66 FLRA No. 139

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4802

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DECISION

June 25, 2012

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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 exceptions to an award of Arbitrator Robert T. Simmelkjaer 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 exceptions.[1]

The Arbitrator found that the grievants are entitled to overtime pay under the Customs Officer Pay Reform Act (COPRA) and, alternatively, the Fair Labor Standards Act (FLSA), for after-hours studying in connection with a training program. For the following reasons, we deny the Agency's exceptions, but modify the award to exclude the alternative remedy under the FLSA.

II. Background and Arbitrator's Award

The grievants are Customs and Border Protection Officers (CBPOs) who participated in the Unified Canine Training Program (training program). Award at 2, 7. CBPOs may voluntarily apply for canine-handler positions after serving as CBPOs for at least two years.[2] *Id.* at 7-8. New CBPOs selected as canine handlers must successfully complete the training program and pass a final examination before beginning canine-handler duties. *Id.* at 8, 9. Experienced canine handlers must also successfully complete the training program each time they receive a new dog, *id.*, but are not required to pass the final examination, *id.* at 38. CBPOs and canine handlers who fail the training program are "neither disciplined nor subjected to adverse career consequences," but cannot "begin or resume canine[-]handler duties until completing another course successfully." *Id.* at 8.

The Union filed a grievance alleging that the grievants were entitled to overtime pay under COPRA, 19 U.S.C. § 267(a)(1),[3] or, alternatively, the FLSA, 29 U.S.C. § 207(a)(1),[4] for time spent "studying outside regular hours during the [t]raining [p]rogram," Award at 2. The grievance was unresolved and submitted to arbitration, where the Arbitrator framed the issue as: "Have [the grievants] performed uncompensated overtime work under the COPRA or the FLSA? If so, what shall be the remedy?" *Id.*

The Arbitrator found that "several of [the Agency's] instructors were directing [the grievants] to study extensively after hours," and that the grievants engaged in after-hours studying "at the direction of their [t]raining [i]nstructors." *Id.* at 42. In this connection, the Arbitrator determined that the grievants were "required [to] study outside [of] regular working hours [in order] to pass the training quizzes and examinations," *id.* at 39, and that "[t]his requirement was continuously emphasized by training instructors as essential for the successful completion of the program," *id.* at 40. He also determined that when the grievants "were told by their instructors that unless they studied . . . after regular working hours[,] they could not expect to pass the final examination, such communication constituted an official assignment by Agency personnel authorized to make [such] assignments." *Id.* at 47. Thus, the Arbitrator found that the grievants "were officially assigned to study outside their regular hours." *Id.* at 48. Accordingly, he

[1] The Union also filed a motion for leave to resubmit documents that contained missing pages. As there is no dispute that the documents contained missing pages, and the Union's motion is unopposed, we grant the motion. *Cf. Soc. Sec. Admin., Balt., Md.*, 64 FLRA 306, 306 n.1 (2009) (granting motion to consolidate cases where parties did not dispute that cases concerned the same award and motion was unopposed).

[2] The Arbitrator uses the terms "canine officer" and "canine handler" interchangeably throughout the award. *See, e.g.*, Award at 37. We use the term "canine handler" for the purposes of this decision.

[3] The pertinent wording of 19 U.S.C. § 267(a)(1) is set forth *infra*.

[4] Title 29 U.S.C. § 207(a)(1) states, in pertinent part, that "no employer shall employ any of [its] employees . . . for a workweek longer than forty hours unless such employee receives compensation for [the] employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which [the employee] is employed." 29 U.S.C. § 207(a)(1).

awarded each grievant two hours of overtime at a rate of two times their regular rate of pay, plus interest. *Id.* at 53, 54.

In the alternative, the Arbitrator found that the grievants' after-hours studying was compensable work under the FLSA. *Id.* at 36-42. Accordingly, he awarded each grievant two hours of overtime at a rate of one and a half times their regular rate of pay, as well as liquidated damages. *Id*. at 43, 53.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that the award is contrary to COPRA and its implementing regulations, specifically, 19 C.F.R. § 24.16(d).[5] Exceptions at 12-21. According to the Agency, COPRA and its implementing regulations do not define "officially assigned," and "[i]n the absence of [such] definitions . . . , the plain meaning of these words is the best determinant of their meaning." *Id.* at 17. In this connection, the Agency contends that the Arbitrator's interpretation of "officially assigned" within the meaning of COPRA conflicts with the plain wording of the statute. *Id.* The Agency also contends that the award is inconsistent with legislative intent to: (1) prevent overtime abuse; and (2) "ensure appropriate compensation for [c]ustoms [i]nspectors performing *overtime customs services* . . . [for] 'users' of the system." *Id.* at 13-16. The Agency further maintains that the award conflicts with 19 C.F.R. § 24.16(d) because the Arbitrator found that "mere recommendations, suggestions, or endorsements" given by training instructors equated to an official assignment of overtime, and this finding disregards that regulation's requirement that overtime be made in accordance with the following priorities: "(1) alignment with workload; (2) minimizing costs; and (3) annuity integrity." *Id.* at 15-16. The Agency also maintains that case law interpreting the Federal Employees Pay Act (FEPA) – which the Agency asserts provided the model for COPRA – demonstrates that COPRA should be interpreted as requiring "an express supervisory mandate to work . . . overtime." *Id.* at 16-21. In this regard, the Agency asserts that the promulgating regulation for FEPA requires that "overtime work . . . may be ordered or approved *only in writing*." *Id.* at 19 (internal quotation marks omitted). The Agency further claims that "Congress can be presumed to have been aware of" the Supreme Court's decisions in *Schweiker v. Hansen*, 450 U.S. 785 (1981) (*Schweiker*), and *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (*Richmond*) – which concern "the specific requirements for holding government liable for payments from the Treasury" – when it enacted COPRA in 1993. Exceptions at 21. In this regard, the Agency asserts that the United States Court of Appeals for the Federal Circuit (Federal Circuit) relied on those decisions in finding that FEPA imposes a writing requirement in *Doe v. United States*, 372 F.3d 1347, 1354 (Fed. Cir. 2004) (*Doe*). Exceptions at 20-21. In addition, the Agency claims that it "is entitled to deference from the Arbitrator as to its reasonable interpretation of 'officially assigned'" within the meaning of COPRA. *Id.* at 16 n.3 (citing *Gen. Servs. Admin. v. FLRA*, 86 F.3d 1185, 1187 (D.C. Cir. 1996) (*GSA*)).

The Agency also argues that the award is contrary to the FLSA and its implementing regulations. *Id.* at 5-12.

B. Union's Opposition

With respect to COPRA, the Union contends that the Arbitrator did not err in finding that the grievants were "officially assigned" to work overtime. Opp'n at 24-34. Specifically, the Union contends that, even if Congress intended for COPRA's "officially assigned" standard to mirror FEPA's "officially ordered or approved" standard, the relevant case law in existence at the time when COPRA was enacted supports the Arbitrator's determination. *Id.* at 28-34. The Union also contends that post-COPRA case law interpreting FEPA provides no basis for finding the Arbitrator's interpretation of COPRA deficient. *Id.* at 33-34. In addition, the Union argues that the Supreme Court's decisions in *Schweiker* and *Richmond* do not concern FEPA, and that, in enacting COPRA, Congress could not

[5] Title 19 C.F.R. § 24.16(d) provides, in pertinent part:

> Work Assignment Priorities. The establishment of regularly-scheduled administrative tours of duty and assignments of Customs Officers to overtime work under this section shall be made in accordance with the following priorities, listed below in priority order:
> (1) Alignment. Tours of duty should be aligned with the Customs workload.
> (2) Least Cost. All work assignments should be made in a manner which minimizes the cost to the government or party in interest. Decisions, including, but not limited to, what hours should be covered by a tour of duty or whether an assignment should be treated as a continuous assignment or subject to commute compensation, should be based on least cost considerations . . . .
> (3) Annuity integrity. For Customs Officers within [three] years of their statutory retirement eligibility, the amount of overtime that can be worked is limited to the average yearly number of overtime hours the Customs Officer worked during his/her career with the Customs Service . . . . .

19 C.F.R. § 24.16(d).

have anticipated that the Federal Circuit would later rely on those decisions in finding that FEPA imposes a writing requirement. *Id.* at 30-31.

The Union also contends that the Arbitrator did not err in determining that time spent by the grievants studying outside of regular hours constitutes compensable work under the FLSA. *Id.* at 15-20. In addition, the Union asserts that §§ 2425.4(c) and 2429.5 of the Authority's Regulations bar several of the Agency's arguments. *Id.* at 5-13.

IV. Preliminary Issue

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator. 5 C.F.R. §§ 2425.4(c), 2429.5.[6] The Union argues that §§ 2425.4(c) and 2429.5 bar the Agency's argument that it is "entitled to deference from the Arbitrator as to its reasonable interpretation of [COPRA's] 'officially assigned'" standard pursuant to the D.C. Circuit's decision in *GSA*, 86 F.3d at 1187. Opp'n at 12. There is no indication in the record that the Agency raised this argument before the Arbitrator, even though it could have done so. Because the Authority will not consider arguments that could have been, but were not, presented to the arbitrator, we dismiss the Agency's argument under §§ 2425.4(c) and 2429.5 of the Authority's Regulations.

The Union also argues that §§ 2425.4(c) and 2429.5 bar several arguments that the Agency makes in support of its contention that overtime pay is not warranted under COPRA or the FLSA in the circumstances of this case. *Id.* at 7-13. It is undisputed that, before the Arbitrator, the Agency argued that compensation was not warranted under COPRA or the FLSA. Even if the Agency did not specifically raise each and every one of these sub-arguments regarding COPRA and the FLSA below, they are inextricably intertwined with the Agency's overall argument regarding COPRA and the FLSA, and are arguments that the Authority would consider on de novo review in any event. Accordingly, we find that §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not provide a basis for dismissing these arguments, and we consider them.

[6] Section 2425.4(c) provides that exceptions may not rely on any "evidence [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides that the "Authority will not consider any evidence [or] . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator." 5 C.F.R. §§ 2425.4(c), 2429.5.

V. Analysis and Conclusions

When exceptions involve an award's consistency with law, the Authority reviews any question of law raised by the exceptions and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they were based on nonfacts. *See U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 340 (2011) (*CBP*).

COPRA provides, in pertinent part, that "a customs officer who is *officially assigned* to perform work in excess of [forty] hours in the administrative workweek . . . or in excess of [eight] hours in a day shall be compensated for that work at an hourly rate of pay . . . equal to [two] times the hourly rate of basic pay." 19 U.S.C. § 267(a)(1) (emphasis added). COPRA's implementing regulations do not define the term "officially assigned to perform work." *See* 19 C.F.R. § 24.16. And the parties have not cited any precedent defining that term in the context of COPRA.

There is no dispute that after-hours studying constitutes "work" within the context of COPRA. The Agency contends that "[i]n the absence of statutory or regulatory definitions of 'officially assigned,' the plain meaning of these words is the best determinant of their meaning." Exceptions at 17. Where a statute does not define a pertinent term, the Authority has found it appropriate to consider dictionary definitions of the term. *U.S. Nuclear Regulatory Comm'n*, 66 FLRA 311, 317 (2011) (Member Beck dissenting on other grounds).

The term "officially" means, among other things, "with official authorization." *Webster's 3d New Int'l Dictionary* 1567 (2002) (*Webster's*). "Official" means "derived from the proper office or authority" or "prescribed or recognized as authorized." *Id.* Here, the Arbitrator found that when the grievants "were told by their instructors that unless they studied . . . after regular working hours[,] they could not expect to pass the final examination[,] such communication constituted an official assignment by Agency personnel *authorized* to make such assignments." Award at 47 (emphasis added). The Agency does not dispute that the instructors were "officially authorized" to assign overtime. As such, the assignment of overtime from the instructors was "with official authorization." *Webster's* at 1567.

As to whether the instructors "assigned" the work, in context, "assign" means "to appoint (one) to a . . . duty." *Id.* at 132. As such, "assigned" – the past tense of "assign" – means to have been appointed to a duty. The term "appoint" means "to fix by a decree, order, command, resolve, decision, or mutual agreement"; "ordain, prescribe"; or "to establish with power or firmness." *Id.* at 105. A "duty" is defined as an "obligatory task[] . . . enjoined by order . . . according to . . . occupation, or profession." *Id.* at 705. To "enjoin" means "to direct, prescribe, or impose by order." *Id.* at 754.

The Arbitrator found that "several of [the Agency's] instructors were directing [the grievants] to study extensively after hours," and that the grievants engaged in after-hours studying "at the direction of their [t]raining [i]nstructors." Award at 42. The Arbitrator further found that the grievants were "required [to] study outside [of] regular working hours [in order] to pass the training quizzes and examinations," *id.* at 39, and that "[t]his requirement was continuously emphasized by training instructors as essential for the successful completion of the program," *id.* at 40. Because the Agency does not argue that the Arbitrator's factual findings are nonfacts, we defer to those findings. *See CBP*, 66 FLRA at 340. As such, the record demonstrates that instructors ordered the grievants to engage in the "obligatory task" of studying after hours in order to successfully complete the training necessary to obtain or maintain a canine-handler position. *Webster's* at 754. Thus, we find that the grievants, who were directed by instructors to study after hours, were appointed to a duty with official authorization and, therefore, "officially assigned to perform work" in excess of forty hours in a workweek or eight hours a day within the meaning of COPRA. *See* 19 U.S.C. § 267(a)(1).

The Agency also argues that the award is contrary to the legislative intent for COPRA. Exceptions at 13-16. To the extent that Congress enacted COPRA to prevent overtime abuse and "ensure appropriate compensation for [c]ustoms [i]nspectors performing *overtime customs services* . . . [for] 'users' of the system," *id.* at 14-15, the Agency provides no basis for finding that the award is inconsistent with that intent. As for overtime abuse, the award requires only that the Agency provide overtime compensation where after-hours work was "officially assigned"; it does not preclude the Agency from denying unsubstantiated overtime claims. Award at 53. As for ensuring appropriate compensation for overtime customs services provided to "users" of the system, Exceptions at 15, the Agency does not demonstrate that Congress intended for COPRA to cover *only* overtime that could be billed to third parties. Thus, the Agency provides no basis for finding that the award is contrary to the legislative intent for COPRA.

The Agency further contends that the award conflicts with 19 C.F.R. § 24.16(d), which requires that overtime be made in accordance with the following priorities: (1) "[a]lignment . . . . [w]ith [Agency] workload"; (2) "[l]east [c]ost"; and (3) "[a]nnuity integrity." 19 C.F.R. § 24.16(d). But the award does not preclude the Agency from assigning overtime work in accordance with such priorities. Therefore, the Agency's claim is without merit.

The Agency also contends that COPRA was modeled after FEPA, and that FEPA case law demonstrates that COPRA should be interpreted as requiring "an express supervisory mandate to work . . . overtime." Exceptions at 16-21. Even assuming that FEPA precedent is relevant, the Arbitrator's factual findings support a conclusion that the grievants were subject to such a mandate. To the extent that the Agency relies on FEPA precedent to argue that "officially assigned" overtime under COPRA must be authorized in writing, the FEPA case law that existed at the time of COPRA's enactment was unclear as to whether overtime was required to be authorized in writing. *See Doe*, 372 F.3d at 1354. Thus, there is no basis for finding that, when Congress enacted COPRA, it intended to include a requirement that overtime be assigned in writing. *See* 19 C.F.R. § 24.16. In addition, unlike FEPA's regulations, COPRA's implementing regulations do not contain a writing requirement.

Finally, the Agency argues that "Congress can be presumed to have been aware of" the Supreme Court's decisions in *Schweiker* and *Richmond* – which the Federal Circuit relied on in upholding FEPA's writing requirement in *Doe*. Exceptions at 21. Although *Schweiker* and *Richmond* pre-date COPRA's enactment, they do not concern FEPA. *See Schweiker*, 450 U.S. 785; *Richmond*, 496 U.S. 414. Further, the Federal Circuit's reliance on these decisions in *Doe* – which was decided after COPRA's enactment – to interpret FEPA's writing requirement provides no basis for finding the Arbitrator's interpretation of COPRA deficient.

For the foregoing reasons, we find that the award is not contrary to COPRA, and deny the Agency's exceptions regarding COPRA.

COPRA precludes compensation for "officially assigned" work under any other pay statute. *Bull v. United States*, 479 F.3d 1365, 1378 (Fed. Cir. 2007). As we have found that the Arbitrator did not err in determining that the grievants were entitled to compensation for "officially assigned" work under COPRA, they are not entitled to compensation under the FLSA. *See id.* Therefore, we modify the award to exclude the alternative remedy under the FLSA, and we find it unnecessary to address the Agency's exceptions concerning the FLSA.

VI. Decision

The Agency's exceptions are denied, but the award is modified to exclude the alternative remedy under the FLSA.