

65 FLRA No. 191

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
EGLIN AIR FORCE BASE, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1897
(Union)

0-AR-4716

DECISION

June 13, 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 Patricia S. Plant filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency failed to pay employees for time spent on standby duty (standby). For the reasons discussed below, we set aside the award.

II. Background and Arbitrator's Award

Prior to the onset of Hurricane Ida, *see* Award at 17-18, the Agency sent an e-mail to security personnel (Agency e-mail), notifying them that they were being placed on "[Six]-Ring Stand-By[.]" i.e., they were required to "answer [the] phone within [six] [ring[s] to receive instructions[.]" *Id.* at 17. The e-mail also stated that security personnel were to: (1) "be contactable at all time"; (2) have an "alternate number where your unit can reach you during a recall"; (3) refrain from going "hunting, camping or out of town"; (4) know that "even having

a cell phone with you is no guarantee of contactability"; and (5) refrain from consuming alcohol. *Id.* The next day, the Agency issued a directive stating that certain employees would "[r]emain on [one]-hour standby after [the] hurricane passes, for possible [twenty-four] hour emergency recovery operations." *Id.* at 18. Approximately three weeks later, the Agency directed supervisors to "inform . . . personnel that we are no longer on six ring standby." *Id.*

The Union filed a grievance alleging that the Agency violated Article 36.03 of the parties' agreement (Article 36.03),¹ and 5 C.F.R. § 551.431 (§ 551.431),² by failing to pay security personnel for time spent on standby. *See id.* The matter was unresolved and was submitted to arbitration. *Id.*

An arbitration hearing was held. After the hearing, but before the issuance of the award, the Arbitrator e-mailed the Agency's attorney, asking her to "kindly check on the status of [the Arbitrator's] invoice[.]" Exceptions, Attach. 6 at 12-13. The Arbitrator and the Agency exchanged additional e-mails on this subject over the next two weeks. *See id.* at 4-13. Subsequently, the Arbitrator sent an e-mail to the Agency (Arbitrator's e-mail), where she stated: "[y]our finance office is at fault, less than thorough and totally responsible for the delay in my receiving my funds[;]" and "[y]our finance department has screwed me over for the last time." *Id.* at 4.

1. Article 36.03, entitled "STANDBY TIME[.]" states:

Designated employees may be restricted to the official duty station or their living quarters, required to remain in a state of readiness to perform work, and have their activities substantially limited such that they cannot use the time effectively for their own purposes. In these situations, all time spent on standby is considered hours of work.

Award at 65.

2. As relevant here, § 551.431 pertains to time on standby that is considered hours of work for overtime pay purposes. *See U.S. Dep't of Transp., FAA*, 61 FLRA 750, 752 (2006). Section 551.431 states, in pertinent part:

(a)(1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes.

In her award, the Arbitrator did not define the issues before her, but noted how each party stated the issues to be resolved.³ *See id.* at 18-19. According to the Union, the issues to be resolved were whether the Agency willfully violated the Fair Labor Standards Act (FLSA), related regulations, and the parties' agreement, when it "failed to pay [e]mployees [s]tandby [p]ay[.]"⁴ *Id.* at 18. According to the Agency, the issues to be resolved were whether security personnel were "placed on standby as defined by [the parties' agreement]" and § 551.431, and, if so, whether a remedy of backpay was appropriate. *Id.* at 19.

The Arbitrator, citing Article 36.03, stated that the parties "mutually agreed as to the definition of [s]tandby time[.]" and emphasized that there was nothing "ambiguous . . . in what the [parties] set out as their agreed upon understand[ing] of the term 'standby.'" *Id.* at 65. The Arbitrator added that the Agency's head of security personnel used the "standby term" in the Agency e-mail. *Id.* at 69. The Arbitrator sustained the grievance and awarded backpay, liquidated damages, and attorney fees, pursuant to the FLSA and § 551.431(a)(1). *Id.* at 70. Additionally, as relevant here, the Arbitrator made comments that were critical of the Agency and some of its witnesses. *See id.* at 58, 61, 64, & 69.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to § 551.431 because security personnel were not on standby during the period for which the Arbitrator ordered standby pay. *See* Exceptions at 9-10. In this regard, the Agency argues that security personnel were "not restricted to a designated post of duty, . . . assigned to be in a state of readiness to perform work, []or substantially limited in the use of their time." *Id.* at 10. Additionally, the Agency argues that the statements in the Arbitrator's e-mail, and the comments in the Arbitrator's award criticizing the Agency and some of its witnesses, indicate that the Arbitrator was biased. *See id.* at 15-16.

3. In her award, the Arbitrator also resolved a procedural matter. *See* Award at 7, 12-17. As no exceptions were filed regarding that matter, we do not address it further.

4. The FLSA provides for the federal minimum standards for wages and overtime. 29 U.S.C. §§ 201-219. 5 C.F.R. Part 551 sets forth the regulations implementing the FLSA in the federal sector. *AFGE, Council 220*, 65 FLRA 596, 597 n.2 (2011).

B. Union's Opposition

The Union maintains that the award is consistent with § 551.431. *See* Opp'n at 5 & n.6. In this connection, the Union argues that security personnel were on standby because they were: (1) "restricted by official order;" (2) directed to be in a state of readiness; and (3) substantially limited in their activities. *Id.* at 5 n.6 (quoting § 551.431). With regard to the "restricted" criterion, the Union asserts that the Agency e-mail was "viewed" by security personnel as an "official order to remain by the phone at home[.]" *id.* at 6, and that the Agency e-mail "effectively limited people to work and home[.]" *id.* at 11 n.10. The Union adds that "limit[ing] people to work and home" is "one of the elements related to standby pay - restricted by official order to a designated post of duty/living quarters[.]" *Id.* (citing § 551.431). Additionally, the Union argues that 5 C.F.R. § 2429.5 (§ 2429.5)⁵ bars the Agency's bias claim, *see id.* at 13, and that, in any event, the Arbitrator was not biased, *see id.* at 14.

IV. Analysis and Conclusions

In reviewing arbitration awards for consistency with law, rule, or regulation, the Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *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 determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Section 551.431 states, in pertinent part, that "[a]n employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty[.]" 5 C.F.R. § 551.431. That is, an employee must be restricted to a "designated post of duty" in order to be on standby under § 551.431. *Id.* Unlike the former version of

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

§ 551.431⁶ (which was not in effect at any times relevant here), *see* 5 C.F.R. § 551.431 (1999), and unlike Article 36.03, which uses wording similar to the wording in the former version of § 551.431, *see* Award at 65, the current version of § 551.431 does not provide that an employee may be on standby if restricted to his or her “living quarters.” *See* 5 C.F.R. § 551.431. As such, the fact that security personnel were restricted to their homes, i.e., their living quarters, does not indicate that security personnel were on standby, as the Union argues. *See* Opp’n at 6, 11 n.10.

The Arbitrator found that security personnel were on standby without finding that security personnel were restricted to a designated post of duty, as required under § 551.431. *See* 5 C.F.R. § 551.431. *Cf. U.S. Dep’t of Commerce, Nat’l Oceanic & Atmospheric Admin., Office of NOAA Corps Operations, Atl. Marine Ctr., Norfolk, Va.*, 55 FLRA 816, 820-21 (1999) (Chair Segal concurring; Member Wasserman dissenting) (arbitrator expressly found that grievants were restricted to a designated post of duty). Further, with regard to the Union’s argument that the Agency restricted security personnel to their homes and were therefore on standby, the Arbitrator did not find, *see* Award at 65, 69, and there is no claim, *see* Opp’n at 5 & n.6, 6-7, 11 n.10, that security personnel’s homes constitute a “designated post of duty” under § 551.431. Accordingly, we find that the Arbitrator’s conclusion that security personnel were on standby is contrary to § 551.431.

With regard to the Arbitrator’s reliance on Article 36.03, the Authority has held that parties may not negotiate over proposals that would entitle

6. The Office of Personnel Management issued the revised version of § 551.431 in 1999, which became effective January 20, 2000. *See* 64 Fed. Reg. 69,165, 69,167, 69,180 (December 10, 1999). The former version of § 551.431 stated, in pertinent part:

(a) An employee will be considered on duty and time spent on standby duty shall be considered hours of work if:

.....

(2) The employee, although not restricted to the agency’s premises:

- (i) Is restricted to his or her *living quarters* or designated post of duty;
- (ii) Has his or her activities substantially limited; and
- (iii) Is required to remain in a state of readiness to perform work.

5 C.F.R. § 551.431 (1999) (emphasis added).

employees to standby pay unless such pay would be consistent with the requirements of § 551.431. *U.S. Dep’t of Homeland Sec., U.S. Customs & Border Prot., Dall., Tex.*, 64 FLRA 603, 605 (2010) (*DHS*). As Article 36.03 permits standby pay to be granted to an employee who is restricted to his or her “living quarters” without regard to whether the employee is restricted to a “designated post of duty,” *see* Award at 65, Article 36.03 is not consistent with the requirements of § 551.431 and, thus, cannot provide a basis for the Arbitrator’s award of standby pay. *See DHS*, 64 FLRA at 605. *See also Soc. Sec. Admin., Office of Disability Adjudication & Review*, 64 FLRA 1000, 1002 n.5 (2010) (insofar as an arbitrator’s award construes an agreement contrary to a government-wide regulation, the award is unenforceable).

For the forgoing reasons, we set aside the award as contrary to § 551.431. Consequently, we find that it is unnecessary to resolve the Agency’s bias exception. *Cf. U.S. Dep’t of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 450 n.3 (2011) (finding it unnecessary to address excepting party’s remaining exceptions).

V. Decision

The award is set aside.