

70 FLRA No. 47

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
LAREDO FIELD OFFICE
HIDALGO PORT OF ENTRY
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 149
(Union)

0-AR-5217

DECISION

May 17, 2017

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

I. Statement of the Case

Arbitrator Patrick Halter found that the Agency violated the parties' collective-bargaining agreement when some employees were not included in certain overtime-assignment pools after the Agency determined those employees were not qualified for overtime pools in work units where the employees had already worked. The Arbitrator directed the Agency to stop violating the parties' agreement and to pay affected employees backpay for missed overtime opportunities.

The question before us is whether the award violates the Agency's right to assign work, under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute), by requiring the Agency to consider employees qualified for overtime pools based on their prior work experiences.¹ The award enforces an overtime-assignment procedure under § 7106(b)(2) of the Statute, which is an exception to § 7106(a)(2)(B).² Therefore, we find that the award does not violate management's right to assign work.

¹ 5 U.S.C. § 7106(a)(2)(B).

² *Id.* § 7106(b)(2).

II. Background and Arbitrator's Award

The parties' agreement provides bargaining-unit employees an annual opportunity to "[b]id" on the work units where they want to work during the upcoming year.³ Based in part on those bids, the Agency assigns each employee to a particular work unit, which becomes the employee's "bid unit" for the year.⁴

The parties' agreement also specifies how the Agency will assign overtime work. First, Article 35, Section 1(A)(4) explains that a "'qualified' employee 'possesses the knowledge, skills[,] and abilities necessary to perform a particular assignment.'"⁵ Then, Article 35, Section 1(A)(7) requires that each overtime pool consist of those "employees who are qualified to perform the overtime assignment."⁶ Next, the agreement defines the "[l]ow [e]arner" within an overtime pool as the employee with the "lowest dollar amount" of earnings from overtime and premium pay (as determined by a negotiated formula) at the time that an overtime opportunity occurs.⁷ Finally, the agreement requires the Agency to offer an overtime assignment to the "low earner" within the applicable overtime pool before offering the assignment to other employees in the pool.⁸

When assembling overtime pools, the Agency treated all employees as qualified for assignments in (1) the passenger-screening unit and (2) their own bid units. The Union filed a grievance claiming, in pertinent part, that the Agency's practice failed to recognize that some employees were qualified for overtime assignments in more than those two work units. The grievance went to arbitration, where, as relevant here, the stipulated issues were "[w]hether the Agency's overtime pools are in compliance with the parties' definition of 'overtime pool' . . . in Article 35, [Section 1(A)(7)] of the parties' [a]greement," and, if not, "what shall be the remedy?"⁹

The Arbitrator found that the agreement reserved to management the right to determine the necessary qualifications for an overtime assignment and whether an employee met those qualifications. But the Arbitrator found that, by limiting employees'

³ Award at 12 (quoting Collective-Bargaining Agreement (CBA) Art. 13).

⁴ *E.g., id.* at 11.

⁵ *Id.* (quoting CBA Art. 35, § 1(A)(4)); *see* Opp'n, Attach. A at 165 (CBA Art. 35, § 1(A)(4)).

⁶ Award at 11 (quoting CBA Art. 35, § 1(A)(7)); *see* Opp'n, Attach. A at 165 (CBA Art. 35, § 1(A)(7)).

⁷ Opp'n, Attach. A at 165 (CBA Art. 35, § 1(A)(7)) (citing CBA Art. 35, § 1(H) as the source of the formula to determine low-earner status); *see* Award at 11 (discussing "low earner").

⁸ Award at 11 (referring to the "call-out order" in CBA Art. 35, § 1(E)(1)(a)-(g)); *see* Opp'n, Attach. A at 168 (CBA Art. 35, § 1(E)(1)(a)-(g)).

⁹ Award at 11.

overtime-pool eligibilities to only the passenger-screening unit and their own bid units, the Agency had not complied with Article 35, Section 1(A)(7)'s definition of "overtime pool."¹⁰ As an example, the Arbitrator found that the Agency would assign employees to work outside the passenger-screening unit and their own bid units during the employees' regularly scheduled duty hours, but then find those same employees unqualified for the overtime pools in the units where they had worked during regular-duty hours. In addition, the Arbitrator found that the Agency treated employees as unqualified for overtime pools in work units from which the employees may have only recently transferred. The Arbitrator found that these practices were inconsistent with the parties' agreement.

Consequently, the Arbitrator directed the Agency to consider employees' "actual work experience[s]" when assembling future overtime pools.¹¹ In particular, he directed that the Agency may not consider an employee qualified to perform duties in a work unit "on regular time" but consider that employee unqualified to perform the same duties "on overtime."¹² He also directed the Agency to pay affected employees backpay for missed overtime opportunities.

The Agency filed an exception to the award, and the Union filed an opposition.

III. Analysis and Conclusion: The award is not contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.

The Agency asserts that the award denies management the right to determine who is qualified for overtime assignments, which is part of management's right to assign work under § 7106(a)(2)(B) of the Statute.¹³ Further, the Agency asserts that the Arbitrator did not enforce a contract provision negotiated under § 7106(b), which provides exceptions to management's rights under § 7106(a).¹⁴ In contrast, the Union argues that the Arbitrator enforced a negotiated procedure for overtime assignments under § 7106(b)(2).¹⁵

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.¹⁶ 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.¹⁷ When a party alleges that an arbitrator's award is contrary to a management right under § 7106(a), the Authority first assesses whether the award affects the exercise of the asserted management right.¹⁸ If the award affects the right, then the Authority examines, as relevant here, whether the award provides a remedy for a contract provision negotiated under § 7106(b).¹⁹

As the Agency correctly observes,²⁰ "requiring an agency to adhere to objective criteria in assigning overtime affects management's right to assign work."²¹ Here, the award requires the Agency to assign overtime according to Article 35's criteria.²² Thus, we find that the award affects the right to assign work.²³

As to whether the award provides a remedy for a procedure negotiated under § 7106(b)(2),²⁴ the Arbitrator directed the Agency to consider an employee qualified for overtime pools in units where the Agency had previously assigned the employee to work.²⁵ The Authority has recognized that, when an agency assigns an employee to perform certain duties, the agency necessarily finds the employee qualified to perform those duties.²⁶ Thus, when an arbitrator enforces an overtime-rotation procedure, § 7106(b)(2) authorizes the arbitrator to apply the agency's previous findings on

¹⁶ *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

¹⁷ *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).

¹⁸ *U.S. Dep't of Transp., FAA*, 68 FLRA 402, 404 (2015) (*FAA*).

¹⁹ *Id.*

²⁰ Exception Br. at 9 (citing *Indian Head*, 55 FLRA at 600; *Laborers*, 9 FLRA at 706).

²¹ *Indian Head*, 55 FLRA at 600 (citing *U.S. Dep't of Commerce, Patent & Trademark Office*, 37 FLRA 1204, 1214 (1990)).

²² See Award at 14 (directing Agency to "cease and desist from violating Article 35").

²³ See *Indian Head*, 55 FLRA at 600.

²⁴ See *FAA*, 68 FLRA at 404 (after finding effect on management right, Authority examines whether award provides a remedy for § 7106(b) contract provision); Opp'n at 12-16 (arguing that award enforces § 7106(b)(2) procedure).

²⁵ Award at 13.

²⁶ See *U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 4, 6 (2007) (*Puget Sound*); *U.S. DOD, Def. Logistics Agency, Red River Army Depot, Texarkana, Tex.*, 55 FLRA 523, 524, 526 (1999) (*Texarkana*); *U.S. Dep't of the Treasury, Customs Serv., Dall., Tex.*, 37 FLRA 1022, 1028 (1990) (*Customs*).

¹⁰ *Id.* at 12 (citing CBA Art. 35, § 1(A)(7)).

¹¹ *Id.* at 13.

¹² *Id.*

¹³ Exception Br. at 9 (citing 5 U.S.C. § 7106(a)(2)(B); *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Indian Head, Md.*, 55 FLRA 596, 600 (1999) (*Indian Head*); *Laborers Int'l Union of N. Am., AFL-CIO, Local 1276*, 9 FLRA 703, 706 (1982) (*Laborers*)).

¹⁴ *Id.* at 10-11 (asserting that award is not enforceable under § 7106(b)(2) or (3)).

¹⁵ *E.g.*, Opp'n at 14 & n.9.

employees' qualifications to perform duties within the rotation.²⁷

In this case, by directing the Agency to consider employees' prior work experiences in determining their qualifications for overtime pools, the Arbitrator required only that the Agency abide by *its own previous determinations* that the employees were qualified to perform work in the units where the Agency previously assigned them.²⁸ Consistent with Authority precedent, we find that this remedy enforces an overtime-assignment procedure under § 7106(b)(2).²⁹ Therefore, the award is not contrary to § 7106(a)(2)(B), and we deny the Agency's contrary-to-law exception. Consequently, we find it unnecessary to address the Union's claim³⁰ that the Authority's Regulations bar the Agency from arguing that the pertinent provisions of Article 35 are not enforceable under § 7106(b).³¹

IV. Decision

We deny the Agency's exception.

²⁷ *Puget Sound*, 62 FLRA at 4, 6 (citing *Indian Head*, 55 FLRA at 599) (finding that arbitrator could enforce § 7106(b)(2) overtime-assignment procedure by providing employee backpay for improper exclusion from overtime rotation because, by assigning the employee similar work before, "management had determined that the [employee] possessed the necessary qualifications to perform the disputed work"); cf. *Texarkana*, 55 FLRA at 524, 526 (finding that § 7106(b)(3) authorized enforcing contract provision on assigning overtime duties because the "[a]gency had assigned [the grievants] to those duties previously," and arbitrator merely "applied the [a]gency's prior determination that they were qualified"); *Customs*, 37 FLRA at 1028 (finding no effect on management's right to assign work where arbitrator directed agency to provide grievants with "future work schedules and assignments consistent with" their previous ones, because arbitrator "applied the [a]gency's previous determination that they were qualified").

²⁸ *E.g.*, Award at 13 (finding that the Agency may not consider an employee qualified to perform duties in a work unit "on regular time" but unqualified to perform those duties "on overtime").

²⁹ See *Puget Sound*, 62 FLRA at 6.

³⁰ Opp'n at 8-11.

³¹ See *USDA, U.S. Forest Serv., Law Enf't & Investigations, Region 8*, 68 FLRA 90, 92-93 (2014) (treating argument as properly before the Authority, where argument denied on its merits).