73 FLRA No. 55

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3917
(Union)

0-AR-5761

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DECISION

September 30, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members
(Member Grundmann concurring; Chairman DuBester dissenting)

I. Statement of the Case

Arbitrator Stanley H. Michelstetter issued an award finding that the Agency violated the parties' collective-bargaining agreement when it denied the grievant compensatory time off for travel (travel comp time) to engage in negotiations. Because the grievant retired before the award was issued and travel-comp-time hours are forfeited at retirement, the Arbitrator awarded the Union eleven hours of official time as a remedy. The Agency filed exceptions on contrary-to-law and exceeded-authority grounds. Because the award is contrary to 5 C.F.R. § 550.1403, we set it aside.

II. Background and Arbitrator's Award

In December 2017, the parties negotiated the Agency's implementation of a policy. The official duty station of one of the Union's designated representatives (the grievant) was in Seattle, Washington. The negotiations took place in the District of Columbia for the convenience of the Agency's representatives. Negotiations were scheduled for Monday, December 4 through Friday, December 8, with Monday and Friday designated as travel days with no negotiations scheduled.

On Thursday, the parties agreed to continue negotiations on Friday. Because the parties previously agreed to reserve Friday as a travel day, the Agency's chief negotiator stated that the Union's representatives would receive travel comp time as compensation for their travel on Friday. After working on a Union counterproposal Friday morning, the grievant boarded a previously-scheduled flight to Seattle. The flight arrived timely in Portland, Oregon, but weather delayed the connecting flight and no ground transportation to Seattle was available. The grievant traveled to Seattle on the first available connecting flight, which was the next morning. Upon returning to the office, the grievant requested eleven hours of travel comp time. The Agency denied the request on the basis that it was not permitted under 5 C.F.R. § 550.1403.

The Union filed a grievance challenging the denial. The parties were unable to resolve the grievance, and the matter proceeded to arbitration. The grievant retired before the arbitration hearing.

As relevant here, the Arbitrator framed the issue as whether the Agency violated the parties' agreement when it denied the grievant's request for travel comp time "commencing Friday, December 8, 2017," and if so, whether "Office of Personnel Management [(OPM)] regulations prohibit the Agency from allowing the travel comp[] time in dispute."[1]

The Arbitrator found that the Agency agreed to compensate the grievant with travel comp time in exchange for continuing negotiations on Friday. Under the terms of the parties' agreement, the Arbitrator found the Agency was required to approve the grievant's request for travel comp time so long as it was allowed by law, rule, or regulation. Specifically, the Arbitrator found that the Agency could not approve the grievant's travel comp time request unless approval was permitted under 5 C.F.R. § 550.1403. Section 550.1403 authorizes agencies to approve requests for travel comp time for "officially authorized travel – *i.e.*, travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. *Time spent traveling in connection with union activities is excluded.*"[2]

The Arbitrator found that the regulation was "ambiguous as to whether an agency can voluntarily authorize travel which is otherwise paid official travel as 'authorized travel.'"[3] On this point, the Arbitrator acknowledged that the above-emphasized,

[1] Award at 1.
[2] *Id.* at 23 (emphasis added) (quoting 5 C.F.R. § 550.1403).
[3] *Id.* at 24.

second sentence of the definition of "travel," when read alone, excludes any travel for union activity from eligibility for travel comp time.[4] However, the Arbitrator also determined that the first sentence "appear[s] to allow the Agency to classify travel that is in connection with union activities to also be for 'work purposes'" and, thus, appears to allow the Agency to "grant travel comp[] time."[5] The Arbitrator found that the rules of statutory construction could support either interpretation.

To resolve this perceived ambiguity, the Arbitrator examined the regulation's history. The Arbitrator found that the sentence excluding union activity from the definition of travel was added to the final regulations because "OPM apparently recognized that the regulation was otherwise ambiguous."[6] The Arbitrator found that the history of the regulation, contained in the final rule, showed that "OPM did not consider whether an [a]gency may in its discretion designate travel in connection with union activities as being for 'work purposes.'"[7] On this basis, the Arbitrator concluded that "OPM never considered whether an [a]gency could voluntarily make the judgment involved in this case."[8] While acknowledging that OPM defined "travel" as "travel for work purposes," the Arbitrator found that OPM "really did not consider whether a 'work purpose' could include the convenience of the agency."[9]

To answer the question of whether the convenience of an agency could constitute a "work purpose," the Arbitrator relied on the U.S. Supreme Court's decision in *Bureau of Alcohol, Tobacco & Firearms v. FLRA* (*BATF*).[10] The Arbitrator found that, in *BATF*, the Court held that federal agencies are not obligated to pay per diem and travel expenses for travel in connection with union activities. However, the Arbitrator also referenced a footnote in *BATF* in which the Court commented that its decision did not "preclude an agency from making such payments upon a determination that they serve the convenience of the agency or are otherwise in the primary interest of the government."[11] The Arbitrator also noted two private-sector cases in which courts concluded that an employer commits an unfair labor practice by refusing to compensate union representatives for travel expenses related to negotiations when the employer has agreed to do so.[12]

Relying on this precedent, the Arbitrator found that § 550.1403 did not prohibit the Agency from agreeing to pay the grievant's travel comp time. On this basis, the Arbitrator concluded that the Agency violated the parties' agreement by refusing to pay the grievant travel comp time.

As a remedy, the Arbitrator – noting that the grievant had since retired – awarded the eleven hours of travel comp time sought by the grievance as official time to the Union, and ordered the Agency to cease and desist from violating any agreement with the Union to pay travel comp time when such payment is permitted by law.

The Agency filed exceptions to the award on September 7, 2021, and the Union filed an opposition to the Agency's exceptions on October 7, 2021.

III. Analysis and Conclusion: The award is contrary to 5 C.F.R. § 550.1403.

The Agency argues that the award is inconsistent with the plain and unambiguous language of 5 C.F.R. § 550.1403[13] because that regulation "expressly exclude[s] time spent traveling for [u]nion activities from the definition of 'travel' eligible for [travel comp time]."[14] The Authority reviews questions of law raised by the exceptions de novo.[15] 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.[16] In making this assessment, the Authority defers to the arbitrator's factual findings unless the excepting party establishes that they are nonfacts.[17]

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[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* The Arbitrator also noted § 550.1403 is part of the implementing regulations for 5 U.S.C. § 5550(b), which "does not expressly deal with travel-paid official time." *Id.*
[8] *Id.* (citing *Pay Administration (General)*, 72 Fed. Reg. 19093, 19094 (Apr. 17, 2007) (*Pay Admin.*)).
[9] *Id.* at 24-25.
[10] 464 U.S. 89 (1983).
[11] Award at 25 (quoting *BATF*, 464 U.S. at 107 n.17).
[12] *Id.* (citing *Midstate Tel. Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983); *Axelson, Inc., Subsidiary of U.S.A. Indus., Inc. v. NLRB*, 599 F.2d 91 (5th Cir. 1979)).
[13] Exceptions Br. at 8-12.
[14] *Id.* at 10.
[15] *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021) (citing *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995)).
[16] *Id.* at 306-07 (citing *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998)).
[17] *NTEU*, 72 FLRA 182, 186 (2021) (citing *AFGE, Nat'l INS Council*, 69 FLRA 549, 552 (2016)).

When interpreting regulations, the Authority applies general principles of statutory construction.[18] The first step in statutory interpretation "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."[19]

As noted, § 550.1403 defines "travel" for the purpose of travel comp time eligibility to mean "officially authorized travel – i.e., travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. *Time spent traveling in connection with union activities is excluded.*"[20]

By itself, the emphasized wording unambiguously prohibits the Agency from agreeing to pay the grievant travel comp time in the circumstances of this case. Accordingly, the award conflicts with § 550.1403 and we find, for the following reasons, that the authorities cited by the Arbitrator do not establish otherwise.

In assessing the meaning of an OPM regulation, the Authority will defer to OPM's interpretation, unless that interpretation is plainly erroneous or inconsistent with the regulation.[21] In the publication of final rule for § 550.1403, OPM "revised the definition of travel in § 550.1403 to clarify that time spent traveling in connection with union activities is not creditable for the purpose of earning compensatory time off for travel."[22] As part of this clarification, OPM expressly rejected the recommendation from "two unions and one individual" that "an employee should be able to earn compensatory time off when [that employee] travels while performing union representational duties."[23] OPM further clarified that "the term 'travel for work purposes' is intended to mean travel for agency-related work purposes,"[24] and in doing so referenced Authority precedent holding that the performance of representational duties does not involve the performance of agency work.[25]

Based on OPM's explanation, we conclude that OPM considered – and rejected – the premise that union activity may be considered agency work for purposes of applying § 550.1403. We also conclude that the Arbitrator's conclusion to the contrary is not consistent with OPM's explanation.

Moreover, we find that the Supreme Court decision that the Arbitrator relied on to define a "work purpose" does not affect this outcome.[26] In *BATF*, the Court concluded that although agencies were not required, pursuant to § 7131(a) of the Federal Service Labor-Management Relations Statute,[27] "to pay . . . travel expenses and per diem allowances to union representatives engaged in collective bargaining,"[28] unions could "presumably negotiate for such payments in collective bargaining."[29] However, the decision in *BAFT* did not address agencies' authority to award travel comp time for time spent traveling in connection with union activities, nor did it construe § 550.1403.

Because § 550.1403 does not permit travel comp time for the grievant's travel under the circumstances presented in this case, we find that the award is contrary to

[18] *See AFGE, Loc. 953*, 66 FLRA 543, 545 (2012) (rejecting asserted regulatory interpretation that was "contrary to [a] 'fundamental principle of statutory construction'" (quoting *U.S. GPO, Wash., D.C.*, 57 FLRA 299, 302 (2001))); *id.* (citing *Ass'n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 242 (2000) (finding that principles of statutory construction apply to regulations)).

[19] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989)).

[20] 5 C.F.R. § 550.1403 (emphasis added).

[21] *NTEU*, 72 FLRA 749, 750 (2022) (citing *U.S. Dep't of the Navy, Commander, Navy Region Mid-Atl., Naval Weapons Station Earle*, 72 FLRA 533, 534-35 (2021) (Chairman DuBester concurring on other grounds)); *U.S. Dep't of Transp., FAA*, 55 FLRA 797, 802 (1999) (stating that an "agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation" (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994))).

[22] *Pay Admin.*, 72 Fed. Reg. at 19094.

[23] *Id.*

[24] *Id.*

[25] *Id.* (citing *AFGE, Council 214, AFL–CIO*, 31 FLRA 1259, 1261–62 (1988) (the performance of representational duties does not involve the performance of work as used in the phrase "technology of performing work" under 5 U.S.C. § 7106(b)(1)); *U.S. DOD, Army & Air Force Exch. Serv., Dallas, Tex.*, 53 FLRA 20, 24 (1997) (the performance of representational activities does not involve "work" within the meaning of 5 U.S.C. § 7106(a)(2)(B)); *U.S. Dep't of HHS, SSA, Off. of Hearings & Appeals*, 48 FLRA 357, 364 (1993) (job performance encompasses the performance of agency-assigned duties and does not include duties performed on behalf of a union)).

[26] Award at 25 (citing *BATF*, 464 U.S at 107 n.17).

[27] 5 U.S.C. § 7131(a).

[28] 464 U.S. at 94 (citing *Interpretation & Guidance*, 2 FLRA 264, 265 (1979)).

[29] *Id.* at 107 n.17.

the regulation. Accordingly, we grant the Agency's contrary-to-law exception and set aside the award.[30]

IV. Decision

We set aside the award.

[30] The Agency also asserts that the award is contrary to 5 U.S.C. § 7131, Exceptions Br. at 13-16, and that the award is deficient on exceeded-authority grounds, *id.* at 16-19. Because we find that the award is contrary to § 550.1430, it is unnecessary to address the Agency's remaining exceptions. *See U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 605 n.53 (2021) (Chairman DuBester concurring); *U.S. Dep't of the Treasury, IRS*, 65 FLRA 369, 372 n.10 (2010).

Member Grundmann, concurring:

I write separately to acknowledge that I share many of the concerns that the Chairman expresses in his dissent. Here, the Agency promised to pay the grievant compensatory time off for travel (travel comp time), the grievant gave up duty-free time to continue negotiations, and then the grievant's travel was extended due to circumstances beyond the grievant's control.

In my view, the equities of this case tend to support the Arbitrator's award of travel comp time. However, I agree that 5 C.F.R. § 550.1403 bars that remedy here. As the Authority may not invalidate an Office of Personnel Management regulation,[*] I am obliged to agree that the award must be set aside.

Accordingly, I concur.

[*] *See, e.g., U.S. Dep't of the Army, Corpus Christi Army Depot Corp., Corpus Christi, Tex.*, 56 FLRA 1057, 1065 (2001).

Chairman DuBester, dissenting:

At the outset, I acknowledge that this is a difficult case concerning an issue that has not been squarely addressed by the Authority – namely, the circumstances under which an agency may authorize comp time for time spent traveling by union representatives in accordance with 5 C.F.R. § 550.1403. I disagree with the majority that § 550.1403, when read in its entirety, is unambiguous with respect to whether the Agency was prohibited from authorizing travel comp time for the grievant's travel under the circumstances presented by this case.[1] And, unlike the majority, I would resolve that uncertainty by concluding that the Agency was allowed to authorize the travel comp time in question because it constituted "travel for work purposes" within the meaning of this provision.

In support of this conclusion, I would note the Arbitrator's finding that the parties explicitly agreed in their collective-bargaining agreement that "[t]he Union['s] negotiators will be on duty time for all time spent participating in negotiations."[2] Based upon the parties' bargaining history, the Arbitrator found that by adopting this provision, the Agency "was agreeing on a case-by-case basis to grant time off necessary to facilitate the efficiency of negotiations."[3] The Arbitrator further found that the Agency exercised this authority during the negotiations at issue in this case by agreeing to grant travel comp time for the Union's negotiators who "gave up their duty[-]free time and worked until about 1 P[.]M[.] Friday" after the parties decided to continue their negotiations beyond the scheduled stop on Thursday.[4]

In my view, the Arbitrator correctly applied these findings to conclude that § 550.1403 did not prohibit the Agency from awarding the travel comp time. The language of the provision certainly contemplates that compensable "travel" includes travel that is officially authorized "for work purposes."[5] More importantly, neither the OPM interpretation relied upon by the majority, nor the Authority precedent upon which OPM's interpretation relies, addresses the particular circumstances present in this case.

Accordingly, I would deny the Agency's contrary-to-law exception on this issue, and would consider the Agency's remaining exceptions to the award.

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[1] Majority at 4 (finding that the regulation prohibits the Agency from agreeing to pay the grievant travel comp time in the circumstances of this case).

[2] Award at 9 (quoting § 49.05(3) of the parties' agreement).

[3] *Id.* at 22 (further finding that this provision "effectively memorializes the authority of the Agency to grant travel compensatory time to facilitate efficient negotiations in the Government's interest").

[4] *Id.* at 23.

[5] 5 C.F.R. § 550.1403.