**70 FLRA No. 98**

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
BEAUMONT, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1010
COUNCIL OF PRISON LOCALS #33
(Union)

0-AR-5289

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DECISION

April 13, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

## I. Statement of the Case

On May 8, 2017, Arbitrator Vicki Peterson Cohen issued an award finding, as relevant here, that the Agency violated the Fair Labor Standards Act (FLSA)[1] and the parties' collective-bargaining agreement by failing to pay certain employees (officers) for the time that they spent traveling during a one-hour period between their regular and overtime shifts. The Arbitrator directed the Agency to compensate the officers with overtime pay and to reimburse the officers' mileage expenses (mileage-reimbursement remedy). There are two main, substantive questions before us.

The first question is whether the mileage-reimbursement remedy violates the doctrine of sovereign immunity. Because the Arbitrator failed to provide any statutory authority for that remedy, the answer is yes.

The second question is whether the Arbitrator's award of pay for travel time is contrary to the FLSA. Because the award conflicts with 5 C.F.R. § 551.422 – an Office of Personnel Management (OPM) regulation implementing the FLSA – the answer is yes.

## II. Background and Arbitrator's Award

The Agency is a correctional institution (the prison) that frequently sends its inmates to local hospitals to receive medical treatment. During officers' regular shifts at the prison, the Agency seeks volunteers to work overtime at the hospitals to guard the inmates (the overtime shifts). The overtime shifts begin one hour after the officers' regular shifts end. Officers are often unaware of the opportunity to volunteer for an overtime shift until "hours before" that shift begins.[2]

The Union filed a grievance alleging, in relevant part, that the Agency violated the parties' agreement and the FLSA by failing to pay the officers, who volunteered to work the overtime shifts, for the time that they spent traveling from the prison to the hospitals. The parties could not resolve the grievance, and the Union invoked arbitration.

At arbitration, the Arbitrator framed the issue as whether the Agency violated the parties' agreement, or any laws or regulations, by not paying the officers for the time that they spent traveling between their regular shifts at the prison and their overtime shifts at the hospitals.

Under an erroneous interpretation of Department of Labor (DOL) regulations and private-sector case law concerning the FLSA, the Arbitrator found that the one-hour gap between the officers' regular and overtime shifts was part of the officers' workday and that the officers did not pursue personal activities while traveling during that period. Based on those erroneous findings, the Arbitrator concluded that the Agency had violated the FLSA by failing to pay the officers while traveling from the prison to the hospitals between shifts. The Arbitrator further found that – by failing "to follow the . . . FLSA"[3] – the Agency also had violated Article 3, § b of the parties' agreement (Article 3). Article 3 provides that the parties "are governed by . . . laws, rules, and government-wide regulations."[4]

As remedies, the Arbitrator, as relevant here, awarded overtime pay and the mileage-reimbursement remedy.

On June 7, 2017, the Agency filed exceptions to the award, and on July 7, 2017, the Union filed an opposition to the Agency's exceptions.

[1] 29 U.S.C. §§ 201-219.

[2] Award at 21.
[3] *Id.* at 22.
[4] *Id.* at 3 (quoting Art. 3, § b).

## III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's sovereign-immunity argument.

The Agency argues that the mileage-reimbursement remedy is contrary to the doctrine of sovereign immunity.[5] The Union asserts that §§ 2425.4(c) and 2429.5 of the Authority's Regulations[6] bar the Agency's arguments concerning that remedy.[7]

Under §§ 2425.4(c) and 2429.5, the Authority will not consider any arguments that could have been, but were not, presented to the arbitrator.[8] However, the Authority has held that "a claim of federal sovereign immunity can be raised by an agency at any time."[9] Consequently, it is unnecessary for us to determine whether the argument was raised below.[10]

## IV. Analysis and Conclusions

The Agency argues that the award is contrary to law.[11]

### A. The mileage-reimbursement remedy is contrary to the doctrine of sovereign immunity.

The Agency argues that the mileage-reimbursement remedy is contrary to the doctrine of sovereign immunity.[12] The United States is immune from suit except as it consents to be sued.[13] Sovereign immunity can be waived by statute, but a waiver will be found only if "unequivocally expressed in statutory text."[14] Thus, an agency is subject to a monetary claim only if the statute on which the claim is based unambiguously establishes that (1) the government has waived its sovereign immunity to permit suit and (2) the scope of that waiver extends to an award of money damages.[15] Accordingly, the Authority has found that when an arbitrator directs an agency to pay monetary damages to an employee, there must be statutory support for such a remedy.[16]

Here, it is undisputed that the Arbitrator did not cite any statutory support for the mileage-reimbursement remedy.[17] And the Union does not argue that any such support exists. Consequently, the mileage-reimbursement remedy violates the doctrine of sovereign immunity, and we set it aside.[18]

### B. The award of pay for travel time is contrary to the FLSA, as implemented by 5 C.F.R. § 551.422.

The Agency contends that the award of pay for the officers' travel time between shifts is contrary to the FLSA.[19] As relevant here, 5 C.F.R. § 551.422(a)(1) provides that time spent traveling shall be considered hours of work if the employee "is required to travel during regular working hours."[20] The Authority, applying that section, has stated that travel that occurs outside of an employee's regular working hours is not considered hours of work.[21]

The Agency, relying on § 551.422(a)(1), argues that the officers' travel time was not compensable because, among other things, it did not occur during "regular working hours."[22] The Union does not dispute that argument. Instead, the Union relies on federal court precedent to support its contention that the officers' travel time was compensable.[23] However, in the cases that the Union identifies, the courts did not apply the OPM regulations regarding travel time. Those cases concerned travel time for *non-federal employees*.[24] We,

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[5] Exceptions at 20-21.
[6] 5 C.F.R. §§ 2425.4(c), 2429.5.
[7] *See* Opp'n at 5.
[8] 5 C.F.R. §§ 2425.4(c), 2429.5; *see, e.g.*, *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 962 (2015) (*DOJ*) (citations omitted).
[9] *DOJ*, 68 FLRA at 962 (quoting *SSA, Office of Disability Adjudication & Review, Region 1*, 65 FLRA 334, 337 (2010)).
[10] *See id.* at 962-63 (declining to apply §§ 2425.4(c) and 2429.5 to bar a sovereign-immunity claim); *U.S. DHS, U.S. CBP*, 68 FLRA 253, 257 (2015) (same).
[11] Exceptions at 6-16, 20-21.
[12] *Id.* at 20-21.
[13] *E.g.*, *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 49 (1996) (citing *United States v. Testan*, 424 U.S. 392, 399 (1976)); *see U.S. Dep't of HHS, Food and Drug Admin.*, 60 FLRA 250, 252 (2004) (*HHS*) (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)).
[14] *HHS*, 60 FLRA at 252 (quoting *Lane*, 518 U.S. at 192).
[15] *Id.* (citing *Lane*, 518 U.S. at 192; *INS, L.A. Dist., L.A., Cal.*, 52 FLRA 103, 104-05 (1996)).
[16] *E.g.*, *id.*
[17] *See* Award at 24 (basing the remedy solely on a "Federal Bureau of Prison[s] [d]irective").
[18] *See HHS*, 60 FLRA at 252 (concluding that a portion of an award providing money damages to a union violated the doctrine of sovereign immunity because it was undisputed that there was no statutory basis for such a remedy).
[19] Exceptions at 6-16.
[20] 5 C.F.R. § 551.422(a)(1).
[21] *NTEU, Chapter 41*, 57 FLRA 640, 644 (2001) (*NTEU*).
[22] Exceptions at 10.
[23] Opp'n at 11-14, 18 (citing *Gilmer v. Alameda-Contra Costa Transit Dist.*, No. C 08-05186 CW, 2010 WL 289299 (N.D. Cal. Jan. 15, 2010); *United Transp. Union, Local 1745 v. City of Albuquerque*, 178 F.3d 1109 (10th Cir. 1999)).
[24] *See Gilmer*, 2010 WL 289299, at *1-5, 8-9; *Albuquerque*, 178 F.3d at 1112, 1118-21.

on the other hand, must apply those OPM regulations – specifically § 551.422.[25]

Here, it is undisputed that the officers' travel did not take place during their regular working hours, as § 551.422(a)(1) requires.[26] Moreover, the Union does not contend that the officers' travel time is otherwise compensable under the OPM regulations. Thus, similar to *U.S. DOJ, Federal BOP, Federal Correctional Complex, Fort Worth, Texas*,[27] we conclude that the award of pay for the officers' travel time between shifts is contrary to § 551.422(a)(1), and we set aside that portion of the award.[28] Also, because the Arbitrator's finding that the Agency violated Article 3 was based solely on the FLSA violation,[29] we set aside that finding as well.

Finally, because we set aside the portions of the award concerning the compensability of the officers' travel time, it is unnecessary for us to address[30] the Agency's remaining exceptions.[31]

## V. Decision

We grant the Agency's exceptions and set aside the mileage-reimbursement remedy and the award of pay for the officers' travel time.

[25] *See* 5 C.F.R. § 551.101(b) (noting that part 551 "contains the regulations, criteria, and conditions set forth by . . . []OPM[] as prescribed by the [FLSA] . . . and *must* be read in conjunction with [the FLSA]" (emphasis added)); *id.* § 551.401(h) (stating that "time spent in a travel status is hours of work as provided in § 551.422").

[26] *See NTEU*, 57 FLRA at 644 (stating that "[t]ravel time is not considered hours of work . . . if it occurs outside [of an employee's regularly scheduled administrative workweek]"); 5 C.F.R. § 551.421(a) ("regular working hours," as used in 5 C.F.R. § 551.422, means the days and hours of an employee's "regularly scheduled administrative workweek").

[27] 70 FLRA 446 (2018) (*DOJ*) (Member DuBester dissenting).

[28] As we noted in *DOJ*, simply put, because the officers' regular work shifts have ended, there is no entitlement to overtime compensation for however the officers transported themselves elsewhere. That is the question in this case, namely, when did the officers' regular work hours end. The dissent's reliance on Federal Personnel Manual (FPM) Letter 551-10, issued in 1976, does not change or challenge the finding that the officers' workday ended at the end of their regular working hours. To conclude that the officers could, or should, be paid for time driving to a new shift for which they volunteered makes no more sense than to pay employees to drive from their homes to an overtime shift for which they volunteer. Further, the fact remains that the FPM was sunsetted for good by the end of 1994. As the dissent also notes, the Authority would apply the FPM provisions only if those provisions had been incorporated into the Code of Federal Regulations *without substantive change*, a high standard the dissent in no way demonstrates. Also, our decision is much more in keeping with the guidance of the U.S. Court of Appeals for the Federal Circuit in its decisions of *Adams v. United States*, 471 F.3d 1321 (2006), and *Bobo v. United States*, 136 F.3d 1465 (1998), in which that court was unpersuaded by attempts to expand compensation to the drive away from work. Finally, our decision here is well within the guidance of the U.S. Supreme Court decision *Integrity Staffing Solutions Inc. v. Busk*, 135 S. Ct. 513, 519 (2014). There, Justice Thomas, writing for the full Court, noted that the lower court had erred in its review by focusing on whether an employer "required" a particular activity, in that case, post-shift security screenings. These precedents are more persuasive, and even binding, than an OPM letter from 1976 (predating the Civil Service Reform Act).

Moreover, even if the abolished FPM letter applied, it would not support the dissent's position. The letter stated that time spent traveling outside of regular working hours was compensable *only if* it was "authorized travel." FPM Letter No. 551-10 at 1 (1976). And the letter defines "[a]uthorized travel" as travel that was performed "[u]nder the direction and control of . . . the employing agency." Attachment to FPM Letter No. 551-10 at 1. Here, the Agency did not direct the officers to travel; the officers *volunteered* to work the overtime shifts. *See Balestrieri v. Menlo Park Fire Prot. Dist.*, 800 F.3d 1094, 1097-98, 1101 (9th Cir. 2015) (finding that employees who volunteered to work an overtime shift were not entitled to compensation while traveling to it). And nothing in the record indicates that the Agency controlled, in any manner, the officers' travel or their conduct while traveling. *Cf.* Exceptions at 15 (stating that the officers, while traveling between shifts, were free to pick up food, go home, or use the hour in "any way [they] want[ed]"). Accordingly, the travel was not compensable as "authorized travel" under FPM Letter 551-10.

[29] Award at 22 (finding that the Agency violated Article 3 for failing "to follow the . . . FLSA").

[30] *See U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (citation omitted).

[31] *See* Exceptions at 6-7, 13 (relying on 5 C.F.R. §§ 550.112(g), 551.412(b) to argue that the award of pay for travel time was contrary to law); *id.* at 14 (arguing that the Arbitrator erred by applying DOL regulations to determine the compensability of the officers' travel time); *id.* at 16-19 (arguing that the Arbitrator's determination that the officers' travel time was compensable was based on nonfacts).

**Member DuBester, dissenting:**

For the same reasons expressed at greater length in my dissent in *U.S. DOJ, Federal BOP, Federal Correctional Complex, Fort Worth, Texas* (*DOJ*),[1] the majority's conclusion, that the time the prison officers spend traveling between work sites is not compensable, is contrary to well-settled legal principles and rests on a misapplication of law.

In all relevant ways, the facts of this case are identical to those in *DOJ*. Also the same is the Arbitrator's conclusion that the period between the end of the officers' prison shifts and the beginning of the officers' hospital shifts is part of the officers' compensable continuous workday – which starts when officers enter the prison to begin the workday, and continues until the officers leave the hospital to end the workday.[2] As in *DOJ*,[3] the Arbitrator's award finding that the prison officers must be paid for their work-site-to-work-site travel comports with Fair Labor Standards Act (FLSA) implementing regulations,[4] Authority precedent,[5] and judicial case law.[6]

The majority again mistakenly holds – citing 5 C.F.R. § 551.422(a)(1) – that the officers' work-site-to-work-site travel is non-compensable because it is outside the officers' "regular working hours."[7] But, as expressed in my dissent in *DOJ*,[8] this regulation, read in conjunction with Department of Labor (DOL) regulations,[9] and Office of Personnel Management (OPM) guidance,[10] supports the travel reimbursement the Arbitrator ordered. Dispositive of the precise issue here is Federal Personnel Manual (FPM) letter 551-10, addressing travel "[f]rom job site to job site" that is "outside regular working hours."[11] Incorporating the continuous workday rule, FPM letter 551-10 states: Travel "[f]rom job site to job site," that is "outside regular working hours," is compensable "hours of work" if the time spent traveling is "*continuous with and serve[s] to extend the employee's regular tour of duty*."[12] As the Arbitrator found, the officers' travel time was continuous with and served to extend their regular tour of duty.[13] Therefore consistent with OPM's own interpretation of § 551.422(a)(1), the officer's work-site-to-work-site travel time is fully compensable.

The majority again – incorrectly – discounts FPM Letter 551-10, asserting that the officers' travel was not "authorized."[14] But, as expressed in my dissent in *DOJ*,[15] the FPM letter provides otherwise. The FPM letter defines "Authorized Travel" as travel performed under the agency's "direction or control" and for the agency's "benefit."[16] That travel includes the time officers travel from work site to work site during the continuous workday, as directed by, and for the benefit

[1] 70 FLRA 446, 449-51 (2018) (Dissenting Opinion of Member DuBester).

[2] Award at 20-22; *see IBP, Inc. v. Alvarez*, 546 U.S. 21, 29-30, 37, 40 (2005) (*Alvarez*) (holding that continuous workday rule provides that activities that take place between the first and last principal activities of the day, including those that otherwise would be non-compensable under the FLSA, are compensable because they occur during the continuous workday).

[3] 70 FLRA at 449-51.

[4] It is well-established that the FLSA applies to the federal sector. *AFGE v. OPM*, 821 F.2d 761, 769-70 (D.C. Cir. 1987). And it is equally well-established that the administration of the FLSA in the federal sector must be consistent with the Secretary of Labor's administration of the FLSA in the private sector. *Id.*; *see also* 5 C.F.R. § 551.101.

[5] *U.S. DOJ, Fed. BOP, Fed. Med. Ctr., Lexington, Ky.*, 68 FLRA 932, 937 (2015) (recognizing continuous workday rule); *AFGE, Local 3652*, 68 FLRA 394, 399 (2015) (same); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (same) (citing *Alvarez*, 546 U.S. at 29-30, 37, 40).

[6] *Alvarez*, 546 U.S. at 29-30, 37, 40.

[7] Majority at 4-5. Section 551.422(a)(1) provides that "[t]ime spent traveling shall be considered hours of work if . . . [a]n employee is required to travel during regular working hours[.]"

[8] 70 FLRA at 449-51.

[9] *See* 29 C.F.R. § 785.38 ("Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. . . . If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time."); *id.* § 785.16 (whether travel time between shifts is compensable under the FLSA turns on whether the period is "long enough to enable [the employee] to use the time effectively for his [or her] own purposes" which is resolved "depend[ing] upon all the facts and circumstances of the case").

[10] 45 Fed. Reg. 85,660, 85,661 (1980) (Part 551 rules "are consistent with the rulings, interpretations, and opinions of the [DOL] and the courts in the private sector); *see also* 5 C.F.R. § 551.101.

[11] FPM Letter 551-10 (attachment Table 2, n.3); *see also* 45 Fed. Reg. at 85,661 ("the specific rules for compensable travel under the [FLSA] . . . are contained in [Federal Personnel Manual] FPM Letters 551-10 and 11 [to the 551 series] . . . with examples on how the rules are to be applied under the [FLSA]"). Contrary to the majority's view that the FPM is obsolete merely because OPM has discontinued updating this publication, Majority at 5 n.29, as expressed in my dissent in *DOJ*, 70 FLRA at 450 n.21, the FPM remains relevant to demonstrate OPM's intent when promulgating Part 551.

[12] FPM Letter 551-10 (attachment Table 2, n.3).

[13] Award at 20-22.

[14] Majority at 5 n.28.

[15] 70 FLRA at 449-51.

[16] FPM Letter 551-10.

of, the Agency.[17] Considering these factors, it is clear that the officers' extended workday is "authorized" by the Agency when the Agency assigns the officers to the hospital shifts for which they successfully volunteer.

Regarding "direction and control," the Agency permits the officers' to start traveling only after they have completed their prison shifts, and requires them to complete their travel in time to perform their hospital shifts. And regarding "benefit," as the Arbitrator found, the officers' travel time between work sites is not long enough for officers to use that time effectively for their own purposes. Consequently, that travel time benefits the Agency exclusively.[18] Further, for the reasons expressed in my dissent in *DOJ*,[19] the majority's conclusion that the Agency did not require the officers to travel – or get paid – during the period between shifts, because they "volunteered" to work overtime,[20] does not change this result.

Finally, I would uphold the mileage-reimbursement remedy because the Back Pay Act (BPA)[21] waives sovereign immunity. As I wrote in *AFGE, Local 342*,[22] and reiterated in *DOJ*,[23] I find it appropriate to revisit the Authority's existing precedent holding that the BPA's "'pay, allowances, or differentials' do not include the payment of travel expenses."[24] Consistent with the BPA's intent to make employees whole after being affected by an unjustified and unwarranted personnel action, I would find the Arbitrator's mileage-reimbursement remedy is proper.[25]

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[17] For the reasons expressed in my dissent in *DOJ*, 70 FLRA at 451 n.28, the judicial precedent cited by the majority, Majority at 5 n.29, is inapposite. Those decisions involve compensation for *home-to-work* travel and travel related to security screenings – neither of which is relevant here. This case concerns only work-site to work-site travel during a continuous workday.

[18] Award at 21.

[19] 70 FLRA at 449-51.

[20] Majority at 5 n.29.

[21] 5 U.S.C. § 5596.

[22] 69 FLRA 278, 280 (2016) (Member DuBester concurring on mileage-reimbursement issue).

[23] 70 FLRA at 449-51(quoting BPA).

[24] *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Sci. Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 741-42 (2015).

[25] *See* 5 U.S.C. §§ 7101-7135*; see also In re Wilson*, 66 Comp. Gen. 185, 189 (1987) (cited favorably, and applied in, *DOD Dependents Schools*, 54 FLRA 259, 267 (1998)) (employee entitled to relocation-expense reimbursement that he would have received but for his agency's unjustified and unwarranted personnel action).