66 FLRA No. 30

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 858
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
RISK MANAGEMENT AGENCY
KANSAS CITY, MISSOURI
(Agency)

0-AR-4614

_____

DECISION

September 21, 2011

_____

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Charles Feigenbaum 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 concluded that, with limited exceptions addressed below, the Agency did not violate the Fair Labor Standards Act (FLSA) and its implementing regulations by failing to properly compensate the grievants for overtime work.

For the reasons that follow, we deny the Union's exceptions in part and remand the award in part.

II. Background and Arbitrator's Award

During the period in dispute, the Agency compensated the grievants with compensatory time off (comp time) for overtime work, rather than paying them at the rate of one and one-half times the hourly rates of pay (overtime pay). Award at 3-4. A grievance was filed alleging, in pertinent part, that the Agency violated the FLSA and its implementing regulations by failing to properly compensate the grievants for overtime work.[1] *Id.* at 3. The grievance was unresolved and submitted to the Arbitrator,[2] where the parties stipulated to the following issues: "Did the Agency fail to provide appropriate compensation (either comp time or wages) for non-exempt employees relative to this grievance? If so, what shall the remedy be?" *Id.* at 2.

Before the Arbitrator, the Union argued that the Agency violated the FLSA and its implementing regulations by forcing the grievants to accept comp time, rather than overtime pay. *Id.* at 11. The Arbitrator found that the Agency committed the alleged violations with respect to two grievants and awarded them "appropriate payment, including liquidated damages." *Id.* at 23, 29. With regard to the remaining grievants who worked overtime, the Arbitrator found that they all had requested comp time because the Agency did not have funds available to present overtime pay as an option. *Id.* at 19-20. He further found that the Agency provided the grievants the choice between: (1) working overtime in return for comp time; or (2) not working overtime. *Id.* at 20-21. In this regard, he found that if the grievants had declined to work overtime, then this would not have had an "adverse [e]ffect on them." *Id.* at 22. In addition, he determined that because the Agency did not require the grievants to work overtime, the Agency did not intimidate, threaten, or coerce them into accepting comp time if they chose to work overtime. *Id.* at 22-23. Thus,

---

[1] 5 U.S.C. § 5543 provides, in relevant part:

> (b) The head of an agency may, on request of an employee, grant the employee compensatory time off from the employee's scheduled tour of duty instead of payment under . . . the [FLSA] for an equal amount of time spent in . . . overtime work. An agency head may not require an employee to be compensated for overtime work with an equivalent amount of compensatory time-off from the employee's tour of duty.

5 C.F.R. § 551.531 provides, in relevant part:

> (c) An agency may not require that an employee be compensated for overtime work under this subpart with an equivalent amount of compensatory time off from the employee's tour of duty. An employee may not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any other employee for the purpose of interfering with such employee's rights to request or not to request compensatory time off in lieu of payment for overtime hours.

[2] A series of earlier arbitration hearings took place before another arbitrator on the issue of whether certain grievants were exempt under the FLSA. Award at 3; Tr. at 12. At the arbitration hearing relevant to this case, the parties agreed to limit the issue to eighteen grievants stipulated to be non-exempt from the FLSA. Award at 3.

he found that the Agency did not violate the FLSA and its implementing regulations in this regard.

The Union also claimed before the Arbitrator that the Agency did not compensate the grievants for "suffer or permit" overtime work performed during lunch or after normal work hours.[3] *Id.* at 23. The Arbitrator found that even if the grievants worked during these times, the Union did not meet its burden to prove that the grievants worked "suffer or permit" overtime. *Id.* at 24. Specifically, he found that: (1) supervisors were unaware that the grievants were working during these times; and (2) the amounts of time to be compensated were "uncertain and indefinite." *Id.* With regard to supervisory knowledge, the Arbitrator found that supervisors did not ask the grievants whether they were performing this overtime work and that the grievants did not tell supervisors about such work. *Id.* at 23. The Arbitrator further found, based on witness testimony, that supervisors may not have known that the grievants were working during lunch because the grievants' lunch times varied, and even if supervisors "saw food out on [a grievant's] desk, and the [grievant] on the phone or at her computer, this did not necessarily mean that the phone or computer activity was work-related." *Id.* at 26-27. With regard to the amounts of time, the Arbitrator found that the grievants, through testimony, gave only their "best guesses," which was insufficient to prove that they worked on certain minimum amounts of "suffer or permit" overtime work. *Id.* at 24.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator's finding that overtime work was "voluntary" is based on a nonfact. Exceptions at 4. Specifically, the Union argues, the record reflects testimony from the grievants that "work for which they earned comp time was performed because it needed to get done and was not voluntary." *Id.*

The Union also asserts that the award is contrary to law for three reasons. First, the Union contends that the award is contrary to 5 C.F.R. § 551.531 because the Arbitrator erroneously found that the grievants were not required to perform overtime work. Citing *Social Security Administration, Memphis, Tennessee*, 59 FLRA 564 (2004) (*SSA*), the Union contends that employees are entitled to overtime pay where they are "compelled to work beyond their regularly scheduled work day based on the size of the workload and pressure by their supervisors to get the job done." Exceptions at 8. Here, the Union argues, the grievants were required to perform overtime work because "there was work that needed to be completed, and could not be completed within their regular tour of duty, and in some instances, because of pressure from supervisors." *Id.*

Second, the Union claims that the award is contrary to the FLSA and its implementing regulations because the Arbitrator acknowledged that the grievants worked uncompensated "suffer or permit" overtime, but erroneously found that supervisors were unaware that grievants were working overtime during lunch. *Id.* at 9. According to the Union, witness testimony demonstrates that supervisors were aware of this overtime because they either asked grievants to work, or saw grievants working, during lunch. *Id.* at 12. The Union also contends that the Arbitrator erred by finding that the specific amount of overtime could not be ascertained because, according to the Union, testimony shows the amount and extent of overtime work as a matter of "just and reasonable inference." *Id.* at 9-10.

Third, the Union argues that the award is contrary to the Back Pay Act, 5 U.S.C. § 5596, because the Arbitrator failed to address or resolve the Union's application for attorney fees. *Id.* at 13.

B. Agency's Opposition

The Agency argues that the Union's nonfact exception lacks merit because the Union disputed before the Arbitrator whether the Agency required the grievants to work overtime. Opp'n at 1. In addition, the Agency claims that the Arbitrator found that the grievants were not coerced into working overtime. *Id.* at 4. Finally, with regard to the issue of attorney fees, the Agency asserts that the Union's exception is premature because arbitrators are not required to resolve requests for attorney fees before an award of backpay becomes final and binding. *Id.*

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union contends that the Arbitrator's finding that overtime work was "voluntary" is based on a nonfact. Exceptions at 4. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (*NFFE*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.*

Even assuming that the challenged finding is a "factual" finding, the issue of whether the Agency required the grievants to perform overtime work was

[3] The relevant statutory provisions defining "suffer or permit" overtime are set forth below.

disputed at arbitration. *See* Award at 13. As the parties disputed this factual matter at arbitration, the Union does not provide a basis for finding the award deficient as based on a nonfact. *See NFFE*, 56 FLRA at 41. Accordingly, we deny the Union's nonfact exception.

B. The award is contrary to law only insofar as the Arbitrator did not address the Union's request for attorney fees.

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.*

1. The award is not contrary to 5 C.F.R. § 551.531(c).

The Union contends that the award is contrary to 5 C.F.R. § 551.531(c) because the Arbitrator erroneously found that the grievants were not required to perform overtime work and accept comp time.

Under 5 C.F.R. § 551.531, comp time may be granted "[a]t the request of an employee," and an employer may not coerce employees or interfere with their "rights to request or not to request compensatory time." The regulation thus requires that employees be given an uncoerced option of whether or not to request comp time; it does not require the payment of overtime in any particular circumstance. *AFGE, Local 507*, 58 FLRA 378, 380 (2003) (Chairman Cabaniss dissenting). In particular, there is no indication that pay is required if the employee is permitted to refuse to work overtime hours but chooses to work those hours in return for comp time. *Id.* Put simply, nothing in the regulation prohibits an employer from offering the employee the choice of overtime work for comp time or no overtime work at all. *Id.*

Moreover, with regard to a finding of coercion, the Authority defers to an arbitrator's factual findings when conducting a de novo review, and if the factual findings support the arbitrator's legal conclusion, then the Authority denies the exceptions. *See id.* at 380-81. The Authority has declined to find coercion where, for example, an employer offered employees the option of changing their work schedules to avoid overtime or accepting comp time for overtime work. *Id.* By contrast, the Authority has upheld an award finding coercion where the Arbitrator made factual findings that employees were "compelled to work beyond their regularly scheduled work day based on the size of the workload and pressure by their supervisors to get the job done." *SSA*, 59 FLRA at 566.

In this case, unlike in *SSA*, the Arbitrator made no findings that the grievants were compelled to work overtime because of the size of the workload or pressure by their supervisors to get the job done. Instead, he expressly found that the grievants were not intimidated, threatened, or coerced into accepting compensatory time off under 5 C.F.R. § 551.531(c). Award at 23. In this connection, he found that the Agency provided the grievants the choice between: (1) working overtime in return for comp time; or (2) not working overtime. *Id.* at 20-21. In finding that the Agency did not require the grievants to work overtime, the Arbitrator noted that a refusal to work overtime would have had no "adverse effect on them." *Id.* at 22. These factual findings, to which we defer, support a conclusion that the grievants were not coerced into working overtime. Thus, the Union does not demonstrate that the award is inconsistent with § 551.531(c), and we deny this exception.

2. The award is not contrary to 29 U.S.C. § 203(g) and 5 C.F.R. § 551.104.

The Union contends that the award is contrary to the FLSA and its implementing regulations regarding "suffer or permit" overtime.

The FLSA defines "[e]mploy" as including "to suffer or permit to work." 29 U.S.C. § 203(g). As defined in 5 C.F.R. § 551.104, to "suffer[] or permit[]" to work means "any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed."

A determination of whether a supervisor knows or has reason to believe that work is being performed is a factual finding. *AFGE, Local 4044*, 65 FLRA 264, 266 (2010) (*Local 4044*); *AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 723 (2006). Here, the Arbitrator weighed the testimony before him and acknowledged that supervisors may have seen grievants eating at their desks, but concluded that it was "uncertain or unproven that supervisors were aware that the [grievants] were working at lunch or after hours." Award at 27. The Union does not allege that this finding is based on a nonfact, and, as stated previously, we defer to factual findings in conducting a de novo review. This factual finding supports the Arbitrator's conclusion that supervisors did not "suffer or permit" the grievants to work.

See Local 4044, 65 FLRA at 266. Therefore, we find that the award is not contrary to 29 U.S.C. § 203(g) and 5 C.F.R. § 551.104, and we deny this exception.[4]

3. The Arbitrator's failure to address the Union's request for attorney fees is contrary to law.

The Union argues that the award is contrary to the Back Pay Act because the Arbitrator failed to address or resolve the Union's application for attorney fees. Exceptions at 13.

The Authority has held that "awards of backpay should not be granted under the Back Pay Act where there is an independent statutory basis for such an award." *U.S. Dep't of the Navy, U.S. Naval Acad., Nonappropriated Fund Program Div.*, 63 FLRA 100, 103 (2009). In addition, the Authority has found that the FLSA, 29 U.S.C. § 216(b) (§ 216(b)),[5] constitutes an independent statutory basis for awards of backpay and reasonable attorney fees. *Id.* at 102-03; *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Greenville, Ill.*, 65 FLRA 607, 608 (2011). Under § 216(b), attorney fees are mandatory for prevailing parties. *IFPTE, Local 529*, 57 FLRA 784, 786 (2002). The Authority has held that an employee is a prevailing party if the employee receives "an enforceable judgment or settlement which directly benefitted [the employee] at the time of the judgment or settlement." *NAGE, Local R4-6*, 55 FLRA 1298, 1301 (1999) (applying standard to Back Pay Act claim) (citation omitted).

Here, the Arbitrator found, and there is no dispute, that the Agency violated the FLSA and its implementing regulations with respect to two grievants by forcing them to accept comp time rather than overtime pay, and he awarded them "appropriate payment, including liquidated damages." Award at 11, 29-30. Therefore, we find that the two grievants are prevailing parties entitled to a "reasonable attorney's fee" under § 216(b) of the FLSA. However, as the Arbitrator did not address attorney fees, he did not assess, and the record does not show, what constitutes a reasonable fee in this case. Therefore, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for a determination of the amount of the reasonable attorney fees to which the Union is entitled.

V. Decision

The Union's exceptions are denied in part, and the award is remanded in part.

[4] As the Arbitrator found that supervisors were unaware of the grievants performing "suffer or permit" overtime and, thus, no amounts of overtime were shown, it is unnecessary for the Authority to resolve the Union's claim that the Arbitrator erred by finding that specific amounts of overtime could not be ascertained.

[5] Section 216(b) provides, in relevant part: "The court . . . in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."