arbitrator denied it a fair hearing because the Arbitrator failed to consider specific "evidence and hold a [damages] hearing in order to precisely calculate damages," Exceptions at 49; *see also id.* at 48, and that the award is impossible to implement because it is based on averages which makes it "impossible for the parties to understand which grievant ought to receive a given amount of money." *Id.* at 54. Because we remand the award to the Arbitrator to consider specific evidence on overtime, we find it unnecessary to address these exceptions. *See, e.g., U.S. Dep't of VA*, 72 FLRA 212, 214 (2021) (then-Member DuBester concurring in part) (finding it unnecessary to address bias exception where award is remanded to arbitrator for sufficient findings); *U.S. Dep't of Transp. FAA, Nashua, N.H.*, 65 FLRA 447, 450 (2011) (finding it unnecessary to address fair-hearing exception, among others, where award is contrary to law and set aside); *AFGE, Loc. 3230*, 59 FLRA 610, 612 n.4 (2004) (declining to address fair-hearing and essence exceptions where Authority remanded award).

⁶⁰ Exceptions at 55-62.

⁶¹ *Id.* at 56 (quoting 29 U.S.C. § 216(b)).

⁶² *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 70 FLRA 186, 189 (2017) (*BOP Guaynabo*) (quoting *Local 1662*, 66 FLRA at 927) (citing 29 U.S.C. § 260); *see AFGE, Loc. 987*, 66 FLRA 143, 146-47 (2011); *see also* 29 U.S.C. § 216(b).

⁶³ *BOP Guaynabo*, 70 FLRA at 189 (quoting *AFGE, Loc. 3828*, 69 FLRA 66, 69 (2015) (*Local 3828*)).

⁶⁴ *Id.* (quoting *Local 3828*, 69 FLRA at 69).

⁶⁵ Damages Award 11-12.

⁶⁶ *BOP Guaynabo*, 70 FLRA at 189; *AFGE, Loc. 2571*, 67 FLRA 593, 594 (2014) (*Local 2571*).

⁶⁷ Exceptions at 58.

⁶⁸ Damages Award at 11.

⁶⁹ *Cf. Local 2571*, 67 FLRA at 595 (modifying award to include liquidated damages where arbitrator found that agency acted negligently, which precludes finding that agency acted in good faith).

⁷⁰ *See, e.g., BOP Jesup*, 69 FLRA at 205 (remanding issue as to whether agency's FLSA violation was willful).

⁷¹ Exceptions at 113-15.

⁷² *U.S. Dep't of the Navy, U.S. Naval Acad., Nonappropriated Fund Program Div.*, 63 FLRA 100, 103 (2009) (*Navy*) (citing *IFPTE, Loc. 529*, 57 FLRA 784, 786 (2002)).

⁷³ *Id.* (citing *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 58 FLRA 87, 90 (2002); *Martinez v. U. S. Postal Serv.*, 89 M.S.P.R. 152, 161 (2001)).

⁷⁴ *See* Damages Award at 17; Exceptions at 113; *see generally* Opp'n at 12-29 (rebutting various Union arguments but not addressing Union arguments regarding the Arbitrator's market-rate findings).

facility is located.⁷⁵ Because the appropriate rate is the community in which the Union's attorneys ordinarily practice – in this case, Washington, D.C. – and the Arbitrator did not apply that rate, the fee award is deficient.⁷⁶ Accordingly, we remand the award to the parties, absent settlement, for resubmission to the Arbitrator for a determination of the amount of fees using the Washington, D.C. hourly rate.

4. The Union's remaining arguments do not establish that the award of fees and costs is deficient.

The Union argues that the amounts requested for fees and costs were reasonable and that the Arbitrator erred by reducing them.⁷⁷ However, “[t]he Authority requires that fee requests ‘be closely examined to ensure that the number of hours expended was reasonable[,]’ because ‘the number of hours expended are not necessarily those reasonably expended.’”⁷⁸ The standard of review as to the reasonableness of the number of hours awarded is deferential, and an arbitrator's determination as to the appropriate amount will not be disturbed absent a specific showing that it is incorrect.⁷⁹

The Arbitrator reviewed the Union's summarized billing and expense statement.⁸⁰ This statement identified each attorney's hours and rates, and the level of experience and position in the law firm.⁸¹ The statement also included the hours and rates of paralegals.⁸² Based on the Union's statement, the Arbitrator examined each request for fees and costs and concluded that they were unreasonable, finding primarily that they were either excessive or duplicative.⁸³ The Arbitrator therefore adjusted and reduced the requested amounts.⁸⁴

The Union argues that the Arbitrator determined the amount of fees and costs prematurely, before the Union had an opportunity to submit its “detailed and contemporaneous billing records.”⁸⁵ The Union contends that a detailed fee petition would have enabled the

Arbitrator to “correctly identify[] the factual and legal basis” for the amount requested.⁸⁶ But the record demonstrates that the Union had the opportunity to, and did, submit evidence to the Arbitrator regarding its entitlement to attorney fees and expenses.⁸⁷ And the Union makes no argument that the actual invoices would show any difference in the amount of time spent on the case than what was already in the evidence submitted to the Arbitrator. Because we defer to the Arbitrator as to the reasonableness of the requests, and the Union fails to identify a specific error in the determination, we find that the Union has not demonstrated that the Arbitrator erred.⁸⁸

The Union, citing Authority precedent, also claims that the Arbitrator erred by determining that the Union's share of the Arbitrator's fee was not reimbursable.⁸⁹ Under the FLSA, a prevailing party is entitled to “a reasonable attorney's fee to be paid by the defendant, and costs of the action,”⁹⁰ and, as the Union notes, these costs may include the portion of the arbitrator's fee paid by the prevailing party.⁹¹ In the cases cited by the Union, however, the arbitrators premised their awards of this cost upon a determination that the parties had not contractually agreed to waive the entitlement to costs.⁹² Here, in contrast, the Arbitrator found that the parties' agreement required the parties to split the arbitration fees. And in neither of the decisions upon which the Union relies did the Authority conclude that such a contractual provision is unenforceable under the FLSA. Nor does the Union challenge the Arbitrator's interpretation of the agreement regarding fee splitting on essence grounds. Therefore, the Union fails to demonstrate that the Arbitrator's determination regarding costs is contrary to law.⁹³

Based on the foregoing, we grant the Union's contrary-to-law exception, in part, and deny it, in part, as it pertains to the reasonableness of the fees and costs. We remand those portions of the damages award described above.

⁷⁵ Damages Award at 22-23 (noting that the Phoenix rate “is significantly lower than the rates charged in Washington, D.C.”).

⁷⁶ *Navy*, 63 FLRA at 603.

⁷⁷ Exceptions at 112, 115-16. The Union also argues that the Arbitrator based the award on nonfacts and exceeded the arbitral authority in this regard. *Id.* at 110, 112, 113, 115-16. We have already rejected both arguments.

⁷⁸ *U.S. DHS, ICE*, 64 FLRA 1003, 1008 (2010) (*ICE*) (quoting *U.S. DOD, Def. Fin. & Acct. Serv.*, 60 FLRA 281, 286 (2004) (internal quotation marks omitted)).

⁷⁹ *Id.* (citing *McKenna v. Dep't of Navy*, 108 M.S.P.R. 404, 411 (2008)).

⁸⁰ Damages Award at 13.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.* at 13-20.

⁸⁴ *Id.* at 21-25.

⁸⁵ Exceptions at 111.

⁸⁶ *Id.* at 117.

⁸⁷ *See* Aug. 24 Letter; Fee Request.

⁸⁸ *ICE*, 64 FLRA at 1008.

⁸⁹ Exceptions at 110.

⁹⁰ 29 U.S.C. § 216(b).

⁹¹ *BOP Greenville*, 65 FLRA at 608-09.

⁹² *BOP Carswell*, 65 FLRA at 967-68 (finding agency failed to timely raise argument that parties' agreement waived entitlement to costs under § 216(b)); *BOP Greenville*, 65 FLRA at 608-09 (denying agency's essence exception where agency did not argue that the fee-sharing provisions of parties' agreement were intended to supplant the cost provisions of § 216(b)).

⁹³ *See* 29 U.S.C. § 216(b).

V. Decision

We dismiss those exceptions that we have found untimely. We deny the Union's nonfact and exceeded-authority exceptions and we deny, in part the contrary-to-law exception. We grant the contrary-to-law exception, in part and remand, in part, the matter to the parties, absent settlement, for resubmission to the Arbitrator consistent with this decision.