70 FLRA No. 68

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

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

0-AR-5277

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DECISION

September 19, 2017

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

I. Statement of the Case

The grievants are Customs and Border Patrol Officers (officers) who volunteered to work as canine handlers. To become canine handlers, officers are required to successfully complete an Agency training program. The Union filed a grievance claiming that the grievants should have been paid overtime for time spent studying for the canine training program outside the regular workday. Arbitrator Andrew M. Strongin found that the outside study time did not constitute overtime work under the Customs Officers Pay Reform Act (COPRA)[1] or the Fair Labor Standards Act (FLSA),[2] and denied the grievance.

The only question before us is whether, under the doctrine of collateral estoppel, the Arbitrator was precluded from issuing the award because the issues the award addresses were resolved in a prior Authority decision involving the same parties. Because the earlier Authority decision did not involve the same issues of fact and law, the answer is no.

II. Background and Arbitrator's Award

The Agency employs officers to prevent the illegal entry of contraband and persons into the United States. Officers may volunteer for the collateral duty of conducting searches with the assistance of canines. Selected officers must attend an Agency training program and pass an exam. The training program consists of classroom instruction and practice in canine handling. Officers who become canine handlers maintain their current job classification.

A prior canine-training program included a requirement that participants pass an eight-hour essay exam, but did not provide any study time during the regular work day. While this former program structure was in place, the Union filed a grievance alleging that officers in training were entitled to overtime pay for hours spent studying beyond the regular work day. That grievance went to arbitration, and the arbitrator issued an award (the Simmelkjaer award) finding that the Agency "officially assigned" overtime work within the meaning of COPRA because training instructors directed the grievants to study outside of regular work hours.[3] As a remedy, the arbitrator ordered the Agency to pay two hours of overtime under COPRA for each day of training. Alternatively, he found that the outside study time was compensable work under the FLSA and awarded overtime and damages under that statute.[4]

The Agency filed exceptions to the Simmelkjaer award, but the Authority upheld the award in *U.S. DHS, U.S. CBP* (*CBP*).[5] In *CBP*, the Authority agreed that the officers were entitled to compensation for "officially assigned" work under COPRA, but could not also be compensated under the FLSA because compensation under COPRA "precludes compensation for 'officially assigned' work under any other pay statute."[6] Therefore, the Authority "modif[ied] the award to exclude the alternative remedy under the FLSA," and found "it unnecessary to address the Agency's exceptions concerning the FLSA."[7]

Here, the Arbitrator found that the Agency had, subsequent to *CBP*, changed the training program with the "specific intention of precluding any further need to pay overtime for outside study."[8] The Arbitrator identified four principal changes: (1) the exam was moved to the first two weeks of training and was given at the end of the classroom-instruction segment of the program; (2) during each day of classroom instruction, the officers were given two hours of study time; (3) the

[1] 19 U.S.C. § 267.
[2] 29 U.S.C. § 201, *et seq.*

[3] *See* 19 U.S.C. § 267(a)(1) (customs officers are entitled to overtime when "officially assigned to perform work in excess of [forty] hours in the administrative workweek . . . or in excess of [eight] hours in a day").
[4] Exceptions, Ex. 11, Simmelkjaer Award at 36-44.
[5] 66 FLRA 745 (2012).
[6] *Id.* at 748 (quoting *Bull v. United States*, 479 F.3d 1365, 1378 (Fed. Cir. 2007)).
[7] *Id.* at 749.
[8] Award at 5.

exam was changed from an essay to a multiple-choice format; and (4) in contrast to the situation in *CBP*, instructors consistently reminded the officers that outside study time was not required.

The Arbitrator also found that, following *CBP*'s issuance, the parties entered into a remedial agreement requiring the Agency to notify officers that they could submit overtime claims for outside-study time. And, the grievants did submit overtime claims for outside-study time, which the Agency denied – asserting that changes to the program made overtime study unnecessary. The Union then filed a grievance, and the matter went to arbitration.

The Arbitrator framed the relevant issue as "[w]hether attendees of the Agency's [training program] . . . performed uncompensated overtime work under COPRA or the FLSA[.]"[9]

The Arbitrator found that the officers "did not perform[] uncompensated overtime work under COPRA or the FLSA."[10] First, the Arbitrator found that the grievants were not entitled to overtime compensation under COPRA because they, unlike the grievants in *CBP*, were not explicitly directed to work overtime. Applying Authority precedent, he determined that because the outside-study time was not "assigned *as overtime*," it was not "officially assigned" so as to be compensable under COPRA.[11]

As for overtime compensation under the FLSA, the Arbitrator noted that "[a]fter-hour time spent in training specifically qualifies as 'work'" under § 551.423(a)(2) of the FLSA's regulations[12] if (1) an agency directs an employee to participate in the training and (2) the purpose of the training is to improve the employee's performance of duties in his or her current position.[13] The Arbitrator found that the grievants did not meet § 551.423(a)(2)'s first prong because the Agency did not direct them to participate in the training program. He also found that the grievants "suffer[ed] no adverse effects if they [chose] not to apply for [the] collateral duty,"[14] and there were no adverse consequences if they were selected but failed to meet the requirements to become canine handlers. Therefore, the Arbitrator concluded that the grievants were not entitled to FLSA overtime because the outside study time was not "hours of work" under the FLSA.[15]

Contrary to the Union's argument, the Arbitrator determined that the Authority's decision in *CBP* did not prevent him – under the doctrine of collateral estoppel – from considering whether the outside study time was compensable overtime under the FLSA. The Arbitrator reasoned that the Authority decided *CBP* under COPRA, and did not address the Union's overtime claim under the FLSA. The Arbitrator was unpersuaded by the Union's contention that the Authority, in upholding the Simmelkjaer award under COPRA, implicitly affirmed Arbitrator Simmelkjaer's finding that outside study constituted "hours of work" under the FLSA's regulations.[16]

The Union filed an exception to the award, challenging only the denial of overtime under the FLSA, and the Agency filed an opposition.

III. Analysis and Conclusion: The award is not contrary to law.

The Union contends that by upholding the Simmelkjaer award's grant of overtime pay under COPRA in *CBP*, the Authority "necessarily" agreed with that award's finding that outside study *is* compensable "work" under the FLSA.[17] Therefore, the Union argues, the Arbitrator in this case erred by not applying the doctrine of collateral estoppel to bar his contrary finding that the outside study involved here was *not* compensable.[18]

We agree with the Arbitrator that, contrary to the Union's argument, the Authority's decision in *CBP* did not prevent him – under the doctrine of collateral estoppel – from considering whether the outside study time was compensable overtime under the FLSA. Collateral estoppel (also known as "issue preclusion") prevents a second litigation of the same issues of fact or law even in connection with a different claim or cause of action.[19] The doctrine applies to bar subsequent litigation when: (1) the same issue was involved in an earlier proceeding; (2) the issue was actually litigated in that proceeding; (3) resolution of the issue was necessary to the decision in the first case; (4) the decision in the first case – on the issue allegedly precluded – was final; and (5) the party attempting to re-raise the issue was fully represented in the first case.[20]

The Union's collateral-estoppel claim does not satisfy the doctrine's second and third requirements. Specifically, the factual and legal issues concerning the

[9] *Id.* at 2.
[10] *Id.* at 42.
[11] *Id.* at 20-21; *see U.S. DHS, U.S. CBP*, 66 FLRA 838 (2012) (Member DuBester dissenting in relevant part).
[12] 5 C.F.R. § 551.423(a)(2).
[13] Award at 25-26 (citing 5 C.F.R. § 551.423(a)(2)).
[14] *Id.* at 39.
[15] *Id.* at 24; *see also id.* at 40.
[16] *Id.* at 27.
[17] Exceptions Br. at 20.
[18] *Id.* at 15.
[19] *AFGE, Local 2258*, 70 FLRA 210, 211 (2017) (*AFGE*) (citations omitted).
[20] *Id.*

overtime claim in this case, under the FLSA, were not actually litigated in the *CBP* decision. Moreover, resolution of the FLSA claim for overtime in *CBP* was not necessary to the *CBP* decision.

Regarding the doctrine's second requirement – whether the same issues in this case were actually litigated in *CBP* – the Union's claim overlooks a key factual distinction between this case and *CBP*. In *CBP*, the Authority agreed that the officers were entitled to compensation for "officially assigned" work.[21] The Authority based this determination on the arbitrator's finding that "the [Agency's] instructors ordered the grievants to engage in the 'obligatory task' of studying after hours in order to successfully complete the training," and "that the grievants engaged in after-hours studying at the direction of their [t]raining [i]nstructors."[22]

But in the instant case, the Arbitrator found – and it is undisputed – that the Agency *did not* direct the grievants to study after hours.[23] Rather, under the revised program, the grievants here were repeatedly reminded that outside study was unnecessary.[24] Specifically, in response to *CBP*, the Agency redesigned the training program to avoid the need for overtime study time by modifying the exam format and allowing two hours of study time during regular hours.[25] Consequently, the factual and legal issues concerning the overtime claim in this case, where the grievants were *not* directed to study after hours, were not actually litigated in the *CBP* decision.

Further, regarding the doctrine's third requirement – whether resolving the FLSA issue was necessary to deciding *CBP* – the answer is clearly no. The dispositive legal question in *CBP* was whether the award's ruling that the grievants were entitled to overtime compensation under COPRA was contrary to law.[26] The Authority expressly found "it unnecessary to address the Agency's exceptions concerning the FLSA."[27]

Accordingly, because the factual and legal issues in this case – concerning overtime under the FLSA – were not actually litigated in *CBP*, and because resolution of the claim for overtime under the FLSA was not necessary to the *CBP* decision, the elements of collateral estoppel are not satisfied.[28] The Union's collateral-estoppel claim therefore does not provide a basis for finding the award deficient.

IV. Decision

We deny the Union's exception.

[21] 66 FLRA at 748.
[22] *Id.* (citation omitted).
[23] Award at 5-6, 8, 38; *see CBP*, 66 FLRA at 748.
[24] *See* Award at 6, 8.
[25] *Id.* at 5-6; *see also* Exceptions Br. at 9 n.4.
[26] 66 FLRA at 749.
[27] *Id.*
[28] *See AFGE*, 70 FLRA at 212.