67 FLRA No. 62

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

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4598
(66 FLRA 838 (2012))

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ORDER DENYING
MOTION FOR RECONSIDERATION

February 14, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring)

I. Statement of the Case

Arbitrator M. David Vaughn found in an initial award and a second award that customs officers (officers) were entitled to overtime pay under the Customs Officers Reform Act (COPRA).[1] The Agency filed exceptions to the Arbitrator's awards. In *U.S. DHS, U.S. CBP* (*Customs II*),[2] the Authority found that, based on the plain language of COPRA, the Arbitrator erred when he found that officers were entitled to overtime pay at twice their normal rate of pay, as provided for by COPRA, rather than the time-and-a-half rate required under the Fair Labor Standards Act (FLSA).[3] The Authority set aside that portion of the award. And the Union filed this motion for reconsideration.

The question before us is whether the Union has established extraordinary circumstances that warrant reconsideration of *Customs II*. In its motion for reconsideration, the Union asks that we reconsider the Authority's previous conclusion that the Arbitrator erred when he found that the officers were entitled to overtime pay under COPRA. Because the Union's arguments do not provide a basis for granting reconsideration, we deny the motion.

II. Background

A. Arbitrator's Awards

The Union filed grievances concerning overtime pay for officers who performed firearms maintenance and canine-related duties. As relevant here, the parties disputed what it meant for an officer to be "officially assigned to perform work" as that term is defined in COPRA.[4]

In an initial award, the Arbitrator found that, under COPRA, the term "officially assigned" means "work resulting from tasks [assigned] to [officers] by officials with appropriate authority by direct instruction, either orally, in writing[,] or by other means."[5] In a second award, the Arbitrator elaborated further on this standard and determined that the term "other means" includes assignments made pursuant to a mandatory Agency policy or regulation that would result in "some type of adverse consequence to the employee" if the employee fails to comply.[6] Applying his interpretation of the term "officially assigned," the Arbitrator found that the officers were entitled to overtime for firearms maintenance and canine-related duties 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 duty time or facilities to perform the tasks.[7]

B. Decision in *Customs II*

The Agency filed exceptions to the Arbitrator's awards, and in *Customs II*, the Authority found that portions of the Arbitrator's awards were contrary to "[t]he plain language" of COPRA.[8] In this regard, the Authority found that an award of overtime 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."[9] The Authority concluded that the awards were contrary to COPRA because the Arbitrator found that the officers were entitled to overtime without determining that the

[1] 19 U.S.C. § 267.
[2] 66 FLRA 838 (2012) (Member DuBester dissenting in part).
[3] 29 U.S.C. §§ 201-219.
[4] 19 U.S.C. § 267(a)(1).
[5] *Customs II*, 66 FLRA at 839 (first and second alterations in original) (quoting Initial Award at 49) (internal quotation marks omitted).
[6] *Id.* (quoting Second Award at 22) (internal quotation marks omitted).
[7] *Id.*
[8] *Id.* at 843.
[9] *Id.* (citing 19 U.S.C. § 267(a)(1); *NTEU v. Weise*, 100 F.3d 157, 161 (D.C. Cir. 1996)).

Agency assigned the officers to perform firearms maintenance and canine-related duties outside of their forty-hour week or eight-hour day.[10]

Subsequently, the Union filed this motion for reconsideration of the Authority's decision.

III. Preliminary Matters

The Union requests oral argument.[11] Section 2429.6 of the Authority's Regulations provides that the Authority, in its discretion, may request or permit oral argument in any matter "under such circumstances and conditions as they deem appropriate."[12] The Authority has denied requests for oral argument where the record provided a sufficient basis on which to render a decision.[13] We deny the Union's request for oral argument because the record in this case is sufficient to resolve the Union's motion.[14]

The Agency requests permission to file an opposition to the Union's motion for reconsideration. The Authority typically will grant a request to file an opposition to a motion for reconsideration.[15] Because no basis is presented to depart from this practice, we grant the Agency's request.

The Union also requests permission to file a supplemental submission to reply to the Agency's opposition. In particular, the Union seeks to respond to the Agency's claim that the Union's arguments – concerning the Authority's plain-language analysis in *Customs II* and compensation for mandatory overtime work – should not be considered because these arguments were not raised to the Arbitrator or in the Union's opposition to the Agency's exceptions.[16] It is unnecessary for us to decide this issue because, even assuming the arguments were properly raised, we find, for the reasons discussed below, that these arguments do not show that extraordinary circumstances warrant reconsideration of *Customs II*.

IV. Analysis and Conclusions: The Union has failed to establish extraordinary circumstances warranting reconsideration of the Authority's decision in *Customs II*.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision.[17] A party seeking reconsideration under § 2429.17 bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action.[18] The Authority has found that errors in its conclusions of law or factual findings constitute extraordinary circumstances that may justify reconsideration.[19] The Authority also has found extraordinary circumstances where an intervening court decision or change in the law affected dispositive issues, or the moving party has not been given an opportunity to address an issue raised sua sponte by the Authority in its decision.[20] But attempts to relitigate conclusions reached by the Authority are insufficient to establish extraordinary circumstances.[21]

The Union argues that extraordinary circumstances warrant reconsideration because the Authority erred "when it rejected the Arbitrator's interpretation of COPRA as contrary to the statute's plain text."[22] Specifically, the Union contends that the Arbitrator's interpretation was reasonable and that the Authority erred by applying a plain-meaning analysis to reject it.[23] The Union also asserts that the Authority's conclusion that COPRA "requires a link between the

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[10] *Id.* (citing *Bull v. United States*, 63 Fed. Cl. 580, 583 (2005) (*Bull I*) (COPRA does not preclude overtime under other pay regimes, including FLSA), *aff'd*, 479 F.3d 1365 (Fed Cir. 2007) (*Bull III*); *Bull v. United States*, 68 Fed. Cl. 212, 276 (2005) (*Bull II*) (officers entitled to FLSA overtime for "suffered or permitted" overtime)); *see also id.* at n.5 (citing *Bull III*, 479 F.3d at 1369, 1370, 1381) (noting that Federal Circuit did not disturb the lower court's finding that although work in question was required, it was not officially assigned under COPRA).

[11] Mot. for Recons. at 38.

[12] 5 C.F.R. § 2429.6.

[13] *E.g., AFGE, Local 3937*, 65 FLRA 21, 21 n.1 (2010); *Nat'l Mediation Bd.*, 56 FLRA 320, 320 n.3 (2000) (*Mediation Bd.*).

[14] *See, e.g., Mediation Bd.*, 56 FLRA at 320 n.3.

[15] *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 352, 353 (2005) (citing *Library of Cong.*, 60 FLRA 939, 939 n.2 (2005)).

[16] Union's Mot. to File Supplemental Submission at 2; *see also* Agency's Opp'n to Mot. for Recons. at 4, 7-8.

[17] *E.g., U.S. DHS, U.S. CBP*, 66 FLRA 1042, 1043 (2012).

[18] *Id.*; *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935, 936 (2000); *U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott Air Force Base, Ill.*, 50 FLRA 84, 85 (1995) (*Scott Air Force Base*).

[19] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 65 FLRA 256, 257 (2010); *Scott Air Force Base*, 50 FLRA at 86-87.

[20] *Scott Air Force Base*, 50 FLRA at 86-87.

[21] *E.g., Ass'n of Civilian Technicians, P.R. Army Chapter*, 62 FLRA 144, 145 (2007) (*ACT*) ("The Authority has uniformly held that attempts to relitigate conclusions reached by the Authority are insufficient to satisfy the extraordinary circumstances requirement." (citing *Library of Cong.*, 60 FLRA at 941)).

[22] Mot. for Recons. at 5.

[23] *Id.* at 6-7 (citing *Maharaj v. Stubbs & Perdue, P.A.*, 681 F.3d 558, 569 (4th Cir. 2012); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237-38 (D.C. Cir. 2008); *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 986 (1st Cir. 1995)).

assignment of work and a particular period of time"[24] improperly adds a requirement that is not supported by COPRA's plain language.[25]

Additionally, the Union contends that the Authority cites no legislative history to support its decision,[26] and that the Authority's interpretation of COPRA is not supported by relevant case law.[27] The Union argues, in this regard, that the cases cited by the Authority do not support the decision.[28] Specifically, the Union asserts that the court in *Bull v. United States*[29] did not analyze the same section of COPRA that is at issue in this case,[30] and that the court in *NTEU v. Weise* (*NTEU*)[31] defined the term "customs officer" rather than "officially assigned."[32]

We find that the foregoing arguments fail to demonstrate extraordinary circumstances that justify reconsideration of *Customs II*. In that decision, the Authority found that COPRA requires a link between the assignment of work and a particular period of time. The Authority concluded, therefore, that the Arbitrator erred when he found that the officers were entitled to overtime without determining that the Agency assigned the officers to perform work outside of their regular hours.[33] The Union's arguments are nothing more than an attempt to relitigate these conclusions and the bases on which they were reached, that is, to also relitigate the Authority's reliance on *NTEU* and the *Bull* decisions.[34] As such, they provide no basis for granting reconsideration.[35]

In addition, the Union asserts that *Customs II* "dictates [a] harsh result"[36] because it "could prevent thousands of employees from receiving any compensation for their mandatory overtime work."[37] Specifically, the Union argues that extraordinary circumstances exist because the Authority's decision could impact or undermine the ability of employees to receive overtime pay. The Authority has previously rejected similar arguments – that an Authority decision would have an adverse impact on a pay-for-performance program – and found that such arguments did not establish extraordinary circumstances.[38] Therefore, this claim provides no basis for granting reconsideration.

The Union further argues that extraordinary circumstances exist for reconsideration because it was unable to present "crucial" arguments with respect to the Authority's decision in *U.S. DHS, U.S. CBP* (*Customs I*).[39] *Customs I* issued after the Union filed its opposition to the Agency's exceptions in *Customs II*, and the Union contends that the Arbitrator's interpretation of COPRA in this case is consistent with the Authority's interpretation of COPRA in *Customs I*.[40] In particular, the Union asserts that the tasks "mandated by Agency policy"[41] are "obligatory"[42] in the same manner that mandated study time was found to constitute an "officially assigned" duty in *Customs I*.[43] In *Customs I*, however, the arbitrator found that employees were directed by instructors to study after hours.[44] But here, the Arbitrator did not find that the Agency assigned officers to perform work after their regular hours.[45] As a result, *Customs I* is distinguishable and does not establish a basis for reconsideration.

Accordingly, we find that the Union has failed to establish that extraordinary circumstances exist to warrant reconsideration of *Customs II*. While Member DuBester reaffirms his dissent in *Customs II*, consistent with the Authority's longstanding precedent in cases involving similar circumstances,[46] he joins in denying the motion for reconsideration.

V. Order

We deny the Union's motion for reconsideration.

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[24] *Id.* at 13 (quoting *Customs II*, 66 FLRA at 843) (internal quotation marks omitted).
[25] *Id.* (citing *Customs II*, 66 FLRA at 846-47 (Dissenting Opinion of Member DuBester)); *see also id.* at 14, 17.
[26] *Id.* at 23; *see also id.* at 36-37.
[27] *Id.* at 15-24 (citing *Customs II*, 66 FLRA at 843, 847).
[28] *Id.* at 17-19 (citing *Bull III*, 479 F.3d at 1378 n.9, 1379; *NTEU*, 100 F.3d at 161; *Bull I*, 63 Fed. Cl. at 583; *Customs II*, 66 FLRA at 843 n.5, 847).
[29] 63 Fed. Cl. at 581.
[30] Mot. for Recons. at 18-19 (citing *Customs II*, 66 FLRA at 847; Opp'n at 21-23).
[31] 100 F.3d at 157-61.
[32] Mot. for Recons. at 19 (citing *Customs II*, 66 FLRA at 843) (internal quotation marks omitted).
[33] *Customs II*, 66 FLRA at 843.
[34] *Bull III*, 68 Fed. Cl. 212; *Bull II*, 479 F.3d 1365; *Bull I*, 63 Fed. Cl. 580.
[35] *E.g., U.S. Dep't of the Treasury, IRS*, 67 FLRA 58, 60 (2012) (attempt to relitigate conclusions reached by the Authority did not provide a basis for granting reconsideration); *ACT*, 62 FLRA at 145 (same).
[36] Mot. for Recons. at 25.
[37] *Id.* at 24; *see also id.* at 25-28.
[38] *E.g., Library of Cong.*, 60 FLRA at 941.
[39] 66 FLRA 745 (2012).
[40] Mot. for Recons. at 29; *see also id.* at 1, 5, 30-37.
[41] *Id.* at 32.
[42] *Id.* (internal quotation marks omitted).
[43] *Id.* at 33 (internal quotation marks omitted).
[44] 66 FLRA at 748.
[45] *Customs II*, 66 FLRA at 843.
[46] *E.g., OPM*, 61 FLRA 657, 657 n.1 (2006); *NAGE, Local R3-77*, 60 FLRA 258, 260 n.5 (2004); *IBEW, Local 80*, 55 FLRA 1107, 1108 n.* (1999); *AFGE*, 30 FLRA 371, 372 n.* (1987).

Member Pizzella, concurring:

Albert Einstein is said to have defined insanity as "doing the same thing over and over again and expecting different results."

The same question has been presented to us by the same parties three times – first on exceptions to an award of Arbitrator Robert T. Simmelkjaer in *U.S. DHS, U.S. CBP* (*Customs I*)[1] and twice in this proceeding. Moreover, this case concerns claims for overtime pay dating back to 1998.[2] Indeed, at this point, the claims are not only older than the canines that are maintained by the officers, they are older than the Agency itself.[3] And many of the original grievants – who, let us not forget, are still waiting to receive the Fair Labor Standards Act overtime that the Agency improperly withheld[4] – are likely retired.

This case has dragged on because the parties were "unable to agree on a process for the submission and payment of individual claims for . . . overtime," requiring the Arbitrator to develop one for them.[5] And despite the many years this issue has been ongoing, when the issue arrived here the second time, we had to resolve whether the award was "final," as opposed to "interlocutory."[6] Given the length of time, and the importance of the issue to the hard-working men and women of Customs and Border Protection, one would think the parties could have at least gotten that far without our intervention.

As I noted in *U.S. DHS, CBP*, the filing of frivolous grievances – including the filing of repetitive grievances over the same matter (or the refusal to settle grievances that arbitrators and the Authority have consistently resolved in favor of the grievant) in the hope of achieving a different result – "unwisely consumes federal resources . . . [and] undermine[s] 'the effective conduct of [government] business.'"[7]

Thank you.

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[1] 66 FLRA 745 (2012).
[2] *U.S. DHS, U.S. CBP*, 66 FLRA 838, 839 (2012) (*Customs II*).
[3] *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. No. 108-32 at 4 (2003), *reprinted in* 6 U.S.C. § 552 note.
[4] *Customs II*, 66 FLRA at 842-43.
[5] *Id.* at 839.
[6] *Id.* at 841-42.
[7] 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella) (alteration in original) (quoting 5 U.S.C. § 7101(a)(1)(B)).