66 FLRA No. 154

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4598

_____

DECISION

July 24, 2012

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

The Agency filed exceptions to an initial award and a second award of Arbitrator M. David Vaughn 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. For the reasons set forth below, we deny the exceptions in part, grant the exceptions in part, and set aside the awards in part.

II. Background and Arbitrator's Awards

In 1993, Congress passed the Customs Officers Pay Reform Act (COPRA), 5 U.S.C. § 261,[2] which revised the overtime system for customs officers. The Agency maintained that COPRA was the exclusive compensation system for customs officers and that, as a result, the officers were precluded from receiving overtime compensation under the Fair Labor Standards Act (FLSA). *See, e.g.*, Initial Award at 30. Disagreeing with this interpretation, the Union presented a national grievance alleging that the Agency had improperly exempted customs officers from FLSA coverage. *E.g.*, *id.* at 1. The Union presented a separate national grievance alleging that the officers also were entitled to additional compensation for overtime work under COPRA. *E.g.*, *id.* The grievances were unresolved, and the dispute was submitted to arbitration. *E.g.*, *id.*

The parties stipulated to the following issues:

> (1) Does COPRA "preclude" customs officers "from payment under the" FLSA?;
>
> (2) If customs officers "were improperly denied coverage of the FLSA, are they entitled to liquidated damages in an amount no greater than the amount of their unpaid overtime compensation?"; and
>
> (3) What does "COPRA's 'officially assigned to perform work' standard" mean?

Id. at 2-3.

While the grievance was pending, the United States Court of Appeals for the Federal Circuit (Federal Circuit) held that COPRA did not preclude customs officers from receiving overtime compensation under the FLSA. *See Bull v. United States*, 479 F.3d 1365, 1376-77 (Fed. Cir. 2007) (*Bull II*). Because of this ruling, in its closing brief, the Agency conceded the first issue. Initial Award at 2 n.1; *see also id.* at 12.

Addressing the second issue, the Arbitrator found that the Union had demonstrated that customs officers had been improperly denied coverage of the FLSA. *Id.* at 39-40. The Arbitrator then examined whether the officers were entitled to liquidated damages. *See id.* at 40-45. The Arbitrator noted that the FLSA creates a presumption in favor of liquidated damages and that such damages are appropriate unless an employer can show that it acted in good faith and on a reasonable belief that it was in compliance with the FLSA. *Id.* at 40. The Agency argued that it acted in good faith because, among other things: (1) the law concerning COPRA was complex; (2) COPRA's legislative history supported its position; (3) it never wavered from its position that COPRA was the exclusive pay regime for officers; and (4) the Office of Personnel Management (OPM) did not question or object to its interpretation. *Id.* at 41-42, 44.

The Arbitrator rejected the Agency's arguments. *See id.* at 42-45. The Arbitrator found that: (1) neither the plain language of COPRA nor the statute's legislative history supported the Agency's position, *id.* at 42 (citing *Bull II*, 479 F.3d at 1376-77); (2) the Department of Labor (DOL) and OPM had opined that customs officers remained subject to the FLSA after COPRA's enactment,

[1] Member DuBester's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] The text of the relevant statutory and regulatory provisions is set forth in the appendix to this decision.

id. at 42-43, 44; and (3) the Agency had failed to take any action to ascertain its legal obligations, such as consulting with OPM's legal counsel or attending seminars concerning the FLSA, *id.* at 43. Accordingly, the Arbitrator found that "liquidated damages [we]re warranted in an amount equal to any back pay due under FLSA." *Id*. at 49.

Addressing the third issue, the Arbitrator determined that the term "officially assigned" meant "work resulting from tasks [assigned] to [customs officers] by officials with appropriate authority by direct instruction, either orally, in writing or by other means." *Id.*; *see also* Second Award at 5. Elaborating on this standard, the Arbitrator found that "other means" included assignments by Agency regulation or policy if the regulation or policy was mandatory and non-compliance with the regulation or policy resulted in "some type of adverse consequence to the employee." Second Award at 22. Applying his interpretation, the Arbitrator found that the Agency had officially assigned work under COPRA because: (1) the work was required by policy directives; (2) the officers were subject to potential discipline if the work was not completed; and (3) the officers were not provided sufficient on-duty time or facilities to perform the tasks. *See id.* at 8, 22 (applying this definition, Arbitrator found customs officers entitled to overtime for firearms maintenance and canine-related tasks).

Because the parties were unable to agree on a process for the submission and payment of individual claims for FLSA and COPRA overtime, the Arbitrator accepted proposed claims processes and arguments from each party. *See id.* at 2. The Arbitrator determined that "the basic structure of the Union's claims procedure [was] preferable to the Agency's," *id.* at 31; *see also id.* at 39, and he imposed a detailed claims process for the parties to follow, *see id.* at 31-34.

The Arbitrator held that customs officers could file COPRA claims back to October 15, 1998 and FLSA claims back to July 25, 2004. *Id*. at 38-39. The Arbitrator rejected the Agency's contention that officers were entitled to COPRA for travel compensatory time only between July 2004 and January 2005. *Id.* at 26, 27. The Arbitrator found that officers were entitled to such overtime "with no time limitations" and that they also were entitled to "overtime – COPRA or FLSA[] as appropriate – for all other overtime travel." *Id.* at 27. The Arbitrator further determined that, with regard to travel compensatory time and other travel-related overtime, officers should not receive double compensation for any period of time, including after January 2005. *Id.* at 26, 27.

The Arbitrator retained jurisdiction for thirty days for clarification purposes and allowed the record to remain open for forty-five days so that the parties could recommend specific, limited changes to the claims form. *Id.* at 40. The Arbitrator also retained jurisdiction after the completion of the claims process to resolve disputes over issues concerning the remedy, such as the affect of COPRA backpay on retirement calculations, the calculation of backpay plus interest and/or liquidated damages, and the resolution of individual claims. *See id.* at 36-38, 40. Finally, because the parties were amenable to reaching an agreement concerning attorney fees, the Arbitrator remanded this issue to the parties, but retained jurisdiction to address the issue, if unresolved. *Id.* at 36, 40.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the awards are contrary to law because the Arbitrator improperly awarded liquidated damages. Exceptions at 28-32. The Agency asserts that it acted in good faith and reasonably when it determined that COPRA precluded officers from receiving compensation under the FLSA. *Id.* In support of this claim, the Agency asserts that: (1) the law concerning COPRA is complex, *see id.* at 29; (2) it never wavered from its position that COPRA was the exclusive pay regime for officers and took administratively onerous steps to make employees and managers aware of its position, *see id.* at 31-32; (3) OPM did not correct, and "apparent[ly] accept[ed]," the Agency's interpretation, *id.* at 32 n.21; (4) COPRA's legislative history supports its position, *see id.* at 29-30; and (5) the Union accepted a provision in the parties' agreement "limiting the rights of its bargaining unit employees to receive overtime compensation," *id.* at 30-31.

The Agency also contends that the Arbitrator's interpretation of COPRA's "officially assigned" standard is contrary to law. *Id.* at 5. According to the Agency, work is "officially assigned" under COPRA only if it is authorized or assigned by supervisors as the need for performance of that work arises. *See id.* at 24. The Agency claims that the Arbitrator's interpretation of COPRA's standard conflicts with the plain meaning of the statute. *Id.* at 23-25. The Agency also contends that the Arbitrator's broad definition of the term "officially assigned" cannot be reconciled with COPRA's legislative history, *see id.* at 7-13, or the statute's regulations, *see id.* at 13-15. The Agency further asserts that, even if a requirement to perform certain tasks in an Agency directive, policy, or handbook is an assignment of work, such requirement does not constitute an official assignment of work as overtime under COPRA. *See id.* at 15-23. Moreover, the Agency argues that, as

evidenced by Article 22, Part III, Section 15[3] of the parties' agreement, the Union "seems to have acquiesced [to the] Agency['s] [position] that overtime requires a *specific* order." *Id.* at 16 n.12.

The Agency also contends that the Arbitrator's expansion of COPRA's standard to encompass "suffered or permitted" work conflicts with the Federal Circuit's decision in *Bull II*, which held "that COPRA's 'officially assigned' standard was not intended to encompass" such work. *Id.* at 25; *see also id.* at 26. The Agency also asserts that Congress intended this provision of COPRA to mirror a similar provision of the Federal Employees Pay Act (FEPA). *Id.* at 26-27. As a result, the Agency contends the Arbitrator improperly ignored precedent holding that FEPA's "officially ordered and approved" standard is met only when an employer gives "an express supervisory instruction to work . . . overtime." *Id.* at 27 (emphasis omitted); *see also id.* at 26. Finally, the Agency contends that, to the extent that Congress left a void by not defining the term "officially assigned," the Agency "is entitled to deference . . . as to its reasonable interpretation" of the term. *Id.* at 6 n.6.

The Agency further asserts that the second award is contrary to law because, in establishing the claims process, the Arbitrator inappropriately adopted the evidentiary standard established in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946) (*Mt. Clemens*) for COPRA claims. Exceptions at 33-35.

Finally, the Agency claims that the Arbitrator exceeded his authority by holding that officers "are entitled to COPRA overtime for [travel compensatory time] with *no time limitations*." *Id.* at 33 (quoting Second Award at 27) (internal quotation marks omitted); *see also id.* at 32. According to the Agency, in so holding, the Arbitrator ignored the timeframes that the parties had established for the submission of such claims. *Id.* at 33. The Agency also contends that the Arbitrator exceeded his authority by permitting claims by certain officers for travel compensatory time beyond January 27, 2005. *Id.* According to the Agency, these officers were "afforded [an] opportunity to claim all uncompensated time in a travel status from January 28, 2005, per applicable regulations" and guidance. *Id.* The Agency also contends that the Arbitrator failed "to recognize that COPRA-covered employees may only earn [travel compensatory time] for time spent on official travel away from the official duty station that is not covered by the COPRA provisions (i.e., not related to an inspectional assignment)." *Id.*

B. Union's Opposition

The Union contends that the Arbitrator's award of liquidated damages is not contrary to law because the Agency has not shown that it acted in good faith and had reasonable grounds for believing that COPRA precluded officers from receiving compensation under the FLSA. Opp'n at 42-52. According to the Union, the plain language of COPRA and the FLSA, as well as relevant legislative history, do not support the Agency's position. *Id.* at 43-45. Moreover, the Union claims that the Agency presented no evidence demonstrating that it took any affirmative steps to ascertain its obligations under the FLSA. *Id.* at 47-50. Furthermore, the Union argues that, contrary to the Agency's contention, OPM, through the regulatory process, "clearly expressed [its] opinion[] that . . . officers remained subject to the FLSA after the enactment of COPRA." *Id.* at 46; *see also id.* at 47. Finally, the Union asserts that the Arbitrator correctly held that the Agency was not excused from paying liquidated damages because it failed to understand the law. *Id.* at 50.

The Union argues that the Arbitrator's interpretation of COPRA's "officially assigned" standard is not contrary to law. *Id.* at 11-39. The Union maintains that the Arbitrator's interpretation is consistent with the plain meaning of the statute. *Id.* at 14-16. The Union further claims that the Arbitrator's interpretation does not conflict with *Bull II* because the Federal Circuit did not determine whether an officer's work was officially assigned under COPRA and did not define the term "officially assigned." *Id.* at 21-25. The Union asserts that COPRA's standard was not intended to mirror FEPA's standard, but notes that, even if Congress intended the standards to be identical, the Agency improperly relies on a judicial "interpretation of FEPA . . . that was not in effect when COPRA was enacted." *Id.* at 26 (emphasis omitted); *see also id.* at 30-31. According to the Union, "Congress is presumed to have been aware of judicial interpretations of FEPA," holding that inducement to work overtime was sufficient to meet FEPA's standard, when it decided to mirror COPRA's standard on FEPA's standard. *Id.* at 26-27; *see also id.* at 28-30. The Union also contends that the Agency has not demonstrated that the awards conflict with 19 C.F.R. § 24.16. *Id.* at 32-36. Finally, in response to the Agency's argument that its interpretation is entitled to deference, the Union contends that the Agency makes this argument for the first time in its exceptions and thus the argument is not properly before the Authority. *Id.* at 36. The Union further asserts that, even if this argument is properly before the Authority, Congress did not delegate any authority to the Agency to interpret the term "officially assigned." *Id.* at 37.

[3] Article 22, Part III, Section 15 of the parties' agreement states that "[e]mployees who are classified non-exempt under the [FLSA] may not perform work outside normal working hours unless specifically ordered or authorized by the [e]mployer to do so." Exceptions at 31.

The Union also maintains that the Arbitrator's adoption of the *Mt. Clemens* evidentiary standard as part of the claims process is not contrary to law because "[t]he procedure adopted by the Arbitrator . . . reasonably combines the burden-shifting process established in *Mt. Clemens* with specific evidentiary requirements drawn directly from COPRA." *Id.* at 57; *see also id.* at 56, 58.

Finally, the Union contends that the Arbitrator did not exceed his authority. *Id.* at 52-56. The Union asserts that the Agency misinterprets the Arbitrator's second award. *Id.* at 53. According to the Union, the Arbitrator did not ignore the parties' stipulated timeframes for filing COPRA and FLSA claims, but, rather, merely rejected the Agency's "attempt to restrict the period for which" claims for travel compensatory time "can be filed to a narrower period than the one adopted for the filing of other types of claims." *Id.* at 54; *see also id.* at 53. The Union also asserts that the Arbitrator properly rejected the Agency's attempt to restrict the recovery period for such claims because the Arbitrator had broad discretion in fashioning the remedy. *Id.* at 54-55. Additionally, the Union contends that the Agency "fails to explain the relevance of its observation that employees may earn [travel compensatory time] for time spent on official travel away from the duty station that is not covered by the provisions of COPRA." *Id.* at 55; *see also id.* at 56.

IV. Preliminary Matter

The Authority issued an Order to Show Cause (Order) directing the Agency to explain why its exceptions should not be dismissed as interlocutory. The Agency contends that, because the Arbitrator resolved all three issues submitted to arbitration, its exceptions are not interlocutory. *E.g.*, Agency's Response to Order at 3-4, 5. The Agency argues that the Arbitrator provided the Union with a remedy by requiring "the Agency to pay each aggrieved [officer] backpay, plus interest and/or liquidated damages (whichever is applicable)" and by "direct[ing] a detailed [claims] process, including specific time limits, through which the Agency must discharge individualized payments to each" officer. *Id.* at 6. Additionally, the Agency contends that the Arbitrator's retention of jurisdiction was merely to resolve any disputes over implementation of the remedy and attorney fees. *Id.* at 5-6.

In reply, the Union asserts that the exceptions are interlocutory because the Arbitrator's awards failed to resolve all of the issues submitted to arbitration. Reply at 2. The Union claims that "[t]he Arbitrator has yet to rule on the [effect] of [COPRA] back[pay] on retirement benefits." *Id.* Moreover, the Union asserts that the Arbitrator "anticipates receiving additional input from the parties before issuing a final decision concerning the method by which a monetary remedy is to be calculated," as well as "other elements of the claims process." *Id.* And the Union maintains the Arbitrator has not issued a final decision regarding attorney fees. *Id.*

Under § 2429.11 of the Authority's Regulations, the Authority "ordinarily will not consider interlocutory appeals." 5 C.F.R. § 2429.11. Thus, the Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 65 FLRA 603, 605 (2011). Exceptions to an award are not interlocutory, however, where an arbitrator has retained jurisdiction solely to assist the parties in the implementation of awarded remedies, including the specific amount of monetary relief awarded. *See, e.g., U.S. Dep't of the Treasury, Internal Revenue Serv.*, 63 FLRA 157, 158-59 (2009).

We find that the Agency's exceptions are not interlocutory. The Arbitrator resolved all of the stipulated issues submitted to him. *See Soc. Sec. Admin., Office of Disability Adjudication & Review*, 64 FLRA 527, 529 (2010) (finding the award was final when it resolved all of the issues submitted to arbitration). The Arbitrator concluded that COPRA did not preclude customs officers from receiving compensation under the FLSA and that such officers were entitled to liquidated damages because the Agency had failed to demonstrate that it acted in good faith. Initial Award at 12, 40-45. The Arbitrator also defined COPRA's "officially assigned to perform work" standard and applied his definition to the facts at issue. *See, e.g., id.* at 48, 49; Second Award at 8, 22.

The Arbitrator also awarded a remedy. *See U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head Div., Indian Head, Md.*, 58 FLRA 498, 499 (2003) (finding that, because the Arbitrator provided a remedy instead of postponing a determination of the remedy by leaving the matter up to the parties, the award was final). The Arbitrator determined that customs officers were entitled to backpay plus interest and/or liquidated damages, and ordered the parties to utilize a detailed claims process to determine the specific amount owed to each officer. *See* Second Award at 28-36, 39. Consequently, because the Arbitrator resolved all of the issues submitted to arbitration and ordered a remedy, the awards are final and the Agency's exceptions are not interlocutory. *See NLRB, Region 9, Cincinnati, Ohio*, 66 FLRA 456, 459 (2012) (*NLRB Region 9*) (determining that the award was final when the arbitrator resolved all the stipulated issues and awarded a remedy).

The Union contends that the awards are not final because the Arbitrator failed to resolve various issues. *E.g.*, Reply at 2. But the issues cited by the Union – e.g., the affect of COPRA backpay on retirement calculations, the calculation of backpay plus interest and/or liquidated damages, and the resolution of individual claims – merely concern the implementation of the remedy. As a result, the Arbitrator's retention of jurisdiction to resolve any disputes regarding these issues does not render the Agency's exceptions interlocutory. *See* Second Award at 36-38, 40; *see also U.S. Dep't of the Treasury, Internal Revenue Serv., Wage & Inv. Div.*, 66 FLRA 235, 239 (2011).

Similarly, the Union's contention that the awards are not final because the Arbitrator did not rule on the Union's entitlement to attorney fees is without merit. The Authority has held that an arbitrator's retention of jurisdiction to resolve issues related to attorney fees does not render a party's exceptions interlocutory. *See U.S. Dep't of Homeland Sec., Customs & Border Prot.*, 64 FLRA 989, 991 (2010) (Member Beck dissenting in part) (determining that the agency's exceptions were not interlocutory although the arbitrator retained jurisdiction to address any future union request for attorney fees).

Consequently, the Agency's exceptions are not interlocutory. Accordingly, we will consider the exceptions on the merits.

V. Analysis and Conclusions

A. The awards are contrary to law in part.

When an exception challenges an award's consistency with law, the Authority reviews the question of law raised by the exception 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 this standard, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. The Arbitrator's award of liquidated damages is not contrary to law.

The Agency claims that the awards are contrary to law because the Arbitrator improperly awarded liquidated damages. Exceptions at 28-32. The standard for when an award of liquidated damages is appropriate is set forth in 29 U.S.C. § 260. "That standard, in effect, establishes a presumption that an employee who is improperly denied overtime shall be awarded liquidated damages." *NTEU*, 53 FLRA 1469, 1481 (1998). To avoid an award of liquidated damages, an employer bears the substantial burden of establishing a good-faith, reasonable-basis defense. *See id.* (quoting *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993)). To satisfy these two requirements, the employer must show: (1) that its act or omission giving rise to the violation of the FLSA was in good faith, and (2) that it had reasonable grounds for believing that it was in compliance with the FLSA. *See id.* To meet this burden, the employer must establish that it attempted to ascertain the FLSA's requirements. *See id.*

We find that the Agency has failed to demonstrate that it acted in good faith. Here, we defer to the Arbitrator's factual findings because the Agency does not allege that those findings are nonfacts. His findings demonstrate that the Agency presented no evidence establishing that it took any action to ascertain its obligations, such as consulting with OPM's legal counsel or attending seminars, concerning the FLSA. Initial Award at 43. Moreover, the Agency does not contend that it requested "any specific advice" from OPM about its compliance with the FLSA. *See* Exceptions at 32 n.21 (arguing only that "OPM did not take a contrary position or otherwise correct [the Agency's] view of FLSA['s] non-applicability"). Rather, the Agency merely asserts that, because the law concerning COPRA is complex, it demonstrated that it acted in good faith when it determined that COPRA precludes officers from receiving compensation under the FLSA. *Id.* at 29. However, "ignorance of the prevailing law or uncertainty about its development" does not demonstrate that an employer acted in good faith. *See Reich v. S. New England Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997); *cf. Bull v. United States*, 68 Fed. Cl. 212, 275 (2005) (*Bull I*) (finding that "[p]roof that the law is uncertain, ambiguous or complex" may provide a basis for finding that the second requirement of § 260 is met) (internal quotation marks and citations omitted).

Similarly, the Agency claims that it demonstrated good faith because its unwavering position was that COPRA was the exclusive pay regime for officers and it consistently informed managers and employees of this position. Exceptions at 31-32. The Authority has found, however, that "the fact that an employer has broken the law for a long time without complaints from employees does not demonstrate the requisite good faith required by the FLSA." *See AFGE, Local 987*, 66 FLRA 143, 147 (2011) (*Local 987*) (internal quotation marks omitted).

The Agency also argues that it acted in good faith because COPRA's legislative history supports its conclusion that COPRA was intended to be the exclusive pay regime for officers. Exceptions at 29-30. The court in *Bull II* clearly found, however, that "[n]othing in [COPRA's] legislative history suggests that FLSA overtime compensation, as historically available to Customs workers, was being abolished by COPRA." *See Bull II*, 479 F.3d at 1377, 1380. Accordingly, this argument also provides no support for its contention. *See Bull I*, 68 Fed. Cl. at 275-76 (rejecting defendant's claim that "its reliance upon its interpretation of COPRA . . . constitute[d] a good faith basis for not compensating . . . officers pursuant to the FLSA" and awarding liquidated damages) (internal quotation marks omitted).

Finally, the Agency contends that the Union, by agreeing to a provision in the parties' agreement that limited the rights of bargaining unit employees to receive overtime compensation, acquiesced in the Agency's position concerning COPRA's exclusivity. Exceptions at 30-31. This contention, however, is irrelevant to whether the Agency acted in good faith. *See Local 987*, 66 FLRA at 147 (finding that, to establish that it acted in good faith, an employer's contentions must demonstrate that it honestly intended to ascertain the FLSA's requirements and then acted in accordance with those requirements); *see also Bull I*, 68 Fed. Cl. at 275 (concluding that, although the defendant claimed that its reliance on its interpretation of the parties' agreement "constitute[d] a good faith basis for not compensating canine . . . officers pursuant to the FLSA[,]" it failed to demonstrate that it acted in good faith by attempting to determine the FLSA's requirements) (internal quotation marks omitted).

Consequently, we find that the Agency has not demonstrated that it acted in good faith when it denied customs officers overtime compensation under the FLSA.[4] *See Local 987*, 66 FLRA at 147. Accordingly, we deny the Agency's exception.

2. The awards are contrary to COPRA.

The Agency claims that the awards are contrary to COPRA. *See* Exceptions at 5. Among other things, the Agency asserts that, even if a requirement to perform certain tasks in an Agency directive, policy, or handbook is an assignment of work, such requirement does not constitute an official assignment of work *as overtime* under COPRA. *See id.* at 15-23.

We find that the awards are contrary to COPRA because, even assuming, without deciding, that the Agency "officially assigned" customs officers to perform firearms maintenance and canine related tasks, it did not assign officers to perform such work *as overtime*. Section 267(a)(1) of COPRA provides that "a customs officer who is officially *assigned to perform work in excess of* [forty] hours in the administrative workweek of the officer or in excess of [eight] hours in a day shall be compensated for that work at an hourly rate of pay that is equal to [two] times the hourly rate of the basic pay of the officer." 19 U.S.C. § 267(a)(1) (emphasis added). The plain language of COPRA thus requires a link between the assignment of work and a particular period of time, i.e., the assigning official must assign an employee to perform the work at a time that falls outside that employee's forty-hour week or eight-hour day. *See id.*; *cf. NTEU v. Weise*, 100 F.3d 157, 161 (D.C. Cir. 1996) (finding that the "Sunday and holiday provisions, *like the overtime provision*, indicate that" customs officers "are entitled to premium pay *if they work at certain times*") (emphasis added).

Based on the plain language of COPRA, the Arbitrator erred in concluding that customs officers were entitled to overtime under COPRA for performing certain work merely because: (1) the work was required by an official Agency policy; (2) the officers were subject to potential discipline if the work was not completed; and (3) the officers were not provided sufficient on-duty time or facilities to perform the work. *See* Second Award at 22; *cf. Bull v. United States*, 63 Fed. Cl. 580, 583 (2005) (determining that officers are eligible for overtime under other pay regimes, such as the FLSA, for work not officially assigned); *see also Bull I*, 68 Fed. Cl. at 276 (finding that officers were entitled to overtime under the FLSA for suffered or permitted work, namely firearms maintenance, laundering and processing training towels, and constructing training aids).[5] The Arbitrator failed to find that the Agency assigned customs officers to perform work, namely firearms maintenance and canine related duties, outside those officers' forty-hour week or eight hour day. Consequently, because the Arbitrator awarded customs officers overtime under COPRA for performing certain work without determining that the Agency assigned officers to perform that work as overtime, the awards are contrary to COPRA.

[4] Because an employer must satisfy both of the requirements of § 260 to establish a defense against liquidated damages, and we have found that the Agency has not demonstrated that it satisfied the first requirement, we find that it is unnecessary to address whether the Agency satisfied the second requirement. *See Local 987*, 66 FLRA at 147.

[5] The Federal Circuit in *Bull II* did not disturb the lower court's finding that the work in question, "while required, was not officially assigned" under COPRA. *See Bull II*, 479 F.3d at 1369; *see also id.* at 1370, 1381.

Accordingly, we grant the Agency's exception and set aside the portions of the awards concerning COPRA.[6]

B. The Arbitrator did not exceed his authority.

The Agency asserts that the Arbitrator exceeded his authority. Exceptions at 32-33. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See, e.g., NLRB Region 9*, 66 FLRA at 459-60; *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). Where a party fails to cite any specific limitations on an arbitrator's authority, the Authority will not find that the arbitrator disregarded specific limitations on his or her authority. *See e.g., NLRB Region 9*, 66 FLRA at 460; *AFGE, Local 3627*, 64 FLRA 547, 550 (2010) (*Local 3627*). Moreover, the Authority has found that a party fails to establish that an arbitrator exceeds his or her authority when that party misinterprets the award and relies upon that misinterpretation in arguing that the arbitrator exceeded his or her authority. *See NTEU, Chapter 45*, 52 FLRA 1458, 1463 (1997).

The Agency first argues that the Arbitrator exceeded his authority because he ignored the timeframes the parties established for travel compensatory time claims. Exceptions at 33. The Agency's argument is based on a misunderstanding of the second award. When read in context, the Arbitrator did not find that officers may submit travel compensatory claims beyond the timeframes established by the parties. Rather, the Arbitrator merely rejected the Agency's proposed six-month time period for filing such claims. *See* Second Award at 26, 27; *see also* Opp'n at 53-54. Accordingly, we conclude that the Agency's exception provides no basis for finding that the Arbitrator exceeded his authority. *See, e.g., NAGE, Local R4-45*, 55 FLRA 789, 793-94 (1999) (determining that the agency's exceeded authority exception provided no basis for finding the award deficient because it was based on a misinterpretation of the award).

The Agency also contends that the Arbitrator exceeded his authority by permitting claims by certain officers for travel compensatory time beyond January 27, 2005. Exceptions at 33. According to the Agency, these officers were "afforded [an] opportunity to claim all uncompensated time in a travel status from January 28, 2005, per applicable regulations" and guidance. *Id.* The Agency further contends that the Arbitrator exceeded his authority because he failed to "recognize that COPRA-covered employees may only earn [travel compensatory time] for time spent on official travel away from the official duty station that is not covered by the COPRA provisions." *Id.* In making these arguments, the Agency does not claim that the Arbitrator failed to resolve an issue submitted to arbitration, resolved an issue not submitted to arbitration, or awarded relief to those not encompassed within the grievance. *See NLRB Region 9*, 66 FLRA at 460; *Fed. Energy Regulatory Comm'n*, 58 FLRA 596, 598 (2003). To the extent that the Agency is claiming that the Arbitrator disregarded specific limitations on his authority, the Agency has not cited any such express limitations and, as a result, has not established that the Arbitrator disregarded such limitations. *See NLRB Region 9*, 66 FLRA at 460; *Local 3627*, 64 FLRA at 550. Accordingly, we find that these arguments do not demonstrate that the Arbitrator exceeded his authority.

Accordingly, we deny the Agency's exception.

VI. Decision

The Agency's exceptions are granted in part and denied in part, and the awards are set aside in part.

[6] Based on the foregoing, it is unnecessary to address the Agency's remaining contrary to law arguments. *See U.S. Dep't of the Interior, Nat'l Park Serv., Pictured Rocks Nat'l Lakeshore, Munising, Mich.*, 61 FLRA 404, 407 n.10 (2005). Moreover, because the Agency's contrary to law exception concerning *Mt. Clemens* challenges the Arbitrator's determination to apply that standard to COPRA claims, we find that the exception is moot and that it is unnecessary to address it. *See U.S. Dep't of Veterans Affairs, St. Cloud VA Med. Ctr., St. Cloud, Minn.*, 62 FLRA 508, 511 n.4 (2008) (finding that, because the Authority granted the contrary to law exception and set aside pertinent portions of the award, the union's exceptions as to the remedy became moot, and it was unnecessary to address them).

APPENDIX

19 U.S.C. § 267(a)(1) states:

> Subject to paragraph (2) and subsection (c) of this section, a customs officer who is officially assigned to perform work in excess of 40 hours in the administrative workweek of the officer or in excess of 8 hours in a day shall be compensated for that work at an hourly rate of pay that is equal to 2 times the hourly rate of the basic pay of the officer. For purposes of this paragraph, the hourly rate of basic pay for a customs officer does not include any premium pay provided for under subsection (b) of this section.

19 U.S.C. § 267(c)(2) states:

> A customs officer who receives overtime pay under subsection (a) of this section or premium pay under subsection (b) of this section for time worked may not receive pay or other compensation for that work under any other provision of law.

19 C.F.R. § 24.16 states, in pertinent part:

> (d) 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. However, base pay comparison of eligible employees shall not be used in the determination of staffing assignments.
>
> (3) Annuity integrity. For Customs Officers within 3 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. If the dollar value of the average yearly number of overtime hours worked by such Customs Officer exceeds 50 percent of the applicable statutory pay cap, then no overtime earning limitation based on this annuity integrity provision would apply. Waivers concerning this annuity integrity limitation may be granted by the Commissioner of Customs or the Commissioner's designee in individual cases in order to prevent excessive costs or to meet emergency requirements of Customs.

. . . .

5 U.S.C. § 5542(a) states:

> (a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates[.]

29 U.S.C. § 207(a)(1) states:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
> (1) Except as otherwise provided in this section, no employer shall employ any of

> his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 203(g) states:

> (g) "Employ" includes to suffer or permit to work.

5 C.F.R. § 551.104 states, in pertinent part:

> Suffered or permitted work means any work performed by an employee for the benefit of an agency, whether requested or not, provided the employee's supervisor knows or has reason to believe that the work is being performed and has an opportunity to prevent the work from being performed.

Member DuBester, dissenting in part:

I agree with my colleagues that the Agency's exceptions are not interlocutory. I also agree with my colleagues' determination to deny the Agency's exception to the award of liquidated damages, and the Agency's exceeded-authority exception.

However, I disagree with my colleagues' determination, "[b]ased on the plain language of COPRA,"[7] that the Arbitrator's interpretation of COPRA is contrary to law. Majority at 10. In my view, the Arbitrator's interpretation of the relevant COPRA provision accurately tracks its requirements. COPRA provides double-time overtime compensation to Customs Officers who are "officially assigned to perform work in excess of 40 hours in the administrative workweek . . . or in excess of 8 hours in a day." 19 U.S.C. § 267(a)(1).

The Arbitrator's interpretation of the two parts of this statutory standard is persuasive. As to the first requirement, the Arbitrator interpreted the "officially assigned to perform work" requirement to include "tasks given to [Customs Officers] by officials with appropriate authority by direct instruction, either orally, in writing or by other means of assignment." Initial Award at 49; Second Award at 7. The Arbitrator included weapon-cleaning and canine-care tasks required of Customs Officers by Agency directives, finding that "the mechanism by which the Agency conveys the need to have employees perform such work" is "specific," Second Award at 6, and that this was "required work," *id.* at 7. I am persuaded that the Arbitrator's view that work that is specifically required, including work specifically required by Agency directives, is "officially assigned." 19 U.S.C. § 267(a)(1). As the Arbitrator states at greater length, "[w]here the assignment is by means of an Agency regulation or policy, the statement must be mandatory, and not merely advisory or hortatory; and non-compliance with the regulation or policy must be understood to be attached to some type of adverse consequence to the employee, e.g., discipline." Second Award at 22. The weapon-cleaning and canine-care tasks in dispute satisfy these requirements.

I am also persuaded that the Arbitrator correctly interprets the second COPRA requirement – that the work assigned be "work in excess of 40 hours in the administrative workweek . . . or in excess of 8 hours in a day." *Id.* The Arbitrator finds this requirement satisfied where "the Agency does not allocate the necessary time, facilities or materials during [Customs Officers'] assigned workday for the task to be completed." *Id.* To assign work in such circumstances is, plainly, to assign work "in excess of 40 hours in the administrative workweek" or "in excess of 8 hours in a day." 19 U.S.C. § 267(a)(1). COPRA's language does not plainly include

* The Customs Officers Pay Reform Act (COPRA).

the additional requirement that my colleagues read into the law, that there be a "link" between the assignment of work and "a particular period of time." Majority at 10. I would therefore uphold this part of the Arbitrator's interpretation of COPRA as well.

The case law upon which my colleagues rely does not support interpreting COPRA to require the "link" upon which my colleagues' determination depends. *NTEU v. Weise*, 100 F.3d 157 (D.C. Cir. 1996), suggests, as my colleagues note, that to receive premium pay under COPRA an employee must "work at certain times." *Id.* at 161. The focus of the court's language is on *when* the work is *performed*, not on any "link" between the assignment of work and "a particular period of time." Majority at 10. The inapplicability of *Bull v. United States*, 479 F.3d 1365 (Fed. Cir. 2007) (*Bull II*) is even clearer. Although my colleagues rely on *Bull II* to support their interpretation of COPRA's "officially assigned" language, the *Bull II* court specifically noted that "we do not decide in this case whether any of the work in question is 'officially assigned.'" *Bull II*, 479 F.3d at 1379.

Accordingly, I dissent from this part of the Authority's decision in this case.