

**68 FLRA No. 7**

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
CUSTOMS AND BORDER PROTECTION  
BORDER PATROL  
BIG BEND SECTOR  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL BORDER PATROL COUNCIL  
LOCAL 2509  
(Union)

0-AR-5036

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DECISION

October 28, 2014

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Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members

**I. Statement of the Case**

The Union filed a grievance over the Agency's decision to treat overtime hours the grievant worked as administratively uncontrollable overtime (AUO) instead of regularly scheduled overtime (RSO) under the Federal Employees Pay Act, 5 U.S.C. §§ 5541-5549 (FEPA). Arbitrator John C. "Rusty" Allman sustained the grievance, finding that the Agency should have compensated the grievant for 8.5 hours of RSO.

The main issue before us is whether the award is contrary to law because it awards RSO instead of AUO when, according to the Agency, the requirements for RSO pay were not met. Because the Arbitrator did not find that the grievant's supervisor scheduled the overtime before the start of the grievant's work week, or that the grievant's supervisor had knowledge of the specific days and hours of overtime needed in advance of the work week, as required under 5 C.F.R. § 610.121(b)(3), we find that the award of RSO pay is contrary to law and set it aside.

**II. Background and Arbitrator's Award**

The grievant is a Border Patrol agent with the Big Bend Sector of the U.S. Border Patrol. On March 28, 2013, the grievant was scheduled to work an eight-hour shift beginning at 6:00 p.m. and ending at 2:00 a.m. the following day. Prior to the grievant's shift, some of his fellow agents apprehended six illegal alien suspects; the grievant was assigned to process the post-arrest paper work, or "A-File," of one of the suspects.

The grievant turned in the first draft of his completed A-File to his regular supervisor at approximately 11:30 p.m. Although review of an A-File generally takes thirty to sixty minutes to complete, the grievant's supervisor had six A-Files to review that evening, and he had previously arranged to leave early that night. As a result, the grievant's paperwork was passed on to another supervisor, who relieved the grievant's regular supervisor at midnight.

The subsequent supervisor did not return the grievant's A-File until approximately 5:00 to 5:30 a.m. the next day; that supervisor asked the grievant to make certain corrections. The grievant completed the requested corrections at approximately 7:00 a.m. and resubmitted the A-File to the supervisor, who then approved it. However, the supervisor ordered the grievant to remain on duty until a senior employee could approve the paperwork.

The senior employee reviewed the grievant's A-File and returned it to the grievant for corrections, which the grievant completed at approximately 10:30 a.m. At this point the grievant was allowed to go home. The Union filed a grievance when it learned that the grievant was paid for 8.5 hours of AUO for the period between 2:00 a.m. and 10:30 a.m. instead of 8.5 hours of RSO. The grievance was unresolved and was submitted to arbitration.

The Arbitrator acknowledged that: (1) the Agency regularly assigns AUO to Border Patrol agents who have detained suspected illegal immigrants and then remained on duty to complete the processing of the suspects; and (2) AUO pay is generally appropriate in these circumstances under the applicable statutes and directives. However, the Arbitrator concluded that RSO pay was appropriate in this case.

In reaching this conclusion, the Arbitrator noted that "the suspect assigned for interview was apprehended by [a]gents on a previous shift, not by [the grievant]."<sup>1</sup> The Arbitrator also noted that the grievant finished his first draft of the A-File at 11:30 p.m., leaving

<sup>1</sup> Award at 6.

approximately two-and-a-half hours for his work to be reviewed before the end of his shift. The Arbitrator found that the grievant's work should have been reviewed in forty-five to sixty minutes, but that his A-file was not returned until 7:00 a.m. – five hours after the grievant's shift should have concluded.

Finally, the Arbitrator found that the grievant “had no input as to his remaining on duty until his A-File was approved. Instead, [the grievant] was . . . ordered to remain on duty until [the senior employee] had approved his A-File.”<sup>2</sup> “[B]ecause the Agency had complete control of th[e] event and [the grievant] had no input in the decision to remain on duty,” the Arbitrator found that the grievant's “duty time past 2:00 [a.m.] should be compensated as RSO.”<sup>3</sup> In reaching this conclusion, the Arbitrator relied on an award in a similar case, in which Border Patrol agents were ordered to remain on duty past the end of their shifts to process arrestees.<sup>4</sup> In that case, the arbitrator awarded the grievants RSO instead of AUO.

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

### III. Analysis and Conclusions

The Agency argues that the award is contrary to several statutes and government-wide regulations governing the payment of different types of overtime pay.<sup>5</sup> Specifically, the Agency contends that these statutes and regulations do not allow the grievant to receive RSO pay for the overtime at issue here.<sup>6</sup>

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award *de novo*.<sup>7</sup> 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.<sup>8</sup> In making that assessment, the Authority defers to the arbitrator's underlying factual findings.<sup>9</sup>

Title 5, § 5545(c)(2) of the U.S. Code provides that: “an employee in a position in which the hours of duty cannot be controlled administratively, and which

requires substantial amounts of irregular, unscheduled overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty, shall receive” AUO instead of RSO.<sup>10</sup> However, “if an employee who receives an AUO premium works [RSO], then the employee is entitled to be paid at an hourly rate – RSO pay – for that overtime.”<sup>11</sup> AUO and RSO are mutually exclusive: when an employee eligible for both works more than eight hours in a day, those hours are either compensated as AUO (if the overtime is irregular, unscheduled work) or RSO (if the overtime is regularly-scheduled, administratively controllable work).<sup>12</sup>

A federal law enforcement officer eligible for both AUO and RSO may recover RSO only by: (1) showing that his or her “supervisor scheduled the overtime in advance of the administrative workweek”; or (2) meeting the fact-specific test set out in 5 C.F.R. § 610.121(b)(3).<sup>13</sup> Section 610.121(b)(3) provides that an employee is entitled to RSO if the agency head or a supervisor delegated the power to schedule the employee's overtime “should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so.”<sup>14</sup> Specifically, an employee must show that the supervisor: (1) “[h]ad knowledge of the specific days and hours of the work requirement in advance of the administrative workweek”; and (2) “had the opportunity to determine which employee had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement.”<sup>15</sup> Satisfying this test “requires proof that the supervisor responsible for scheduling the employee's workweek had actual knowledge of the need for the employee to work overtime before the beginning of the workweek.”<sup>16</sup>

First, the Arbitrator did not find that the disputed overtime hours were scheduled, in advance, as part of the grievant's regularly scheduled administrative workweek.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 6-7 (citing Federal Arbitration 100311-02151-3, April 22, 2013).

<sup>5</sup> See Exceptions at 1, 3-4, 9-13.

<sup>6</sup> *Id.*

<sup>7</sup> 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)).

<sup>8</sup> See *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

<sup>9</sup> *Id.*

<sup>10</sup> 5 U.S.C. § 5545(c)(2).

<sup>11</sup> *U.S. DHS, U.S. CBP, Border Patrol, El Paso Sector, El Paso, Tex.*, 67 FLRA 339, 340 (2014) (*El Paso*) (citing *U.S. DHS, ICE*, 66 FLRA 13, 15 (2011)).

<sup>12</sup> 5 C.F.R. § 550.501(a)(1); *Alozie v. United States*, 106 Fed. Cl. 765, 766 (2012) (*Alozie*).

<sup>13</sup> *Alozie*, 106 Fed. Cl. at 774; see also 5 U.S.C. § 5542(a)(1) (providing time-and-a-half compensation for “regular overtime work”); 5 C.F.R. § 550.103 (defining “[r]egular overtime work” as “overtime work that is part of an employee's regularly-scheduled administrative workweek”).

<sup>14</sup> 5 C.F.R. § 610.121(b)(3); see also *Alozie*, 106 Fed. Cl. at 774.

<sup>15</sup> 5 C.F.R. § 610.121(b)(3); see also Opp'n at 11-12.

<sup>16</sup> *El Paso*, 67 FLRA at 340 (quoting *Alozie*, 106 Fed. Cl. at 774); see also Opp'n at 12.

Second, the Arbitrator did not find that, when the grievant's regularly scheduled administrative workweek for the week in dispute was established, the Agency official who established that workweek either: (1) "[h]ad knowledge of the specific days and hours of the work requirement in advance of the administrative workweek," or (2) "had the opportunity to determine which [agent] had to be scheduled, or rescheduled, to meet the specific days and hours of that work requirement."<sup>17</sup> In this regard, the Arbitrator's findings fail to show that the grievant's supervisor could have known, in advance of the grievant's workweek, that six suspects would be arrested immediately prior to the grievant's 6:00 p.m. shift on March 28, 2013, thereby necessitating overtime.<sup>18</sup> On the contrary, the Arbitrator noted that the Big Bend Sector apprehends only 100-200 illegal alien suspects per year, which suggests that the arrest of six suspects in one day is an irregular event.<sup>19</sup> Moreover, the Arbitrator's findings fail to show that the grievant's supervisor could have determined, in advance of the workweek, that the grievant – as opposed to other agents scheduled for the same shift – would require overtime on the morning of March 29, 2013.<sup>20</sup> Accordingly, there is no "proof that the supervisor responsible for scheduling the [grievant's] workweek had actual knowledge of the need for the employee to work overtime before the beginning of the workweek."<sup>21</sup> As a result, the legal requirements for RSO pay have not been met.

In finding that the grievant was entitled to RSO pay, the Arbitrator emphasized that the grievant "had no input as to his remaining on duty" because his supervisor ordered him to remain at work.<sup>22</sup> The Arbitrator relied on an award in a similar case, in which Border Patrol agents were awarded RSO instead of AUO because they were directed to remain on duty by a supervisor.<sup>23</sup> However, the Authority overturned this award in *El Paso*.<sup>24</sup> In that case, the fact that the grievants were commanded to remain on duty was not dispositive, and the Authority found that RSO pay was not appropriate because, like here, the conditions for RSO pay were not satisfied.<sup>25</sup>

Accordingly, we find that the Arbitrator's award is contrary to law and set aside the portion of the award that directs the Agency to pay RSO pay.

#### IV. Decision

We set aside the portion of the award directing the Agency to pay RSO pay.

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<sup>17</sup> 5 C.F.R. § 610.121(b)(3).

<sup>18</sup> Award at 1-2, 6-7.

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.*

<sup>21</sup> *Alozie*, 106 Fed. Cl. At 774; *see also* Opp'n at 12.

<sup>22</sup> Award at 6.

<sup>23</sup> *Id.* at 6-7 (citing Federal Arbitration 100311-02151-3, April 22, 2013).

<sup>24</sup> *See El Paso*, 67 FLRA at 339.

<sup>25</sup> *Id.*