74 FLRA No. 11

UNITED STATES
DEPARTMENT OF DEFENSE
U.S. MARINE CORPS
MAGTFTC/MCAGCC/MCCS
TWENTYNINE PALMS, CALIFORNIA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2018
(Union)

0-AR-5922

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DECISION

October 11, 2024

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members

I. Statement of the Case

Arbitrator Charles J. Murphy issued an award finding the Agency violated the parties' collective-bargaining agreement, the Fair Labor Standards Act (FLSA),[1] and § 510 of the California Labor Code (Cal. Code § 510)[2] by failing to properly compensate certain employees (the grievants) for overtime. As remedies, the Arbitrator awarded the grievants backpay with interest for unpaid overtime under the agreement, the FLSA, and Cal. Code § 510. The Agency filed exceptions to the award on essence, exceeded-authority, and contrary-to-law grounds. For the reasons explained below, we: deny the exceeded-authority exception; grant the contrary-to-law exception and partially set aside the award; and find it unnecessary to resolve the essence exception.

II. Background and Arbitrator's Award

The grievants are federal white-collar, FLSA-nonexempt, non-appropriated-fund (NAF) employees of the Agency in California. The Union filed a grievance alleging the Agency violated Articles 3 and 13 of the parties' agreement (Article 3 and Article 13, respectively), the FLSA, and Cal. Code § 510 by failing to properly compensate the grievants for overtime. In particular, the Union alleged that "California Overtime Laws" entitled the grievants to "time and one half after eight . . . hours [of work] or double time after twelve . . . hours."[3] In its response, the Agency stated that Article 13 and the FLSA entitled the grievants to overtime "for hours worked in excess of [forty] hours per week," but asserted the cited California wage laws did not apply to the grievants.[4] The Agency denied the grievance, and the parties proceeded to arbitration.

At arbitration, the Union noted that the FLSA provides for a two-year recovery period – three years for "willful" violations[5] – but did not argue the Agency's actions were willful within the meaning of the FLSA. Instead, the Union argued California law was "controlling" and required a three-year recovery period.[6] The Union also argued that the Arbitrator should award backpay with interest,[7] but did not contend that liquidated damages under the FLSA were warranted.

The parties were unable to agree to a joint statement of the issues. Accordingly, the Arbitrator framed the issues as: (1) whether the Agency violated Article 13 "when it failed to pay" the grievants "the overtime rate of time and a half for overtime worked after [forty] hours in any workweek"; (2) whether the Agency violated Article 3 or Article 13, the FLSA, and Cal. Code § 510 "related to overtime compensation" when it failed to pay the grievants "the overtime rate of time and one half after eight . . . hours or double time after twelve . . . hours in a single workday"; and, if so, (3) "what remedies shall be provided?"[8]

[1] 29 U.S.C. §§ 201-219.
[2] Cal. Lab. Code § 510.
[3] Exceptions, Attach. 3, Union Overtime Grievance at 1.
[4] Exceptions, Attach. 4, Agency Resp. to Grievance at 1 (internal quotation mark omitted).
[5] Exceptions, Attach. 10, Union's Resp. to Agency's Procedural Arbitrability Br. at 14 (noting that the FLSA "creates a two[-]year statute of limitations, extended to three years for willful violations").
[6] *Id.* (asserting "the limitations period of the State of California [Code of Civil Procedure 338] is controlling, wherein a higher standard and greater period of recovery [than the FLSA] is provided"); *see also* Exceptions, Attach. 12, Union's Written Argument dated June 30, 2023 (Union Br.) at 2 n.3 (asserting "the limitations period of the State of California is controlling").
[7] Union Br. at 2 n.2 (asserting the California Labor Code entitled the grievants to backpay with interest); *id.* at 17 (arguing the grievants were entitled to backpay "with interest" for the Agency's alleged violations of Cal. Code § 510); *id.* at 23 (requesting backpay with interest as a remedy).
[8] Award at 3.

In relevant part, Article 3 states the parties are "governed by existing laws and government-wide rules and regulations as defined in the [Federal Service Labor-Management Relations] Statute in existence at the time this [a]greement becomes effective" and also by "Department of Defense (DOD) policies, Department of the Navy . . . policies, and Marine Corps policies."[9] Article 13 provides that "[o]vertime pay for NAF employees . . . is paid in accordance with FLSA regulations."[10]

On the first framed issue, the Arbitrator found the record clearly demonstrated the Agency violated the FLSA when it failed to pay overtime to "some, although not all" of the grievants when they worked more than forty hours in a workweek, and that the Agency proffered "no excuse, or explanation, for [its] failure to properly compensate" the grievants.[11]

On the second issue, the Arbitrator determined the Agency violated Cal. Code § 510 by failing to pay the grievants overtime in compliance with that statute's requirements. He found that Cal. Code § 510 applied to the grievants by operation of Article 3, which requires the Agency to comply with "governing law,"[12] and Article 13, which requires the Agency to comply with the FLSA. In reaching the latter conclusion, the Arbitrator relied upon federal regulations implementing § 18(a) of the FLSA (FLSA § 18(a)),[13] which – he concluded – "provide that when [s]tates have enacted laws providing greater benefit(s) to employees[,] those laws will apply."[14]

The Arbitrator rejected the Agency's argument that federal overtime laws applicable to NAF employees preempted application of Cal. Code § 510 to the grievants. On this point, he noted that Article 3, by its own terms, required the Agency to comply with governing laws, including Cal. Code § 510, and he concluded that Article 13's "somewhat limited definition of overtime must be read in light of Article 3."[15] The Arbitrator also concluded that "it is the language of the FLSA and its adoption of [s]tate laws providing better benefits that must control."[16]

The Arbitrator also rejected the Agency's argument that Cal. Code § 510 does not apply to federal NAF employees. He based this conclusion upon his finding that the provision's plain language does not exclude NAF employees.

Based on these findings, the Arbitrator concluded the Agency violated the parties' agreement, the FLSA, and Cal. Code § 510 by failing to properly compensate the grievants. Regarding the parties' dispute about the applicable recovery period, the Arbitrator found that "given all the facts[,] the affected employees [were] entitled to recover for the maximum statutory period(s) of time given the Agency's failure to settle this matter at the earliest possible date . . . and for its failure to provide employees with any overtime premium at all."[17] Accordingly, the Arbitrator determined the grievants were "entitled to recover for overtime worked during the statutory recovery period under the California Labor Code, which provides for recovery of payments for overtime for the three years prior to the filing of the grievance."[18] Applying this finding to the specific violations, the Arbitrator determined that under Article 13 of the agreement and the FLSA, the grievants were entitled to backpay, with interest, for hours worked above forty in a workweek at a time and one-half rate. He also determined that under Cal. Code § 510, the grievants were entitled to backpay, with interest, for hours worked above eight in a single workday at a time and one-half rate, and for hours worked above twelve hours in a workday, or on any seventh workday or holiday, at a double-time rate.

On October 19, 2023, the Agency filed exceptions to the award. On November 17, 2023, the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

A. The Arbitrator did not exceed his authority.

The Agency argues the Arbitrator exceeded his authority by addressing whether the Agency failed to pay overtime to employees who worked more than forty hours

[9] *See* Exceptions, Attach. 2, Approved Consolidated Master Labor Agreement (CBA) at 10.
[10] *Id.* at 42.
[11] Award at 6.
[12] *Id.* at 8 (emphasis omitted).
[13] 29 U.S.C. § 218(a).
[14] Award at 7 (citing 29 C.F.R. §§ 778.102, 778.5); *see also id.* ("The FLSA and the California Labor Statutes do not conflict with Article 13: they are intended to operate in conjunction with it, and I so find, that as a result of the fact that the FLSA authorizes [s]tate enactments[,] when the Agency ignores language in Article 3 of the Agreement it violates the contract as well.")
[15] *Id.*
[16] *Id.*; *see also id.* at 8 ("I find that [Cal. Code § 510] does not conflict with the contract or the FLSA because the FLSA specifically recognized the authority of the [s]tates to pass legislation providing more generous compensation.").
[17] *Id.* at 10.
[18] *Id.* at 11.

in a workweek because, the Agency alleges, the parties did not submit that issue to arbitration.[19] Arbitrators exceed their authority when they resolve an issue not submitted to arbitration.[20] When parties do not stipulate to the issues, arbitrators have the discretion to frame them, and the Authority accords the arbitrator's formulation substantial deference.[21] In formulating and resolving the issues before them, arbitrators may rely on the arguments the parties raise in the proceeding.[22] The Authority has held that arbitrators do not exceed their authority where the award is directly responsive to the formulated issues.[23]

The Agency argues that it has never disputed that the grievants are entitled to overtime for working more than forty hours in a week, and, thus, that issue cannot have been before the Arbitrator.[24] However, as the Agency acknowledges, the Arbitrator framed the issues "[b]ecause the parties could not agree on a statement of issues."[25] As noted, the Arbitrator framed as an issue whether the Agency violated Article 13 by failing to pay the grievants "for overtime worked after [forty] hours in any workweek."[26] At arbitration, the Union argued, in part, that the grievants were entitled to overtime for all hours worked over forty in a week,[27] and requested the Arbitrator direct the Agency to pay overtime "for all hours worked."[28] Addressing that issue, the Arbitrator found, as relevant here, that the grievants were "entitled to overtime pay for any and all hours of overtime worked after their forty-hour workweeks pursuant to Article 13."[29] That determination is directly responsive to both the framed issue and the arguments raised in the proceedings. Thus, the Agency's argument provides no basis for finding the Arbitrator exceeded his authority.[30]

We deny this exception.

B. The award is partially contrary to law.

The Agency argues the award is contrary to law in certain respects.[31] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[32] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[33] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[34] We address the Agency's contrary-to-law arguments separately below.

1. The Arbitrator's conclusion that the grievants are entitled to overtime benefits under Cal. Code § 510 is contrary to law.

The Agency argues the Arbitrator erred, as a matter of law, in finding the grievants were entitled to overtime under Cal. Code § 510.[35] The Agency makes three supporting arguments. First, it argues the Arbitrator erroneously concluded that the FLSA, by operation of FLSA § 18(a), "adopts or incorporates [the] more favorable state law standards on overtime compensation" found in Cal. Code § 510.[36] Second, the Agency argues the Arbitrator erred in concluding that the federal regulations upon which he relied in reaching this determination apply to the grievants.[37] Third, the Agency contends the Arbitrator erred by concluding that Cal. Code § 510 covers public employees.[38]

The FLSA requires employers to pay "one and one-half times the regular rate"[39] of pay to nonexempt employees for any work performed in excess of forty hours in a week.[40] FLSA § 18(a), in turn, states that "[n]o provision of [the FLSA] . . . shall excuse noncompliance with any Federal or State law . . . establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under [the FLSA]."[41]

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[19] Exceptions Br. at 32-34.
[20] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Victorville, Cal.*, 73 FLRA 835, 836 (2024) (*BOP Victorville*) (citing *USDA, Food Safety & Inspection Serv.*, 73 FLRA 683, 684 (2023) (*USDA*)).
[21] *Id.* at 836-37 (citing *USDA*, 73 FLRA at 684-85; *AFGE, Loc. 522*, 66 FLRA 560, 562 (2012)).
[22] *Id.* at 837 (citing *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 68 FLRA 960, 966 (2015)).
[23] *Id.* (citing *USDA*, 73 FLRA at 685).
[24] Exceptions Br. at 34.
[25] *Id.* at 33.
[26] Award at 3.
[27] *Id.*
[28] *Id.* at 5.
[29] *Id.* at 11; *see also id.* at 6 (finding the Agency failed to pay "some, although not all" grievants "who worked overtime after having also worked [forty] hours in the same week").
[30] *BOP Victorville*, 73 FLRA at 837 (citing *USDA*, 73 FLRA at 684-85) (finding an arbitrator did not exceed his authority by framing and resolving an issue raised in grievance).
[31] Exceptions Br. at 9-25, 34-37.
[32] *USDA, Food & Nutrition Serv.*, 73 FLRA 822, 825 (2024) (citing *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022)).
[33] *Id.*
[34] *Id.*
[35] Exceptions Br. at 9-21.
[36] *Id.* at 9; *see also id*. at 9-14.
[37] *Id.* at 14-18.
[38] *Id.* at 18-21.
[39] 29 U.S.C. § 207(a)(1).
[40] *See, e.g., U.S. Dep't of the Navy, Naval Sea Sys. Command*, 57 FLRA 543, 546 (2001) (citing 29 U.S.C. § 207(a)).
[41] 29 U.S.C. § 218(a).

As noted, the Arbitrator determined that the more generous overtime provisions of Cal. Code § 510 applied to the grievants by operation of FLSA § 18(a).[42] Additionally, in rejecting the Agency's argument that federal overtime laws applicable to NAF employees preempted Cal. Code § 510's application, the Arbitrator reasoned that it is the FLSA's "adoption of [s]tate laws providing better benefits that must control."[43]

However, federal courts have consistently found that FLSA § 18(a) does not "incorporate" state law.[44] California courts have similarly recognized that this provision does not "federalize" California's more generous wage laws.[45] Indeed, applying this principle to overtime claims brought by federal employees, a federal court has emphasized that FLSA § 18(a) "does not guarantee plaintiffs, as employees covered by the FLSA, the benefit of more favorable [state] laws that do not *of their own force* apply to federal employees."[46] Therefore, to the extent the Arbitrator concluded that Cal. Code § 510 applies to the grievants because the FLSA "adopt[s]" state law by operation of FLSA § 18(a),[47] that conclusion is legally erroneous. For the same reason, to the extent the Arbitrator relied upon U.S. Department of Labor regulations implementing FLSA § 18(a) to conclude that the FLSA incorporated state law,[48] those findings are also contrary to law.

As also noted, the Arbitrator separately concluded that Cal. Code § 510 governed the grievants' overtime by virtue of Article 3, which requires the Agency to comply with "existing laws."[49] Addressing the Agency's third argument, we find that conclusion is also contrary to law.

In reaching that conclusion, the Arbitrator found that Cal. Code § 510 applied to the grievants because its "plain language" does not "exclude NAF employees."[50] However, in addressing this issue, the California Supreme Court has adopted the *precise opposite* of the presumption applied by the Arbitrator. Specifically, that court has stated that "provisions of the [California] Labor Code apply only to employees in the private sector unless they are specifically made applicable to public employees."[51] Moreover, a California court has applied this presumption to conclude that Cal. Code § 510 does not apply to public entities.[52]

Here, Cal. Code § 510 does not expressly apply to public entities, including the federal government. Additionally, the Union has not identified, nor has research revealed, any governing authority stating or suggesting that the California Legislature intended Cal. Code § 510 to apply to the federal NAF grievants at issue in this case. Consequently, we find the Arbitrator's determination that the grievants were covered by, and entitled to overtime under, Cal. Code § 510 is contrary to law. Accordingly, we set aside the remedy that the Arbitrator awarded under Cal. Code § 510 – backpay at a time and one-half rate for hours worked above eight in a single workday, and at a double-time rate for hours worked above twelve in a workday – as contrary to law.

2. The remaining remedies are partially contrary to law.

The Agency does not challenge – as contrary to law – the Arbitrator's finding that it violated the FLSA by failing to pay the grievants the overtime rate of time and a half for overtime worked after forty hours in any workweek. However, it argues the Arbitrator erred in awarding a three-year recovery period for this violation without finding that the Agency's violation was "willful," as required by the FLSA.[53] The Agency also argues the Arbitrator erred by awarding the grievants interest on their overtime backpay.[54]

[42] *See* Award at 7-8.
[43] *Id.* at 7.
[44] *Cosme Nieves v. Deshler*, 786 F.2d 445, 452 (1st Cir. 1986); *see also Fuk Lin Pau v. Jian Le Chen*, Civil No. 3:14cv841(JBA), 2015 WL 6386508, at *8 (D. Conn. Oct. 21, 2015) (noting that a "careful reading of this section makes clear that while the FLSA explicitly disclaims preemption of state law, it does not incorporate state law" (emphasis omitted)).
[45] *Gilb v. Chiang*, 111 Cal. Rptr. 3d 822, 842 (2010) ("[N]othing in the FLSA or its regulations makes state minimum wages payable as a matter of federal law. The [FLSA] and [Department of Labor] regulation . . . do not federalize state minimum[-]wage laws but rather indicate the FLSA does not preempt state law setting higher minimum wages." (emphasis omitted)).
[46] *Cosme Nieves*, 786 F.2d at 452 (emphasis added) (further concluding that, "[i]n order to prevail, plaintiffs cannot simply invoke [§ 18(a)] but must also show that the more beneficial [state] provisions actually apply to them").
[47] Award at 7.
[48] *Id.*
[49] CBA at 10.
[50] Award at 9.
[51] *Stoetzl v. Dep't of Hum. Res.*, 443 P.3d 924, 943 (2019) (quoting *Campbell v. Regents of Univ. of Cal.*, 106 P.3d 976, 988 (2005)).
[52] *Johnson v. Arvin-Edison Water Storage Dist.*, 95 Cal. Rptr. 3d 53, 56 (2009) ("[s]ince [Cal. Code §] 510 . . . do[es] not expressly apply to public entities, [it is] not applicable" to public-sector employees); *see also id.* at 57-58 (rejecting appellant's argument that a public entity is subject to Cal. Code § 510 because it "do[es] not exempt public entities," on grounds that "appellant's position is contrary to an established rule that has been recognized by the Legislature, i.e., public entities are not subject to a general statute unless expressly *included*" (emphasis added)).
[53] Exceptions Br. at 35.
[54] *Id.* at 35-36.

The Arbitrator determined the grievants were entitled to recover overtime payments for the three-year period preceding the grievance's filing "under the California Labor Code."[55] Because we have determined that the Arbitrator's application of Cal. Code § 510 to the grievants' claims was contrary to law, we also find his reliance on that law to impose a three-year recovery period for the grievants' claims is contrary to law.[56]

In a portion of his award addressing the grievance's arbitrability, the Arbitrator additionally stated he had "no authority to deny the affected employees the right to recover for periods identified in *either* the [*FLSA*] or the [California labor statutes]."[57] As part of this discussion, he also stated the grievants were entitled to "recover for the maximum statutory period(s) of time" because of "the Agency's failure to settle this matter at the earliest possible date"; the Agency's "failure to provide employees with any overtime premium at all"; and because the Union's position was "based on a clear and careful interpretation, and a plain reading, of . . . the FLSA, the California statutes, and the [parties' agreement]."[58] Citing a different portion of the award, the Union argues the Arbitrator found the Agency's violations were willful, quoting the Arbitrator's determination that the Agency offered "no excuse, or explanation, for [its] failure to properly compensate these employees."[59]

To the extent the Arbitrator also relied on the FLSA to support awarding a three-year recovery period for the FLSA remedy, we also find that determination deficient. The FLSA provides that unpaid minimum wages, overtime, or liquidated damages under the Act "shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued."[60] Violations of the FLSA are "willful" if the employer knew or showed reckless disregard for whether the FLSA prohibited the employer's conduct.[61] If the employer acts unreasonably, but not recklessly, in determining its obligations under the FLSA, then the resulting actions are not willful.[62]

Applying this standard, we conclude the Arbitrator's findings do not support a finding that the Agency acted willfully with respect to its FLSA violations. As the Agency argues, the award makes no mention of the standard governing willful violations. Additionally, the statement the Union cites as a finding which purportedly justifies the imposition of third-year damages does not relate to the Agency's conduct in determining its obligations under the FLSA, but rather to arguments the Agency made at arbitration concerning the grievance's arbitrability.[63] In any event, those findings do not support a conclusion that the Agency showed reckless disregard for whether the FLSA prohibited the Agency's conduct.[64] Moreover, our review of the record reveals that the Union made no arguments, and proffered no evidence, at arbitration that the Agency's alleged FLSA violations were willful within the meaning of the FLSA.[65] Therefore, we conclude the Arbitrator erred by determining that the grievants were entitled to a three-year recovery period for their FLSA claims.

The Agency also argues the award of interest on the grievants' backpay violates the doctrine of sovereign immunity.[66] As the Authority has acknowledged,[67] federal courts have held that "[a]n allowance of interest on a claim against the United States, absent constitutional requirements, requires an explicit waiver of sovereign

[55] Award at 11.
[56] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 73 FLRA 860, 864 (2024) (where Authority set aside arbitral finding as contrary to law, it also set aside any remedies based on that finding).
[57] Exceptions Br. at 36-37 (quoting Award at 10) (emphasis added).
[58] *Id.* at 37 (quoting Award at 10).
[59] Union Opp'n Br. at 20 (quoting Award at 6).
[60] 29 U.S.C. § 255(a).
[61] *AFGE, Loc. 3955*, 69 FLRA 133, 134 (2015) (citing *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Terre Haute, Ind.*, 60 FLRA 298, 300 (2004)).
[62] *Id.*
[63] *See, e.g.*, Award at 6 ("The Agency's case in this matter seems, to this Arbitrator, to have focused on arbitrability and preemption arguments here rather than on the failure to pay the overtime compensation demanded by the Union under the [parties' agreement], the FLSA[,] and the California Labor Codes."); *id.* at 10 (denying Agency's "second arbitrability claim" that the grievance-initiation provision in the parties' agreement governs the recovery period).
[64] *See, e.g.*, *Parada v. Banco Indus. De Venez., C.A.*, 753 F.3d 62, 71 (2d Cir. 2014) (affirming district court's finding that employer did not willfully violate the FLSA where plaintiff "failed to adduce any evidence regarding how the [violation] occurred").
[65] *See* 29 U.S.C. § 255(a).
[66] Exceptions Br. at 35-36.
[67] *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Off. of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 436 (2001) (*NOAA*).

immunity by Congress," and this congressional "intent . . . to permit the recovery of interest cannot be implied."[68]

The Back Pay Act[69] (BPA) operates as a waiver of sovereign immunity permitting interest on awards arising under the FLSA, if the award satisfies the BPA's requirements.[70] However, 5 U.S.C. § 2105(c) excludes NAF employees from the BPA's coverage,[71] and the FLSA does not independently operate to waive sovereign immunity against awards of post-judgment interest.[72] Therefore, the interest award is contrary to law.[73]

For the foregoing reasons, we grant the Agency's contrary-to-law exception and conclude the Arbitrator erred by finding the grievants are (1) owed interest on any backpay, and (2) entitled to a three-year recovery period. Consequently, we modify the award to state that the grievants are entitled to a two-year recovery period for any violations of Article 13 – and, by extension, the FLSA – for hours worked over forty in a workweek, at the pay rate the FLSA prescribes.

C. We need not resolve the Agency's essence arguments.

The Agency asserts the award fails to draw its essence from Articles 3 and 13, but all of its arguments are ultimately premised on the Arbitrator's conclusion that Cal. Code § 510 applied to the grievants and entitled them to additional overtime benefits.[74] Because we have found the Arbitrator erred in that conclusion and set aside the associated remedy, we find it unnecessary to resolve the Agency's essence exception.[75]

IV. Decision

We deny the exceeded-authority exception and grant the contrary-to-law exception. We set aside the backpay remedy related to violations of Cal. Code § 510. Concerning the Arbitrator's finding that the Agency violated the FLSA, we set aside the interest remedy and modify the recovery period to two years at the pay rate the FLSA prescribes. Because it is unnecessary, we do not address the essence exception.

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[68] *Zumerling v. Marsh*, 783 F.2d 1032, 1034 (Fed. Cir. 1986) (emphasis omitted) (quoting *Fid. Constr. Co. v. United States*, 700 F.2d 1379, 1383 (Fed. Cir. 1983), *superseded by statute on other grounds*, Act of Aug. 5, 1985, Pub. L. No. 99-80, § 1(c)(2)(B), 99 Stat. 183 (amending Equal Access to Justice Act to apply to certain proceedings under Contract Disputes Act of 1978), *as recognized in Ardestani v. INS*, 502 U.S. 129, 138 (1991), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (changing review procedures for immigration orders), *as recognized in O.A. v. Trump*, 404 F. Supp. 3d 109, 128-29 (D.D.C. 2019)) (internal quotation marks omitted).

[69] 5 U.S.C. § 5596.

[70] *NOAA*, 57 FLRA at 436.

[71] 5 U.S.C. § 2105(c) (excluding NAF employees from coverage of laws administered by the U.S. Office of Personnel Management with specific exceptions that do not include the BPA); *see Solano v. United States*, 164 Fed. Cl. 792, 800 (2023) (finding NAF employee could not bring claim for unpaid overtime under the BPA because 5 U.S.C. § 2105(c) excluded them from its coverage).

[72] *Zumerling*, 783 F.2d at 1033 (holding that "the United States has not waived its sovereign immunity with respect to an award of post-judgment interest in FLSA cases").

[73] *See, e.g.*, *U.S. Dep't of Transp., FAA, Nashua, N.H.*, 65 FLRA 447, 449-50 (2011) (*FAA Nashua*) (concluding that grievant, who was not covered by the BPA, was not entitled to backpay interest where Congress did not otherwise authorize employees to receive interest on backpay awarded under the agency's personnel-management system).

[74] *See* Exceptions Br. at 32 (arguing that award does not draw its essence from Article 13 because "[n]either the FLSA, nor Article 13 . . . adopt[s] or incorporate[s] California overtime law," which is "not mentioned at all in the [parties' agreement]"; *id.* (arguing that Arbitrator's application of California law conflicts with Article 3, which "clearly incorporates DOD and Marine Corps policies").

[75] *See, e.g.*, *U.S. Dep't of VA, Zablocki VA Med. Ctr., Milwaukee, Wis.*, 66 FLRA 806, 808 n.6 (2012) (finding it unnecessary to address additional exceptions challenging portion of award that was set aside (citing *FAA Nashua*, 65 FLRA at 450 n.3)); *U.S. Dep't of VA, Med. Ctr., Coatesville, Pa.*, 53 FLRA 1426, 1431 n.5 (1998) (finding it unnecessary to resolve essence exception concerning remedy after granting contrary-to-law exception and setting award aside)).