70 FLRA No. 31

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 2219
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
LITTLE ROCK DISTRICT
(Agency)

0-AR-5219

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DECISION

February 2, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman and Ernest DuBester, Member

I. Statement of the Case

Arbitrator Steven A. Zimmerman issued an award finding that the Agency did not violate the parties' collective-bargaining agreement, or any law, rule, or regulation when it scheduled one grievant a week, in the summer season, to work Tuesday to Saturday rather than Monday to Friday. The Arbitrator denied the Union's grievance, and the Union filed two exceptions.

First, the Union argues that the award is contrary to 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a) because the Agency head never found that the schedule change was required to prevent seriously handicapping the Agency's ability to carry out its functions or substantially increasing its costs. Because the Agency adhered to the six requirements listed in the statute and regulation when making the schedule change, the Union does not demonstrate that the award is contrary to law. We deny this exception.

Second, the Union alleges that the award is contrary to the Fair Labor Standards Act (FLSA),[1] specifically 29 C.F.R. § 778.105, because the Agency changed the grievants' workweek temporarily in order to avoid paying overtime. Because, under the relevant Office of Personnel Management (OPM) regulation, the Agency did not change the grievants' workweek, this argument does not demonstrate that the award is contrary to law, and we deny it.

II. Background and Arbitrator's Award

Previously, the five grievants worked Monday to Friday throughout the year, including during the summer season that runs from June through early September. The Agency would occasionally schedule a grievant to work an additional day on Saturday, and the Agency would pay that grievant appropriate overtime pay. At a certain point, the Agency, instead of the previous scheduling practice, scheduled one grievant a week during the summer season to work Tuesday to Saturday. The Union filed a grievance alleging that the Agency violated the parties' agreement, law, and regulation by rescheduling grievants in this manner in order to avoid overtime. The parties were unable to resolve the grievance, and they submitted the issue to arbitration.

As relevant here, the Union argued that, under 5 U.S.C. § 6101 and 5 C.F.R. § 610.121(a), "the [A]gency can [only] change [the grievants'] work schedule" if the Agency demonstrates that it would be seriously handicapped in carrying out its functions or that costs would be substantially increased without the change, and the Agency made no such showing.[2] Additionally, the Union argued that the Agency violated the FLSA by changing the grievants' workweek in order to avoid paying overtime.

The Agency argued that the schedule change complied with the requirements of 5 U.S.C. § 6101 and 5 C.F.R. § 610.121(a). Furthermore, the Agency contended that the FLSA only requires that an administrative workweek not be moved in order to avoid paying overtime, and the Agency never changed the grievants' administrative workweeks, only their tours of duty.

The Arbitrator found that "the evidence did not prove that the Agency determined that it would be seriously handicapped in carrying out its functions or that the costs would be substantially increased as the reason it changed the workweek schedule."[3] However, the Arbitrator also found that the Agency did not violate 5 U.S.C. § 6101 or 5 C.F.R. § 610.121(a) "because [the Agency] provided each . . . employee the obligations" required by this statute and regulation "during the workweek he was scheduled to work a Tuesday through Saturday schedule."[4]

[1] 29 U.S.C. § 201.

[2] Exceptions, Attach. 4, Tr. at 51.

[3] Award at 35.

[4] *Id.*

Additionally, the Arbitrator found that 29 C.F.R. § 778.105, interpreting § 207(a)(1) of the FLSA, concerned the administrative workweek, as opposed to the days during an administrative workweek on which an employee works. The Arbitrator found that the grievants' administrative workweek did not change during the summer season. Consequently, the Arbitrator found that the Agency did not violate the FLSA, and the Arbitrator denied the grievance.

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

III. Analysis and Conclusions

A. The award is not contrary to 5 U.S.C. § 6101(a)(3) or 5 C.F.R. § 610.121(a).

The Union argues that the award is contrary to law.[5] When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[6] In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions — not his or her underlying reasoning — are consistent with the applicable standard of law.[7] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that those findings are nonfacts.[8]

The Union argues that the award is contrary to 5 U.S.C. § 6101(a)(3) and 5 C.F.R. § 610.121(a).[9] Citing Authority precedent, the Union argues that the grievants' "work schedule[s] cannot be changed once [they are] established absent the [A]gency head's reasonable determination that the change is required to prevent seriously handicapping the [A]gency's functions or substantially increasing its costs."[10] In support, the Union notes that the Arbitrator found that the Agency did not determine that it would be seriously handicapped in carrying out its functions or that the costs would be substantially increased as the reason it changed the workweek schedule. In addition, the Union also argues that the schedule change resulted in the grievants not having two consecutive days off in violation of the statute and regulation.[11] Therefore, the Union concludes, the award is contrary to law.

Under 5 U.S.C. § 6101(a)(3), "[e]xcept where the head of an Executive agency . . . determines that his organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased, he shall provide, with respect to each employee" that:

> (A) assignments to tours of duty are scheduled in advance over periods of not less than [one] week;
> (B) the basic [forty]-hour workweek is scheduled on [five] days, Monday through Friday when possible, and the [two] days outside the basic workweek are consecutive;
> (C) the working hours in each day in the basic workweek are the same;
> (D) the basic nonovertime workday may not exceed [eight] hours;
> (E) the occurrence of holidays may not affect the designation of the basic workweek; and
> (F) breaks in working hours of more than [one] hour may not be scheduled in a basic workday.[12]

These are the same conditions and requirements in 5 C.F.R. § 610.121(a).

The statute and the accompanying regulation state that — absent certain findings by the head of an agency — that agency must provide six listed requirements concerning employees' workweek. Nothing in the statute or regulation limit an agency's ability to change an employee's workweek as long as the agency meets one of two conditions: either (1) the agency head makes a determination that the agency would be seriously handicapped in carrying out its functions or that costs would be substantially increased absent the change; or (2) the change complies with the six, listed requirements of the statute and regulation. Here, the Arbitrator found, and the Union does not challenge this finding, that the Agency "provided each [grievant] the obligations listed in items (A) through (F) [of 5 U.S.C. § 6101(a)(3)] during the workweek he was scheduled to work a

[5] Exceptions at 7.
[6] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[7] *E.g.*, *GSA*, 70 FLRA 14, 15 (2016).
[8] *E.g.*, *AFGE, Nat'l Council 118*, 70 FLRA 63, 67 (2016).
[9] Exceptions at 7-8.
[10] *Id.* at 8. (citing *U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1016 (2015) (*DHS*); *U.S. Dep't of the Navy, Phila. Naval Shipyard*, 39 FLRA 590, 605 (1991) (*Dep't of the Navy*); *VA Med. Ctr., Palo Alto, Cal.*, 36 FLRA 98, 99 (1990) (*VA*)).
[11] *Id.*
[12] 5 U.S.C. § 6101(a)(3).

Tuesday through Saturday schedule,"[13] including the requirement that the grievant receive two consecutive days off. Because the Agency complied with the six listed requirements of the statute and regulation, the Agency did not violate either the statute or the regulation when making the schedule change — even absent a finding of seriously handicapping the Agency's ability to function or substantial cost increase.

The Union relies on several Authority cases, but these cases either involve situations where an agency modified a schedule in a manner that did not comply with the six, listed requirements[14] or involved only an interpretation of the parties' collective-bargaining agreement.[15] As such, these cases do not support the Union's argument as the Arbitrator found that the Agency complied with the six, listed requirements.

Consequently, the Union does not demonstrate that the award is contrary to 5 U.S.C. § 6101 or 5 C.F.R. § 610.121, and we deny this exception.

B. The award is not contrary to the FLSA.

The Union argues that the award is contrary to the FLSA because the Agency changed the grievants' workweek temporarily in order to avoid paying overtime.[16] Specifically, the Union alleges that the award is contrary to 29 C.F.R. § 778.105. This regulation defines the term "workweek" as used in the FLSA and states that "[t]he beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of [the FLSA]."[17] The Department of Labor (DOL) promulgated this regulation interpreting the FLSA.[18] However, OPM, not DOL, administers the FLSA for the grievants.[19] Consequently, 29 C.F.R. § 778.105 does not apply to the grievants.

Nonetheless, OPM has promulgated regulations interpreting the language of the FLSA — namely the definition of a "workweek" — on which the cases cited by the Union rely.[20] The OPM regulation 5 C.F.R. § 551.104 defines a "workweek" as the same as an "administrative workweek" as found in 5 C.F.R. § 610.102.[21] In turn, § 610.102 defines an "administrative workweek" as "any period of [seven] consecutive [twenty-four]-hour periods."[22] The term "administrative workweek" is distinct from a "tour of duty," which is "the hours of a day . . . and the days of an administrative workweek . . . that constitute an employee's regularly scheduled administrative workweek."[23]

In the current case, the Arbitrator found that the grievants' administrative workweeks did not change;[24] rather, the Agency changed the grievants' tour of duty.[25] Contrary to the Union's allegation that the Agency improperly changed the grievants' workweek under the FLSA, the Agency never changed the grievants' workweek at all, let alone temporarily.[26] As such, the Union's argument does not demonstrate that the award is contrary to the FLSA, and we deny the Union's exception.

As we have denied the Union's exceptions, we find it unnecessary to address the Union's requested remedies.[27]

IV. Decision

We deny the Union's exceptions.

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[13] Award at 35.
[14] *DHS*, 68 FLRA at 1016 (agency failed to ensure two of the six, listed requirements); *VA*, 36 FLRA at 99 (agency failed to ensure one of the six, listed requirements); *Gahagan v. United States*, 19 Cl. Ct. 168, 178 (1989) (same).
[15] *Dep't of the Navy*, 39 FLRA at 605 (agency's argument that the award is contrary to 5 C.F.R. § 610.121 "constitutes nothing more than an attempt to relitigate the merits of the grievance and disagreement with the [a]rbitrator's findings of fact, evaluation of the evidence and testimony, reasoning and conclusions, and interpretation and application of the parties' agreement").
[16] Exceptions at 12.
[17] 29 C.F.R. § 778.105.
[18] *Id.* § 778.1 ("This part 778 constitutes the official interpretation of [DOL] with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of [the FLSA].").
[19] 29 U.S.C. § 204(f) ("Notwithstanding any other provision of this chapter, or any other law, the Director of [OPM] is authorized to administer the provisions of this chapter [of the FLSA] with respect to any individual employed by the United States (other than an individual employed in the Library of Congress, United States Postal Service, Postal Regulatory Commission, or the Tennessee Valley Authority).").
[20] *See Abshire v. Redland Energy Servs., LLC.*, 695 F.3d 792, 794 (8th Cir. 2012) (citing 29 U.S.C. § 207(a)(1)).
[21] 5 C.F.R. § 551.104.
[22] *Id.* § 610.102.
[23] *Id.*
[24] Award at 35 ("The [grievants'] administrative workweek did not change during the entire summer season of 2015.").
[25] *Id.* at 26.
[26] *Id.* at 36.
[27] *NTEU*, 66 FLRA 611, 615 n.4 (2012).