

64 FLRA No. 205

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
USP ADMINISTRATIVE MAXIMUM (ADX)
FLORENCE, COLORADO
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1302
COUNCIL OF PRISON LOCALS
(Union)

0-AR-4612

ORDER DISMISSING EXCEPTION

July 30, 2010

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 an exception to an award of Arbitrator David W. Stiteler 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 exception.

The Arbitrator granted the Union's grievance and found that the Agency violated the Fair Labor Standards Act (FLSA) and the parties' agreement by refusing to compensate Correctional Officers (Officers) for time they spent for certain pre- and post-shift activities. The Arbitrator awarded backpay and liquidated damages as a remedy, but ordered the parties to meet and determine which Officers were entitled to backpay and the amount owed to them. For the reasons that follow, we find that the Agency's exception is not interlocutory, but that it is barred by § 2429.5 of the Authority's Regulations.

II. Background and Arbitrator's Award

The Union filed a grievance arguing that the Agency violated the FLSA and the parties' agreement by failing to pay Officers overtime compensation for certain duties, including pre- and post-shift activities, and by failing to maintain accurate timekeeping records. Exception, Attach. B. The Union requested, among other things, "[ten] minutes of overtime per shift" and liquidated damages. *Id.* The matter was unresolved and submitted to arbitration. The Arbitrator framed the following issues:

1. Did the Union satisfy all necessary procedural steps with regard to the grievance?
2. If the grievance is arbitrable, did the Agency violate the FLSA and/or the parties' agreement by failing to keep complete and accurate time records?
3. Did the Agency fail to pay overtime as required by the FLSA and/or the parties' agreement?
4. If so, what is the remedy?

Award at 3.

After determining that the grievance was arbitrable, the Arbitrator concluded that the Agency violated both the FLSA and the parties' agreement, in part. *Id.* at 30. The Arbitrator found that the Officers were entitled to overtime compensation for pre- and post-shift activities, but not for other activities. *Id.* at 23-26. He also concluded that the other groups of employees named in the grievance were not entitled to overtime compensation. *Id.* at 27-28. Additionally, the Arbitrator determined that the Agency failed to maintain accurate timekeeping records. *Id.* at 22.

The Arbitrator sustained and denied the grievance, in part. The Arbitrator determined that Officers were entitled to backpay in the form of overtime in the amount of ten minutes per shift; however, he ordered the parties to meet and determine within ninety days: (1) which Officers were entitled to this compensation; and (2) the amount of compensation owed to each affected Officer. *Id.* at 28, 30. He reiterated that backpay should be paid in accordance with the Union's "proposed remedy[.]" i.e., ten minutes per shift. *Id.* at 28. Additionally, he determined that the Officers were entitled to liquidated damages. *Id.* at 29-30.

Finally, the Arbitrator ordered the Agency to correct its timekeeping records and awarded attorney fees.¹ *Id.* at 29-30.

III. Positions of the Parties

A. Agency's Exception

The Agency argues that the award of overtime and accompanying liquidated damages is contrary to law. According to the Agency, under 5 C.F.R. § 551.412(a)(1),² an award of compensation for preparatory time under the FLSA is recoverable only if that time totals "more than ten minutes[.]" Exception at 5 (quoting 5 C.F.R. § 551.412(a)(1)). The Agency contends that an award of ten minutes or less is *de minimis*, and, therefore, not recoverable. *Id.* (citations omitted). Because the Arbitrator awarded only ten minutes of compensation, the Agency asserts that, even if the Officers' activities were compensable, the award is *de minimis* and, therefore, contrary to § 551.412(a)(1). The Agency, accordingly, asks the Authority to set aside the award of overtime. *Id.* at 5-6. Additionally, the Agency contends that the award of liquidated damages must be set aside because it is tied to the award of overtime. *Id.*

B. Union's Opposition

The Union rejects the Agency's assertion that the award is contrary to law on two grounds. First, the Union contends that the Arbitrator did not award ten minutes per shift; rather, he only suggested, in "dictum[.]" that an award of ten minutes per shift "would be acceptable[.]" which is evidenced by the fact that he ordered the parties to calculate the amount of backpay. Opp'n at 2 (citing Award at 28). Second, the Union argues that, although it requested ten minutes per shift as a remedy in its grievance, that request was directly linked to its claim that all

1. The parties do not address these findings. Accordingly, we will not address them further.

2. 5 C.F.R. § 551.412, "Preparatory or concluding activities," provides, in pertinent part:

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 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

employees listed in the grievance were entitled to overtime compensation. Opp'n at 2-3. Because the Arbitrator did not award compensation to all employees, the Union asserts that it should not be limited to the ten-minute remedy.³ *Id.* at 3.

IV. Order to Show Cause

After the Agency filed its exception, the Authority issued an Order directing the Agency either to show cause why its exception should not be dismissed as interlocutory or demonstrate the existence of extraordinary circumstances that would permit the Authority to consider the exception. *See* Order (March 23, 2010) at 2. The Order stated that, because the Arbitrator granted the parties ninety days to determine the appropriate amount of backpay, the award appeared interlocutory. *See id.*

The Agency filed a response to the Order. The Agency argues that the Arbitrator's award is final because it granted compensation to the Officers and only requires the parties to calculate the amount of that compensation. *See* Agency's Response to Order to Show Cause (Response) at 3. Accordingly, the Agency asserts that the Authority should resolve the merits of the Agency's exception. *Id.* at 3-4.

In its opposition,⁴ the Union argues that the Arbitrator's award is not final because the Arbitrator ordered the parties to meet and determine the appropriate amount of backpay. Opp'n at 1. Thus, according to the Union, the award "anticipate[s] further action by the parties and the Arbitrator[.]" *Id.*

V. Preliminary Issue

Section 2429.11 of the Authority's Regulations provides: "The Authority . . . ordinarily will not consider interlocutory appeals." Accordingly, the Authority will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.

3. The Union also requests attorney fees for having to respond to the exception. Opp'n at 2-3. The Authority will not consider a request for fees and expenses incurred in the preparation of exceptions and oppositions in cases filed under § 7122 of the Statute. *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 64 FLRA 810, 811 n.* (2010) (citation omitted). Such a request must be presented to the Arbitrator. *See id.* (citation omitted).

4. The Union was given leave to file a response to the Agency's Response. *See* Order at 3. The Union submitted its opposition again. *See* Union's Supplemental Submission.

See, e.g., U.S. Dep't of Transp., FAA, Wash., D.C., 60 FLRA 333, 334 (2004). An award is not interlocutory where an arbitrator retains jurisdiction solely to assist the parties in the implementation of awarded remedies. *See, e.g., U.S. Dep't of the Treasury, IRS, 63 FLRA 157, 158-59 (2009) (IRS)* (award was final where arbitrator retained jurisdiction to assist parties in determining the amount of backpay and expenses); *U.S. Dep't of the Air Force, Kirtland Air Force Base, Air Force Materiel Command, Albuquerque, N.M., 62 FLRA 121, 123 (2007)* (award was final where arbitrator retained jurisdiction to assist parties in determining amount of awarded backpay and benefits).

The Arbitrator's award resolved all issues submitted to arbitration. Specifically, and as relevant, the Arbitrator concluded that the Agency owed "affected" Officers ten minutes of overtime per shift because it violated the FLSA and the parties' agreement. Award at 28, 30. Like *IRS*, the only matters left unresolved are the amount of overtime, *i.e.*, backpay, and which Officers are entitled to it. *See IRS, 63 FLRA at 159.* Thus, the award is final. *See id.* (award was final even though arbitrator retained jurisdiction to assist parties in determining the amount of backpay and expenses).

The Union's argument that the award is not final because the Arbitrator ordered the parties to meet and determine the appropriate amount of backpay does not lead us to a different conclusion. As the above precedent establishes, an award is final even where the arbitrator retains jurisdiction to assist the parties in determining the proper amount of backpay. *See IRS, 63 FLRA at 159.*

Accordingly, we find that the award is not interlocutory and consider the Agency's exception.

VI. The Agency's exception is barred by § 2429.5 of the Authority's Regulations.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. Dep't of Transp., FAA, 64 FLRA 387, 389 (2010) (FAA).* Where a party makes an argument for the first time on exception that it could, and should, have made before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Agric., Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine, 57 FLRA 4, 5 (2001)* (Chairman Cabaniss concurring) (where agency relied upon position description at arbitration hearing, Authority refused to consider agency's argument,

raised for the first time on exception, that position description was abolished during the relevant time frame).

The Agency contends that, because the Arbitrator awarded ten minutes of overtime compensation per shift, the award is contrary to 5 C.F.R. § 551.412(a)(1). Exception at 5-6. The record clearly establishes that the Agency had notice -- while before the Arbitrator -- that the Union had requested relief of ten minutes of overtime compensation per shift. Award at 15, 28 (stating that Union sought, in its grievance, compensation of ten minutes per shift); Exception at 1-2 (same); Exception, Attach. B (Union, in its grievance, stated that it requested "ten . . . minutes of overtime per shift"). Despite this notice, the record contains no indication that the Agency ever argued to the Arbitrator, as it does now, that the Union's requested remedy was contrary to § 551.412(a)(1); rather, it argued only that pre- and post-shift activities took "no more than a few minutes." Award at 18.

The Agency had notice of the specific relief sought by the Union; consequently it was required to present its argument concerning 5 C.F.R. § 551.412(a)(1) to the Arbitrator. Because the Agency did not present this argument to the Arbitrator, it may not do so now. *See FAA, 64 FLRA at 390* (§ 2429.5 of the Authority's Regulations barred arguments that arbitrator's remedy was contrary to law because arguments could have been, but were not, presented to arbitrator). Accordingly, we find that the Agency's exception is barred by § 2429.5 of the Authority's Regulations and dismiss it. *See id.*

VII. Decision

The Agency's exception is dismissed.