

**67 FLRA No. 90**

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
BORDER PATROL EL PASO SECTOR  
EL PASO, TEXAS  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL BORDER PATROL COUNCIL  
LOCAL 1929  
(Union)

0-AR-4944

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DECISION

March 31, 2014

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

**I. Statement of the Case**

Arbitrator Patrick J. Halter directed the Agency to pay certain employees regularly scheduled overtime pay (RSO pay), rather than administratively uncontrollable overtime pay (AUO pay). The question before us is whether that direction is contrary to law. The pertinent law requires that, in order for an employee to receive RSO pay, either (1) the employee's overtime hours were scheduled in advance of the employee's administrative workweek, or (2) when the employee's workweek was scheduled, the agency both knew of the specific days and hours of the needed overtime work, and had the opportunity to determine which employees had to be scheduled to do that work. As the Arbitrator did not find – and there is no claim – that these requirements were met, we set aside, as contrary to law, the portion of the award granting RSO pay.

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

The employees at issue in this case are Border Patrol agents whose regularly scheduled tour of duty is from 4:00 p.m. to midnight. During their tour one Thursday night, six of the agents apprehended some individuals, which required the agents to work past midnight. Around 2:00 a.m. on Friday, a supervisor

instructed the agents to remain at the Agency's station to write memoranda regarding the apprehensions. The Agency accepted the memoranda of four of the agents, who then left between 4:00 a.m. and 5:00 a.m. At 9:00 a.m., the Agency gave the other two agents permission to leave without submitting their memoranda, on the condition that they submit their memoranda by 12:01 a.m. on Monday.

The Agency instructed the agents to record their post-midnight work hours as administratively uncontrollable overtime, rather than regularly scheduled overtime. As discussed in greater detail below, agencies may choose to pay employees an annual premium – AUO pay – for their administratively uncontrollable overtime, rather than paying them an hourly overtime rate.<sup>1</sup> By law, the rate for AUO pay cannot exceed twenty-five percent of the employee's rate of basic pay.<sup>2</sup> However, RSO pay, which is paid for regularly scheduled overtime, is paid at a higher rate: one-and-one-half times the employee's rate of basic pay (with some more complicated calculations in the case of law-enforcement officers whose rates of basic pay exceed the minimum rate of basic pay for General Schedule, Grade 10 positions).<sup>3</sup>

The Union filed a grievance alleging that the agents were entitled to RSO pay rather than AUO pay. The grievance went to arbitration.

The Arbitrator found that, before 2:00 a.m. on Friday, the agents performed a "continuation of [the] duties" that had begun during their tour.<sup>4</sup> But the Arbitrator determined that, after that point – when the supervisor directed the agents to write the memoranda – the agents ceased performing those duties and began performing an "assigned administrative task" that the supervisor "directed and controlled."<sup>5</sup> Although the Agency argued that it had an operational need to obtain the memoranda on Friday, the Arbitrator rejected that argument. In this regard, he noted that the Agency has an "unwritten policy" that agents must finish writing memoranda before they leave the station.<sup>6</sup> But he found that the station chief controls the policy and can grant exceptions, as he did for the two agents who left before completing their memoranda. Therefore, the Arbitrator found that the Agency had an "option" to reschedule the time for writing the memoranda.<sup>7</sup> "Based on these

<sup>1</sup> *U.S. DHS, ICE*, 66 FLRA 13, 15 (2011) (*ICE*) (citing 5 U.S.C. § 5545(c)(2); *U.S. DHS, U.S. CBP, El Paso, Tex.*, 61 FLRA 741, 742 (2006)).

<sup>2</sup> 5 C.F.R. § 550.151.

<sup>3</sup> 5 U.S.C. § 5542(a)(1), (2), (4).

<sup>4</sup> Award at 7.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 8.

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

findings as to [the] Agency's administrative control and scheduling of the memoranda," the Arbitrator concluded that the Agency properly paid the agents AUO pay only until 2:00 a.m., and should have paid them RSO pay after that.<sup>8</sup> Accordingly, he sustained the grievance.

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>9</sup> Specifically, the Agency contends that these statutes and regulations do not allow the agents to receive RSO pay in the circumstances of this case.<sup>10</sup>

If an agency requires employees to work overtime hours that cannot be controlled administratively, then, as stated previously, the agency may choose to pay an annual premium for the employees' administratively uncontrollable overtime, rather than paying an hourly overtime rate.<sup>11</sup> This premium – AUO pay – applies to "irregular or occasional overtime work that has not been scheduled in advance of the employee's regularly scheduled administrative workweek."<sup>12</sup> And AUO pay is the *only* pay that the employee may receive for irregular and occasional overtime work.<sup>13</sup>

However, if an employee who receives an AUO premium works regularly scheduled overtime, then the employee is entitled to be paid at an hourly rate – RSO pay – for that overtime.<sup>14</sup> Employees generally may get RSO pay only for overtime work that is scheduled in advance of their administrative workweeks.<sup>15</sup> As a result, for employees who receive an AUO premium, they generally may recover RSO pay only if they show that a supervisor scheduled the overtime at issue in advance of the administrative workweek.<sup>16</sup>

But there is an exception. Specifically, employees may recover RSO pay under 5 C.F.R. § 610.121(b)(3), which provides, in pertinent part:

If it is determined that the head of an agency should have scheduled a period of work as part of the employee's regularly scheduled administrative workweek and failed to do so . . . , the employee shall be entitled to [RSO pay]. In this regard, it must be determined that the head of the agency: (i) Had knowledge of the specific days and hours of the work requirement in advance of the administrative workweek, and (ii) 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>17</sup>

This regulation "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>18</sup>

The Arbitrator did not find – and there is no claim – that the disputed overtime hours were scheduled, in advance, as part of the agents' regularly scheduled administrative workweek. In addition, the Arbitrator did not find – and there is no claim – that, when the agents' 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>19</sup> As a result, the legal requirements for RSO pay are not met, and the Arbitrator's direction that the Agency pay the agents RSO pay is contrary to those legal requirements. Accordingly, we set aside the portion of the award that directs the Agency to pay RSO pay.

The Agency makes additional arguments regarding the Arbitrator's award of RSO pay,<sup>20</sup> and the Union argues that the Authority should not consider one of those arguments because the Agency failed to make

<sup>8</sup> *Id.*

<sup>9</sup> Exceptions at 4-5.

<sup>10</sup> *Id.*

<sup>11</sup> *ICE*, 66 FLRA at 15.

<sup>12</sup> *Alozie v. United States*, 106 Fed. Cl. 765, 766 (2012); see also *U.S. Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 60 FLRA 115, 116 (2004) (citing 5 C.F.R. § 551.501(c)); 5 C.F.R. § 550.103.

<sup>13</sup> *ICE*, 66 FLRA at 15; see also *Alozie*, 106 Fed. Cl. at 766 (employees may not receive both AUO pay and RSO pay for same hours of work).

<sup>14</sup> *ICE*, 66 FLRA at 15 (citing 5 U.S.C. § 5545(c)(2)).

<sup>15</sup> *Alozie*, 106 Fed. Cl. at 774.

<sup>16</sup> *Id.*

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

<sup>18</sup> *Alozie*, 106 Fed. Cl. at 774; see also *Buchan v. United States*, 33 Fed. Cl. 513, 514 (1995) (agency could not have predicted, on the last day for scheduling employees' work week, that RSO was appropriate).

<sup>19</sup> 5 C.F.R. § 610.121(b)(3).

<sup>20</sup> See Exceptions at 6-7.

that argument before the Arbitrator.<sup>21</sup> Given our decision to set aside the award of RSO pay for the reasons set forth above, we find it unnecessary to resolve the parties' remaining arguments.

#### **IV. Decision**

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

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<sup>21</sup> Opp'n at 3.