BOARD OF DIRECTORS OF OFFICE OF COMPLIANCE
John Adams Building, Room LA 200
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Washington, D.C. 20540-1999

United States Capitol Police Board, Employing Office	Arbitrator Roger P. Kaplan
and	Case No. 01-ARB-01(CP)[1]
Fraternal Order of Police, U.S. Capitol Police Labor Committee. Union	

Before the Board of Directors: Susan S. Robfogel, Chair; Barbara L. Camens; Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

I. Statement of the Case

This matter is before the Board on exceptions to an award of Arbitrator Roger P. Kaplan filed by the employing office under 5 U.S.C. §7122, as applied by section 220(a) of the Congressional Accountability Act ("CAA")(2 U.S.C. §1351(a)), and Part 2425 of the

[1]On June 13, 2001, the Board issued its decision denying, as interlocutory, the employing office's exceptions to the Arbitrator's threshold arbitrability determination. The Board reserved its decision on that issue until the exceptions stage following the Arbitrator's merits award. The employing office's exceptions to the Arbitrator's award now render the arbitrability question ripe for decision.

Regulations of the Office of Compliance.

The Arbitrator sustained a grievance, which, in the absence of the parties' stipulation of issues, the Arbitrator characterized as whether the employing office is liable for liquidated damages, fees, costs, interest and attorney fees for its failure to pay bargaining unit employees' Fair Labor Standards Act claims.

For the following reasons, we deny the employing office's exceptions.

II. Background and Arbitrator's Award

In 1996, with the implementation of the CAA, the employing office's bargaining unit employees obtained coverage under the Fair Labor Standards Act ("FLSA"), *29 U.S.C. §206(a)(1) and (d), 207,212(c)*, minimum wage and overtime pay provisions. In 1998, Congress also availed those employees of Sunday premium, night differential, and hazardous duty pay. Apparently late in 1998, the employing office determined and acknowledged that it had erred in not utilizing Sunday premium, night differential and hazardous duty pay in establishing its employees' correct hourly base pay for computing their FLSA overtime entitlements. The employing office subsequently issued an employee bulletin, dated May 11, 1999, announcing its obligation to provide its employees with prospective and retroactive overtime pay <u>once</u> its payroll system necessarily was modified in collaboration with the National Finance Center.[2]

On February 18, 2000, an employee filed a grievance complaining of the payment delay, requesting prompt payment for overtime owed the employees, and seeking a payment time frame schedule and bi-weekly update situation reports. The employing office responded at the third grievance stage (1) that it could not begin paying the overtime until its payroll system modifications are made and integrated with the National Finance Center; (2) that it would pay employees overtime back pay retroactive to November 8, 1998; (3) that it expected the payments to be made not later than June 2000; and (4) that it would provide employees with monthly updates until the payments were implemented. Based upon these representations the employee did not pursue his grievance further.

On July 5, 2000, the employing office issued an employee bulletin presenting workload and program explanations, attributable to both itself and the National Finance Center, why the promised employee compensation had not yet been effected. Whereupon, on July 7, 2000, the union filed a Step 4 grievance asserting that the employing office had breached its commitment in its resolution of the aforementioned grievance and also had failed to implement changes with the National Finance Center in a timely manner. The union sought as a remedy the full payment of the overtime wages, plus an equal amount in the form of *liquidated damages*, and attorney fees and costs. Subsequently, the employing office made the retroactive overtime payments and

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[2]Congress required that the employing office's payroll functions be performed by the National Finance Center, a component of the Department of Agriculture located in Louisiana.

pay adjustments, but not including liquidated damages, on or about March 6, 2001.

The Arbitrator decided the question in favor of the union whether the employing office is liable for liquidated damages, fees, costs, interest and attorney fees for its failure to pay bargaining unit employees' Fair Labor Standards Act claims.

The Arbitrator rejected the employing office's interrelated threshold arguments that he lacked jurisdiction over the grievance because: (1) of sovereign immunity; and (2) that *Part A* of the *Congressional Accountability Act* ("CAA") mandated that all covered employee Fair Labor Standards Act ("FLSA") claims be processed exclusively through the administrative process administered by the Office of Compliance. The Arbitrator relied upon Board precedent upholding an Arbitrator's authority to award Back Pay Act remedies under the CAA. *AFSCME Council 26 and Office of the Architect of the Capitol*, Case No. 00-LMR-03 (2001) ("AFSCME Council 26"). The Arbitrator also made an alternative finding that any failure to have strictly observed the counseling and mediation procedures under Part A of the CAA constituted *harmless error* because essentially equivalent settlement discussions were undertaken in the grievance process.[3]

On the merits, the Arbitrator found that liquidated damages are the norm for FLSA violations. The Arbitrator further held that the employing office did not meet its burden of sustaining the prescribed statutory grounds for defending against an FLSA liquidated damages claim; i.e., good faith, and a reasonably held belief that it had acted lawfully. "Instead, the Department blamed external factors such as the necessity to recalculate basic pay rates of all covered employees, the unique method by which the [employing office's] employees are paid and the inadequate [employing office] information technology." [*Award at page 12*].The Arbitrator made subsidiary findings that the employing office (1) failed to demonstrate it had acted to ascertain the FLSA requirements, (2) left the burden of processing the FLSA payments exclusively to an already over-extended employee, and (3) failed to provide its employees with current information regarding the time frames for rendering the payments.

The Arbitrator sustained the grievance and ruled that the employing office "is liable for liquidated damages for failure to pay Fair Labor Standards Act claims."

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[3]In view of our findings, *infra*, that FLSA claims are subject to negotiated grievance procedure arbitration, we do not pass on whether the arbitrator correctly interpreted and applied the CAA in this regard.

III. Positions of the Parties

A. Employing Office's Exceptions

The employing office argues that the Arbitrator's award is deficient essentially on the following three grounds: (1) the matter was not arbitrable and the Arbitrator lacked jurisdiction under the CAA to decide FLSA claims; (2) the Arbitrator's liquidated damages award is contrary to the FLSA and the Arbitrator's award is based on critical mistakes of fact; and (3) the employing office was denied a fair hearing.

First, the employing office contends that only the Office of Compliance ("OOC") and the courts, pursuant to section 404 of the CAA, are empowered to entertain FLSA claims of covered employees. The employing office acknowledges the arbitrability of FLSA claims in the Executive Branch under the 1978 Federal Service Labor Management Relations Statute ("FSLMRS"), *5 U.S.C., Chapter 71*. However, the employing office argues that the 1995-enacted CAA, while it incorporated the FSLMRS, it nevertheless narrowed the Legislative Branch scope of arbitration because of the CAA's special enforcement scheme. The employing office submits that for the Board to find otherwise "would essentially undermine the Board's own authority and, in effect, be tantamount to an abdication of the OOC's statutory oversight responsibility under the CAA . . . [and would] create an additional right and remedial process not contemplated by Congress under the CAA". Consequently, the employing office represents that the Arbitrator's consideration of this matter is barred by the doctrine of sovereign immunity because Congress only waived its sovereign immunity for those statutes enumerated in Part A of the CAA in connection with dispute processing by the OOC and the courts pursuant to Title IV of the CAA.

Second, the employing office argues that the Arbitrator's findings that the employing office failed to pursue diligently the FLSA overtime payments were contrary to or unsupported by the record. It submits that the Arbitrator's findings do not support his legal conclusions and the employing office characterizes the following as critical mistakes of fact: (1) the employing office failed to show that it acted to ascertain the requirements of the FLSA; (2) the employing office did not provide adequate personnel resources to expedite the payments; (3) The union's July 7, 2000 grievance was entitled "breach of Settlement Agreement" and not a protest over the "failure of prompt payment of overtime". The employing office faults the Arbitrator for not giving it sufficient credit for moving things along with the NFC; failing to accord due weight to the uniqueness and complicated nature of the employing office's pay system; and in not recognizing that the employing office did not have a right of control over the NFC.

Third, the employing office appears to argue that because the union abandoned its overtime non-payment claim at the hearing, the employing office was somehow prejudiced by its failure to present any evidence on the question of its delayed payment constituting an FLSA

violation.

B. Union's Opposition

The union claims that the employing office's non-arbitrability position seeks to gut the labor-management provisions applied to the Legislative Branch by the CAA. The union points to court precedent encouraging and approving Federal Sector arbitration of FLSA claims. The union also relies upon its collective bargaining agreement ("CBA", Article 2, Sec. 02.01) with the employing office that subjects the CBA's administration to *existing and future laws*, and defines grievance to encompass "[any] claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment" (CBA, Article 32, Sec. 32.021.a.(2)). The union also counters the employing office's sovereign immunity argument on the basis of the Board's *AFSCME Council 26* decision, *supra*, and the United States Supreme Court's decision in *C&L Enterprises, Inc. v. Potawatomi Indian Tribe,* 532 U.S. 411, 121 S. Ct. 1589, 149 L.Ed. 2d 623 (2001).

Regarding the Arbitrator's award of liquidated damages, the union contends that the employing office failed to put on any evidence addressing whether its 28 month delay in paying the employees' correct overtime entitlements constituted an FLSA violation. The union supports the Arbitrator's finding that the employing office took no steps to ascertain its liability for that delay in payment and that it devoted woefully insufficient resources to ensuring prompt payment. The union relies on decisions by the Federal Labor Relations Authority and the courts rendering liquidated damages as the norm in such situations as this; i.e., delays in payment, failure to examine FLSA liability, and the existence of payroll system complications and other impediments to prompt payment.

The union contends that the employing office was not denied a fair hearing. The union asserts that its grievance was twofold: i.e., (1) the employing office's failure to abide by its resolution of the original grievance requiring prompt overtime payment and interim employee updates; and (2) employee entitlement to liquidated damages for the employing office's 2 ½ year delay in paying the overtime compensation.[4] The union submits that the employing office freely admitted at the hearing its lag in tendering the overtime payments, which the union treats as the employing office acknowledging its FLSA violation. Accordingly, the union argues that its recognition that the employing office finally had paid its employees the underlying overtime compensation indebtedness did not dispose of or moot the union's claim for liquidated damages.

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[4]The union notes that the employing office never contended before the arbitrator that the union's grievance had failed to raise the prompt payment issue as a justification for the award of liquidated damages.

IV. Analysis and Conclusion

A. Arbitrability and Sovereign Immunity

The employing office's defenses of non-arbitrability and sovereign immunity are inextricably intertwined. If the employing office is correct that FLSA claims may only be raised under the OOC's administrative dispute procedure it necessarily would follow that Congress, in enacting the CAA, did not waive its sovereign immunity to permit arbitrators to entertain such claims under a CBA's negotiated grievance procedures.[5] We find, however, for the reasons stated below, that Congress did allow for negotiated grievance procedure arbitration of FLSA claims.

Section 220(a) of the CAA extends to employing offices, employees, and collective bargaining representatives the rights, protections, and responsibilities established under various portions of the [Executive Branch] Federal Service Labor Management Relations Statute ("FSLMRS") including 5 U.S.C. §§7121-22, relating to grievance arbitration. FSLMRS section 7103(a)(9)[6] defines the term "grievance", in pertinent part:

> "grievance" means any complaint -
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> (A) by any employee concerning any matter relating to the employment of the employee;
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> (B) by any labor organization concerning any matter relating to the employment of any employee; or
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> (C) by any employee, labor organization or agency concerning-
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> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
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> (ii) any claimed violation, misinterpretation, or misapplication of **any law**,

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[5]In this regard the union's reliance on *C&L Enterprises, Inc. v. Potawatomi Indian Tribe, supra*, is not determinative. In that case the Supreme Court decided that an Indian tribe had waived its sovereign immunity by entering into a construction contract providing for binding arbitration of disputes thereunder. A different situation is presented here where the employing office in its collective bargaining agreement, but not the sovereign [Congress], defined the negotiated grievance procedure to encompass the administration of existing and future laws. However, we find, *infra*, that Congress did waive its sovereign immunity regarding the arbitrability of FLSA claims under the CAA.

[6]This FSLMRS *grievance* definition is applied through section 225((f)(1) of the CAA (2 U.S.C. §1361(f)(1), which states: "Except where inconsistent with definitions and exemptions provided in the [CAA], the definitions and exemptions in the laws made applicable by [the CAA] shall apply under [the CAA]".

> rule, or regulation affecting conditions of employment. [emphasis supplied].[7]

The employing office urges the Board to find that the arbitrator lacks authority to entertain grievances arising from the FLSA because Title IV of the CAA creates an administrative and judicial dispute-resolution procedure for claims under the various employment and workplace statutes identified in Title II, Part A, Sections 201 - 206 of the CAA.[8] That procedure provides, under the administration of the Office of Compliance, for mandatory counseling and mediation before a covered employee may elect to either pursue an administrative hearing before a Board-appointed hearing officer or to file a civil action in an appropriate United States District Court. Under this regime, the Board of Directors decides appeals from hearing officer decisions, and the Board's decisions are subject to judicial review by the United States Court of Appeals for the Federal Circuit.

The employing office vigorously argues for the primacy of this dispute-resolution procedure based upon the following language in Section 401 of the CAA:

> In the case of an employee of the office of the Architect of the Capitol or of the Capitol Police, the Executive Director, after receiving a request for counseling under section 402, may recommend that the employee use the grievance procedures of the Architect of the Capitol or the Capitol Police for resolution of the employee's grievance for a specific period of time, which shall not count against the time available for counseling or mediation.

We do not view this provision to provide, as the employing office would have us do, that the statutory rights applied through sections 201-206 of the CAA may not be enforced through negotiated grievance procedures established pursuant to section 220(a) of the Act. In enacting the CAA, Congress applied the FSLMRS provisions permitting employees and unions to grieve and arbitrate "[c]laimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment". Congress allowed for the arbitration of claims arising under laws specified in sections 201-206 of the CAA by providing at the very introduction of its

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[7]The Board of Directors incorporated this definition of "grievance" in its regulations implementing chapter 71 of Title 5 of the U.S. Code, as applied by section 220 of the CAA. [*Office of Compliance Regulations: Labor-Management Relations,* §2421.3, 142 Cong. Rec. 10369-06, 09/12/96].

[8]The Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et seq.*); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et seq.*); The Family and Medical Leave Act of 1993 (29 U.S.C. 2611 *et seq.*); The Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*); The Employee Polygraph Protection Act of 1988 (29 U.S.C.2001 *et seq.*); The Worker Adjustment and Retraining Notification Act (29 U.S.C. 2101 *et seq.*); The Rehabilitation Act of 1973 (29 U.S.C. 701 *et seq.*); and Chapter 43 (relating to veterans' employment and reemployment) of title 38, United States Code.

Title IV Administrative and Judicial Dispute-Resolution Procedures the following statement:

> Except as otherwise provided, the procedure for consideration of alleged violations of part A of title II consists of - [counseling, mediation, etc.].
> [*Section 401, CAA*].

It is plain that the CAA provides for arbitration of grievances seeking to enforce laws affecting conditions of employment. Among the laws having the most prominent effect on working conditions are those applied through sections 201-206 of the CAA. Any interpretation of the CAA that excludes categorically those laws from the scope of arbitrability largely would render nugatory and make a mockery of the labor-management relations program applied to the Legislative Branch by section 220 of the CAA. We found in *AFSCME Council 26*, *supra*, that the Back Pay Act (5 U.S.C. §5596) was incorporated by reference through the CAA and, therefore, the doctrine of sovereign immunity did not bar its application by an arbitrator. We now find that sovereign immunity does not obtain herein because the CAA incorporated the scope of grievance/arbitration from Chapter 71 of the FSLMRS.

In the absence of elucidating legislative history expressing Congress' intent, we can only speculate on the significance of section 401 of the CAA affording the Executive Director discretion to recommend that covered employees first utilize the grievance procedures of the Capitol Police and the Office of the Architect of the Capitol. The most obvious explanation might be to encourage the internal resolution of a grievance before bringing it to the Office of Compliance, an independent agency of the Congress. However, that provision does persuade us to conclude that covered employees, or their representatives, are not free to initiate such statutorily-based claims under employing office grievance procedures, including negotiated grievance procedures. Consistent with this view, the OOC's Procedural Rules, adopted in June 1997, recognize and allow for situations where covered employees of the Capitol Police or Office of the Architect of the Capitol grieve to a final internal decision allegations that could be raised under Part A of Title II of the CAA. [*OOC Procedural Rules*, §2.03(m)(3)].

Finally, we do not agree with the employing office's caution that to permit the arbitration of this FLSA claim "would essentially undermine the Board's own authority and, in effect, be tantamount to an abdication of the OOC's statutory oversight responsibility under the CAA". First, we find, for the reasons stated above, that the CAA delineated between the roles of the OOC and arbitrators in claims arising under Part A of Title II of the CAA. Second, the Board of Directors, through exceptions to arbitrators' awards, retains its authority to review an arbitrator's interpretation and application of each such statute. In this regard, the Board reviews questions of law raised by an arbitration award and the exceptions thereto *de novo*. *National Treasury Employees, Local 1437 and U.S. Department of the Army, Army Research, Development and Engineering Center,* 53 FLRA 1703, 1710 (1998). In applying the standard of *de novo* review, the Board assesses whether the arbitrator's legal conclusions are consistent with law, based on the underlying factual findings. *American Federation of Government Employee*s, *National Border Patrol Council and U.S. Department of Justice, U.S. Immigration and Naturalization Service, United States Border Patrol,* 54 FLRA 905, 910 n.6 (1998). The Board shall proceed to apply these standards, *infra*.

B. Arbitrator's Award of Liquidated Damages

Section 203 of the CAA makes applicable to the Legislative Branch the rights and protections of the Fair Labor Standards Act of 1938, including the remedy of liquidated damages, as would be appropriate if awarded under section 216(b) of the FLSA (*29 U.S.C. §216(b)*). Liquidated damages, under section 216(b), are an equal amount to unpaid wages. An employer may avoid liquidated damages by establishing that it acted in good faith and on the basis of a reasonable belief that it was not violating the [FLSA]. [*29 U.S.C. § 260*].

The arbitrator had a clear legal and factual basis to premise his award of liquidated damages upon the employing office's underlying violation of the FLSA for its admitted approximately 28-month delayed payment of overtime wages to bargaining unit employees.[9] The FLSA has been interpreted to have a prompt payment requirement. *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 89 L.Ed. 1296, 65 S.Ct. 895 (1945); *Wendy Elwell v. University Hospitals Home Care Services,* 2002 U.S. App. LEXIS 423 (6th Cir. 2002); *John F. Rogers, et al., v. The City of Troy, New York, et al.,* 148 F.3d 52 (2nd Cir. 1998); *Calderon v. Witvoet, 999 F.2d 1101 (*7th Cir. 1993); *William Biggs, et al, v. Pete Wilson, Governor, et al.,* 1 F.3d 1537 (9th Cir. 1993), *cert. den.* 510 U.S. 1081(1994);[10] and, *United States* v. *Klinghoffer Bros. Realty Corp.,* 285 F.2d 487 (2d Cir. 1960). In addition, the arbitrator properly could consider the employing office's adjustment of the underlying grievance, acknowledging its indebtedness for unpaid overtime wages, as constituting additional evidence of the employing office's FLSA violation. *U.S. Department of the Navy, Naval Explosive Ordinance Disposal Technology Division India Head, Maryland and AFGE Local 1923*, 2000 FLRA LEXIS 58, 56 FLRA No. 39 (2000).

A judge or other fact finder enforcing the FLSA has the discretion not to award liquidated damages to a prevailing plaintiff if the employer shows to the satisfaction of the adjudicator that the act or omission giving rise to such action was in good faith and that the employer had reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act of 1938. [*29 U.S.C. §*260]. The burden on the employer is substantial and requires proof that the employer's failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon it more than a compensatory verdict. In the absence of such proof, however, a court has no power or discretion to reduce an employer's liability for the equivalent of double unpaid wages. *Wendy Elwell v. University*

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[9]At the arbitration hearing, the employing office's Assistant Police Chief testified: "This is the document [employee bulletin acknowledging FLSA overtime computation error] that the Chief of Police wanted to put out, and the Chief of Police was fairly insistent about this, and we made a mistake and he wanted to own up to the mistake and let our employees know, and also inform them that we would make them whole". [Arbitration transcript, p. 39].

[10]FLSA violation found warranting payment of liquidated damages where workers' pay checks were delayed until 14 or 15 days after scheduled pay day because of state government legislative budget impasse.

Hospitals Home Care Services, supra; *Uphoff v. Elegant Bath,* Ltd., 176 F.3d 399 (7th Cir. 1999); Herman *v. Palo Group Foster Home*, 183 F.3d 468 (6th Cir. 1999); *Kinney v. District of Columbia, 994 F.2d 6 (D.C. Cir. 1993); Walton v. United Consumers Club, Inc.* 786 F.2d 303 (7th Cir. 1986) . Liquidated damages under the FLSA are compensation and not a penalty or punishment. *McClanahan v. Mathews,* 440 F.2d 320 (6th Cir. 1971).

The arbitrator concluded that liquidated damages were warranted because he was unsatisfied that the employing office's explanations met its legal burden imposed by 29 U.S.C. *§*260. After hearing testimony on this point the arbitrator concluded that the employing office devoted insufficient human resources and efforts towards achieving prompt payment of unpaid overtime wages. Nor was the arbitrator persuaded by the employing office's evidence regarding the role and responsibility of the National Finance Center, the effects of *Y2K* activity and the purported workload hardships facing the employing office. In its exceptions, the employing office essentially characterizes the arbitrator's findings to which it excepts as *nonfacts*. We disagree.

To establish that an award is based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator. *Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, Local 1923, 2001 FLRA LEXIS 119; 57 FLRA No. 94 (2001); United States Dep't of the Air Force, Lowry Air Force Base, Denver, Colorado*, 48 FLRA 589 (1993); *Gen. Serv. Admin., Region 2,* 46 FLRA 1039 (1992). An award will not be found deficient based on an arbitrator's determination on any factual matters that the parties disputed below. *Mailhandlers v. Postal Service*, 751 F.2d 834, 843 (6th Cir. 1985); and, *Department of Air Force, supra,* 48 FLRA at 594. In addition, an arbitrator's legal conclusions cannot be challenged on the grounds of nonfact. *e.g., NFFE, Local 561,* 52 FLRA 207, 210-11(1996); *United States Dep't of the Navy, Philadelphia Naval Shipyard,* 39 FLRA 590, 605 (1991).

While the employing office may dispute the arbitrator's interpretation and weighing of the evidence, his finding that the employing office did not act as effectively and expeditiously as it should have in making the payments cannot be viewed as constituting a nonfact. On the other hand, the employing office does not contend that it had reasonable grounds for believing that its 28-month delay in making the correct FLSA overtime payments was not a violation of the FLSA. Further, the employing office has at no time contended that it sought legal advice from any source concerning those FLSA obligations.

Accordingly, the arbitrator certainly had a factual basis to conclude that the employing office did not meet its burden to establish bargaining unit employees' non-entitlement to liquidated damages under 29 U.S.C. *§*260.

C. The Employing Office Was Not Denied a Fair Hearing

The union acknowledged at the arbitration hearing that the employing office finally had

paid its overtime wage indebtedness to the bargaining union employees. Therefore, only the issue of liquidated damages remained for the arbitrator's determination. However, the union never withdrew its allegation that the indebtedness constituted an FLSA violation for failure to make prompt payment of overtime wages, which contention underpinned the union's claim for liquidated damages. The employing office does not contend that it was denied the opportunity to present evidence regarding that underlying FLSA violation and it, in fact, did present testimony concerning its erroneous FLSA base pay computation and its efforts to make its employees whole.

Accordingly, we deny the employing office's exception that it was denied a fair hearing.

V. Decision

The employing office's exceptions are denied.

It is so ordered.

Issued: Washington, D.C. February 25, 2002