68 FLRA No. 139

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
TALLAHASSEE, FLORIDA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 1570
(Union)

0-AR-4897

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DECISION

August 31, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the Fair Labor Standards Act (FLSA)[1] and the parties' agreement by failing to compensate certain correctional officers for activities performed "prior to the beginning of their shift and after the end of their shift."[2] Arbitrator Cary J. Williams sustained the grievance and directed the Agency to compensate the officers with fifteen minutes of overtime pay, plus interest and liquidated damages, for the applicable recovery period.

The substantive questions before us are whether the award: (1) is contrary to 5 C.F.R. § 551.412(a)(1) because the Arbitrator did not find that the officers spent more than ten minutes per workday performing preparatory or concluding activities; (2) is contrary to the FLSA because it awards overtime pay from the time the officers get in line to pass through security screening; (3) is contrary to law because it grants officers both liquidated damages and interest; and (4) is contrary to the FLSA because it awards overtime pay to "all past and present correctional officers who worked . . . on morning watch and evening watch."[3]

Regarding the first question, we are unable to determine whether the Arbitrator found that officers performed compensable preparatory or concluding activities for more than ten minutes per workday, as § 551.412(a)(1) requires. Therefore, we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings. As the remand may result in no compensation for officers, we find it premature, at this time, to resolve the Agency's remaining exceptions.

II. Background and Arbitrator's Award

The employees at issue here are correctional officers at a federal, minimum-security prison. The prison is staffed in three shifts – morning, day, and evening – by officers who work in the Agency's correctional-services department. The morning shift is from 12:00 a.m. to 8:00 a.m.; the day shift is from 7:45 a.m. to 4:15 p.m.; and the evening shift is from 4:00 p.m. to 12:00 a.m. Although officers on each shift "follow[ ] the same procedures,"[4] the morning and evening shifts do not have a fifteen-minute overlap – the evening shift ends at, and the morning shift begins at, 12:00 a.m.

The Union filed a grievance alleging that the Agency violated the FLSA by requiring officers working the morning and evening shifts to perform preparatory or concluding activities without proper compensation. Specifically, the Union argued that the Agency knowingly and willfully required: (1) the morning-shift officers to perform compensable preparatory activities before their shift; and (2) the evening-shift officers to perform compensable concluding activities after their shift. The grievance was unresolved and was submitted to arbitration.

As relevant here, the parties stipulated the issues as whether "the Agency violate[d] the [FLSA] . . . by suffering or permitting correctional officers on the evening . . . and morning [shifts] to perform work before and/or after their scheduled shift change at 12:00 [a.m.] without compensation. If so, what is the remedy?"[5]

Addressing those issues, the Arbitrator determined that the officers, with a caveat not relevant here, perform the following preparatory activities: (1) passing through security screening; (2) entering a secure area to receive their equipment; (3) traveling to

[1] 29 U.S.C. §§ 201-219.
[2] Award at 1.
[3] *Id.* at 37.
[4] *Id.* at 33.
[5] *Id.* at 5.

their assigned post; and (4) exchanging equipment and information with the out-going officer. The Arbitrator determined that these activities are "basically the same for all posts when changing shifts,"[6] and are reversed when conducted as concluding activities.

The Arbitrator determined that these preparatory and concluding activities are compensable, but he did not determine the specific amounts of time that officers spent conducting these activities. The Arbitrator acknowledged that, under 5 C.F.R. § 551.412(a)(1), preparatory and concluding activities are compensable only if employees perform those activities for more than ten minutes per workday. Nevertheless, he "[a]ppl[ied] th[e] reasoning" of another arbitrator's award that had found that § 551.412(a)(1)'s "ten[-]minute rule did not apply because overtime . . . was paid in increments of one-quarter hour."[7] In this connection, he stated that "the specific time necessary to relieve each post is not critical to recovery" because the "Agency pays overtime in [fifteen-]minute increments without setting a minimum time to qualify."[8] The Arbitrator also stated, at various points, that: (1) "the quickest relief posts . . . still require a minimum of five minutes *or more* to complete;"[9] (2) "generally[,] the time ranged from three to ten minutes *or more* both on-coming and off-going;"[10] (3) "the physical layout of the institution is such that it takes *at least a minimum* of four or five minutes to arrive at and relieve any post;"[11] and (4) the officers spent "*at least* five or ten minutes per shift" performing compensable preparatory or concluding activities.[12]

For the reasons discussed above, the Arbitrator concluded that the Agency "suffered and permitted" officers to perform preparatory and concluding activities without compensation.[13] He also concluded that the Agency was aware that shift hours must accommodate preparatory and concluding activities because all other shift changes – morning-to-day and day-to-evening – overlap by fifteen minutes. Consequently, the Arbitrator awarded the affected officers fifteen minutes of overtime pay per shift, plus interest and liquidated damages, for the applicable recovery period. He also directed the Agency to "adjust current [shift] hours to provide a fifteen[-]minute overlap period for the 12:00 [a.m.] shift change similar to the 8:00 [a.m.] and 4:00 [p.m.] shift changes" (the overlap remedy).[14]

The Agency filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations bar the Agency's management-rights exception.

The Agency claims[15] that the overlap remedy abrogates management's rights to assign work, direct employees, and determine its internal-security practices under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).[16]

We find that the Agency's management-rights exception is not properly before us. Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, 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."[17]

At arbitration, the Agency was on notice of the disputed issue and the remedies requested by the Union, including the overlap remedy.[18] However, the Agency did not present any arguments regarding the effect that the requested relief would have on the management rights that it cites.

Because the Agency could have raised its management-rights arguments before the Arbitrator, but failed to do so, we dismiss the Agency's management-rights exception under §§ 2425.4(c) and 2429.5.[19]

IV. Analysis and Conclusions: We remand the award for further findings because we cannot determine whether it is contrary to law.

The Agency argues that the award is contrary to law, specifically, the FLSA, government-wide regulations, and Authority precedent.[20] When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the

[6] *Id.* at 30.
[7] *Id.* at 35.
[8] *Id.* at 34.
[9] *Id.* at 32-33 (emphasis added).
[10] *Id.* at 34 (emphasis added).
[11] *Id.* (emphasis added).
[12] *Id.* at 36 (emphasis added).
[13] *Id.* at 29.
[14] *Id.* at 37.
[15] Exceptions at 6-9.
[16] 5 U.S.C. § 7106.
[17] 5 C.F.R. § 2429.5; *accord id.* § 2425.4(c); *Fraternal Order of Police, Pentagon Police Labor Comm.*, 65 FLRA 781, 783-84 (2011) (dismissing exception under § 2429.5, where record established agency could have raised argument before arbitrator, but did not).
[18] Award at 22-23.
[19] *U.S. DHS, U.S. CBP*, 66 FLRA 335, 337-38 (2011) (dismissing exceptions where agency had notice of specific remedy sought by union at arbitration and could have, but did not, dispute remedy before arbitrator).
[20] Exceptions at 9-17.

exception and the award de novo.[21] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[22] In making that determination, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[23]

The Agency argues that the award is contrary to 5 C.F.R. § 551.412(a)(1) because it awards overtime pay for preparatory or concluding activities that do not exceed ten minutes per workday.[24] Authority precedent holds that an award granting employees overtime pay under the FLSA for performing preparatory or concluding activities for ten minutes or less per workday is contrary to § 551.412(a)(1).[25] Section 551.412(a)(1) provides:

> If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, *and that the total time spent in that activity is more than [ten] minutes per workday*, the agency shall credit all of the time spent in that activity, including the [ten] minutes, as hours of work.[26]

Here, although the Arbitrator acknowledged that preparatory and concluding activities must exceed ten minutes per workday to be compensable,[27] it is unclear whether he found that officers performed such activities for more than ten minutes per workday. At one point in the award, he "[a]ppl[ied] th[e] reasoning" of another arbitration award that had found that § 551.412(a)(1)'s "ten[-]minute rule did not apply because overtime . . . was paid in increments of one-quarter hour"[28] – thus implying that he may have (incorrectly) found it unnecessary to assess whether the officers performed the activities for more than ten minutes per workday. Additionally, at various points, he stated that: "the quickest relief posts . . . still require a *minimum* of five minutes *or more* to complete";[29] "generally[,] the time ranged from three to ten minutes *or more* both on-coming and off-going";[30] "the physical layout of the institution is such that it takes *at least a minimum* of four or five minutes to arrive at and relieve any post";[31] and the officers spent "*at least* five or ten minutes per shift" performing compensable preparatory or concluding activities.[32] Given these findings, it is unclear whether any of the officers performed compensable preparatory and concluding activities for more than ten minutes per workday. As a result, we are unable to determine whether the award conflicts with § 551.412(a)(1).

When the Authority is unable to determine whether an award is contrary to law, the Authority remands the award for further findings by the arbitrator.[33] As we are unable to determine whether the award conflicts with § 551.412(a)(1), we remand this matter to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

The Agency also argues that the award: (1) is contrary to the FLSA because it awards overtime pay from the time the officers get in line to pass through security screening;[34] (2) is contrary to law because it grants officers both liquidated damages and interest;[35] and (3) is contrary to the FLSA because it awards overtime pay to "*all* past and present correctional officers who worked . . . on morning watch and evening watch."[36]

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[21] *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)).
[22] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[23] *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).
[24] Exceptions at 12-14.
[25] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Yazoo City, Miss.*, 68 FLRA 269, 270 (2015); *U.S. DOJ, Fed. BOP, Fed. Prisons Camp, Bryan, Tex.*, 67 FLRA 236, 238 (2014) (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 65 FLRA 157, 159 (2010); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 624-25 (2009); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 598 (2004)).
[26] 5 C.F.R. § 551.412(a)(1) (emphasis added).
[27] Award at 35.
[28] *Id.*
[29] *Id.* at 32-33 (emphasis added).
[30] *Id.* at 34 (emphasis added).
[31] *Id.* (emphasis added).
[32] *Id.* at 36 (emphasis added).
[33] *E.g., U.S. Dep't of the Army, U.S. Army Aviation & Missile Research Div., Redstone Arsenal, Ala.*, 68 FLRA 123, 124 (2014) (Member Pizzella dissenting).
[34] Exceptions at 9-12.
[35] *Id.* at 14-15.
[36] *Id.* at 16 (citing Award at 37).

On remand, the Arbitrator could find, based on § 551.412(a)(1), that no compensation is warranted. As a result, we find it premature, at this time, to resolve the Agency's remaining exceptions.[37]

However, if, on remand, the Arbitrator finds that the officers performed compensable preparatory or concluding activities for more than ten minutes per workday, then he should specify how much time was spent performing which activities, including security screening. We note, in this connection, that in determining whether an employee has engaged in a compensable preparatory or concluding activity, the Authority has assessed whether the activity is "an integral and indispensable part of" the employee's principal activities.[38] We also note that while this case was pending before the Authority, in *Integrity Staffing Solutions, Inc. v. Busk* (*Integrity Staffing*),[39] the U.S. Supreme Court clarified that an activity is "integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."[40] If the Arbitrator clarifies, on remand, that officers performed preparatory and concluding activities for more than ten minutes per workday, then he should apply the *Integrity Staffing* standard to assess whether those individual activities are integral and indispensable activities. And, although it is premature at this time to resolve the Agency's exception regarding liquidated damages and interest (because there may be no compensation remaining after remand), we note that Authority precedent firmly holds that employees may not recover the full amount of both liquidated damages and interest under the FLSA.[41]

V. Decision

We dismiss the Agency's management-rights exception, and we remand the award to the parties for resubmission to the Arbitrator, absent settlement, for further findings.

[37] *Cf. U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 1001 (2011) (*FCI Allenwood*) (finding it unnecessary to address exception regarding § 551.412(a)(1) because it was unclear whether, after remand, there would be more than ten minutes of compensation remaining); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 330 (finding it premature to resolve union exceptions regarding extent of recovery and damages under the FLSA because the Authority was remanding, and, "following the remand, there may be no overtime[-]compensation award"), *recons. denied*, 58 FLRA 587 (2003).

[38] *See, e.g., FCI Allenwood*, 65 FLRA at 999.

[39] 135 S. Ct. 513 (2014).

[40] *Id.* at 517.

[41] *FCI Allenwood*, 65 FLRA at 1001.

Member Pizzella, dissenting:

I disagree with the majority's decision to remand this case (which has now been simmering for almost six years) back to the parties for resubmission to the Arbitrator.

In January 2010, the Union complained that employees were not being paid overtime for the time they spent passing through security screening, collecting equipment, walking to their posts, and then exchanging the equipment with the employees that they relieved.[1]

Whether all of these activities – particularly passing through security screenings at the beginning of the workday[2] – are compensable is dubious, but it is unnecessary to reach this question because the Arbitrator found that the officers spent "five or ten minutes per shift" performing compensable preparatory or concluding activities.[3] Under the Office of Personnel Management's de minimis rule, preparatory and concluding activities must *exceed* ten minutes per workday to be compensable.[4]

Under long-standing Authority precedent, in determining whether an award is contrary to law, the Authority "defers to the Arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts."[5] In this case, the Arbitrator found that the employees' allegedly compensable activities did not exceed ten minutes – a point that the Union appears to concede[6] – and relied, incorrectly,[7] on precedent suggesting that preparatory and concluding activities do

[1] Majority at 2-3.

[2] *See Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 518-519 (2014) (post-shift anti-theft screenings for warehouse workers not compensable); *id.* (favorably discussing Department of Labor opinion finding that pre-shift search of rocket-powder plant employees for matches not compensable) (citing Opinion Letter from DOL, Wage & Hour Div., to Dep't of Army, Office of Chief of Ordnance (Apr. 18, 1951)).

[3] Award at 36.

[4] 5 C.F.R. § 551.412(a)(1).

[5] Majority at 5 (citing *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014)).

[6] Opp'n at 14-15 (arguing, based on *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984), that preparatory and concluding activities did not need to exceed ten minutes to be compensable).

[7] *See Bull v. United States*, 68 Fed. Cl. 212, 226 (2005) (citing *Riggs v. United States*, 21 Cl. Ct. 664, 682 (1990); *Cobra Constr. Co. v. United States*, 14 Cl. Ct. 523, 531 (1988); *Abrahams v. United States*, 1 Cl. Ct. 305, 311 (1982)).

not need to exceed ten minutes to be compensable to award overtime pay.[8]

There is no need to remand this case which has already taken nearly twice the time that it took the United States to fight and win World War II. It is clear that the Arbitrator ordered overtime for employees who performed preparatory and concluding activities for no more than ten minutes per day.

Therefore, I would find that the award is contrary to law.

Thank you.

[8] Award at 35-36 (citing *Lindow*, 738 F.2d 1057; *U.S. DOJ, Fed. BOP, FCC Tucson, Ariz.*, 2011 WL 4737413 (Hammond, Arb.); *AFGE, Local 3979, Sheridan, Or.*, 2010 WL 1637094 (2010) (White, Arb.)).