68 FLRA No. 136

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

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 160
(Union)

0-AR-5102

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DECISION

August 26, 2015

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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

This matter arose when the Agency began denying all official-time requests by customs officers (officers) who regularly worked night shifts and earned premium pay for those shifts (night pay). Rather than pay the officers night pay for time that they spent performing representational activities during the course of their regular night shifts – which the Agency claimed would be unlawful – the Agency required the officers to switch to a day shift in order to use official time. Arbitrator Louise B. Wolitz rejected the Agency's claim that paying night pay to the officers would be unlawful, and she found that the Agency's actions violated the parties' collective-bargaining agreement and the Federal Service Labor-Management Relations Statute (the Statute).[1] There are two questions before us.

The first question is whether the Arbitrator's award is contrary to an Agency-wide regulation. Because § 2425.6(e)(1) of the Authority's Regulations requires an excepting party to support each of its exceptions,[2] and the Agency fails to support this exception, the answer is no.

The second question is whether the award is contrary to law because the Arbitrator erred in finding that it would be lawful for the Agency to pay officers night pay for the time that they spend performing representational activities while on official time. Because the Customs Officer Pay Reform Act (COPRA)[3] provides that officers are entitled to night pay during their regularly scheduled work hours, regardless of the type of work that they perform during their night shifts, the answer is no.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' agreement and the Statute when it denied the officers' requests for official time during their regularly scheduled night shifts. The Agency denied the grievance on the basis that it could not lawfully pay night pay for representational activities performed on official time. The grievance went to arbitration.

At arbitration, the parties stipulated that "[t]he Agency did not provide the Union with reasonable advance notice or an opportunity to bargain over the elimination of the use of official time by [officers] . . . scheduled for . . . night shift[s]."[4] The parties also stipulated to the issues, in pertinent part, as whether the Agency violated the parties' agreement or the Statute by doing so.

Before the Arbitrator, the Agency asserted that COPRA authorizes the Agency's payment of night pay only for "work" performed by officers during a night shift.[5] According to the Agency, it could not lawfully pay night pay for time that officers spend performing representational activities because those activities do not constitute "work" under COPRA.[6] Similarly, the Agency argued that representational activities do not constitute "nightwork" within the meaning of 5 U.S.C. § 5545 – the law that authorizes night pay for government employees, generally.[7] For support, as relevant here, the Agency cited Authority decisions addressing the meaning of "work" under a variety of laws and regulations, and Authority decisions concerning employees' entitlement to premium pay for the time that they spent performing

[1] 5 U.S.C. §§ 7101-7135.
[2] 5 C.F.R. § 2425.6(e)(1).
[3] 19 U.S.C. § 267.
[4] Award at 9 (emphasis omitted).
[5] *Id.* at 10-11 (quoting 19 U.S.C. § 267(b)(1)(A)) (internal quotation marks omitted).
[6] *Id.* at 10 (internal quotation marks omitted) (emphasis omitted).
[7] *Id.* at 11-12 (discussing 5 U.S.C. § 5545) (internal quotation marks omitted) (emphasis omitted).

representational activities outside of their regularly scheduled hours of work.[8]

In contrast, the Union noted that COPRA entitles an officer to night pay "[i]f the majority of the hours of regularly scheduled work" of the officer occur between particular hours.[9] According to the Union, because COPRA does not define the term "work" and "makes no distinction between different kinds of work," COPRA is properly read as requiring night pay for "any kind of work," including representational activities performed on official time.[10] In support of this argument, the Union argued that COPRA and the Fair Labor Standards Act (FLSA) "must be read together" when determining officers' entitlement to premium pay.[11] Therefore, the Union argued, the FLSA's implementing regulations – including 5 C.F.R. § 551.424 – apply. And § 551.424 provides that "'[o]fficial time' granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work."[12]

The Arbitrator stated that she was "not persuaded by the Agency's argument that it is illegal to pay night [pay] to employees to perform representational activities."[13] In this regard, she noted that "[t]he Agency acknowledge[d] that 'work' is left undefined" in COPRA.[14] Further, she found that "there is no language that specifically excludes representational activities" from the meaning of "work" for purposes of COPRA or § 5545.[15] Additionally, she noted that § 5545 provides generally for night pay for "*regularly scheduled*" nightwork.[16] Moreover, she agreed with the Union that § 551.424 supports a finding that night-shift officers who perform representational activities "during those hours when the employee is otherwise in a duty status" are entitled to night pay.[17] Relatedly, the Arbitrator distinguished the Authority decisions cited by the Agency on the basis that they involved employees seeking premium pay for performing representational duties at times when they were "not otherwise on duty."[18] Here, because the officers "were otherwise in a duty status, during their regular working hours," the Arbitrator found that they were entitled to night pay for their official time.[19]

The Arbitrator concluded that the Agency violated the parties' agreement, 5 U.S.C. § 6101, and the Statute when the Agency denied requests for official time during night shifts and rescheduled the requesting officers to day shifts "even when [the official-time] request [was] for fifteen or thirty minutes."[20] Because of the large number of Agency employees who work night shifts, the Arbitrator noted that the Agency's action "affect[ed] approximately two-thirds of the bargaining[-]unit employees . . . , who [were] no longer able to act in a representational capacity, or seek the [U]nion's assistance to pursue grievances unless they . . . [were] willing to forego premium pay to which they are entitled."[21] As remedies, the Arbitrator directed the Agency to cease and desist its statutory and contractual violations, post a notice regarding its violations, and compensate affected employees with backpay.

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

III. Analysis and Conclusions

A. The award is not contrary to an Agency-wide regulation.

The Agency states that the Arbitrator's award is contrary to an Agency-wide regulation.[22] Section 2425.6(e)(1) of the Authority's Regulations provides, in relevant part, that an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[23] In its exceptions, the Agency does not cite any Agency-wide regulations, or provide any arguments in support of this ground. Therefore, we deny this exception under § 2425.6(e)(1) of the Authority's Regulations.[24]

[8] *Id.* at 10-14 (discussing *AFGE, National Council of HUD Locals 222, AFL-CIO*, 60 FLRA 311 (2004) (*HUD*); *U.S. Dep't of Transp., FAA*, 60 FLRA 20 (2004) (*FAA*); *Wright-Patterson Air Force Base, Ohio, 2750th Air Base Wing*, 23 FLRA 390 (1986) (*Wright-Patterson*); *Warner Robins Air Logistics Ctr., Warner Robins, Ga.*, 23 FLRA 270 (1986) (*Warner Robins*)) (internal quotation marks omitted).
[9] 19 U.S.C. § 267(b)(1)(A).
[10] Award at 17.
[11] *Id.* (citing *Bull v. United States*, 479 F.3d 1365 (Fed. Cir. 2007); *Bull v. United States*, 63 Fed. Cl. 580 (2005)).
[12] *Id.* at 18 (quoting 5 C.F.R. § 551.424(b)).
[13] *Id.* at 36.
[14] *Id.* (quoting 19 U.S.C. § 267(b)(1)(A)) (emphasis omitted).
[15] *Id.* (emphasis omitted).
[16] *Id.*
[17] *Id.* at 37 (quoting 5 C.F.R. § 551.424).
[18] *Id.* at 36-37 (discussing *FAA*, 60 FLRA at 23-24; *Warner Robins*, 23 FLRA 270).
[19] *Id.* at 37.
[20] *Id.* at 39.
[21] *Id.*
[22] Exceptions Form at 5.
[23] 5 C.F.R. § 2425.6(e)(1).
[24] *E.g., AFGE, Local 31*, 67 FLRA 333, 334 (2014).

B. The award is not contrary to law.

The Agency makes a number of arguments that the award is contrary to law, all of which are premised on the proposition that it is unlawful for the Agency to pay night pay to officers for time that they spend performing representational activities.[25] In response, the Union argues that COPRA permits the Agency to pay night pay for time that officers spend performing representational activities, so long as those activities occur during the officers' "regularly scheduled work hours."[26]

In resolving an exception claiming that an award is contrary to law, the Authority reviews any question of law raised by an exception and the award de novo.[27] In applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[28] Under this standard, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.[29]

First, the Agency argues that COPRA "prohibits payment of night [pay] for representational activities."[30] As discussed above, COPRA provides that customs officers are entitled to night pay "[i]f the majority of the hours of regularly scheduled work" of the officer occur during certain hours.[31] Although COPRA does not define "work,"[32] the Agency asserts that it defines "customs officer"[33] as an individual "performing those functions specified by regulation . . . for a customs inspector."[34] And the Agency argues that "functions specified by regulation"[35] means those functions found in the officers' position descriptions – not representational activities.[36] For support, the Agency cites[37] *NTEU v. Weise* (*Weise*).[38] In *Weise*, however, the U.S. Court of Appeals for the District of Columbia Circuit explained that the premium-pay provisions of COPRA "turn on *who* is performing the work," not "what functions" they perform.[39] In other words, the court held that customs officers are entitled to premium pay under COPRA and its implementing regulations based solely on their position and the hours that they work – not based on the functions that they perform during those hours.[40] Thus, *Weise* does not support the Agency's argument. More importantly, the Agency fails to establish that representational activities that officers perform during their "regularly scheduled" night shifts cannot be considered "work" for purposes of night pay under COPRA.[41] Consequently, the Agency's argument provides no basis for finding the award deficient as contrary to law.

Next, the Agency argues that the Arbitrator improperly interpreted 5 U.S.C. § 5545 as authorizing night pay for official time.[42] Section 5545 defines "nightwork" as "regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m.,"[43] but is silent as to the definition of "work."[44] According to the Agency, 5 C.F.R. § 551.401(a), which implements § 5545, defines "hours of work" as "all time spent by an employee performing an act for the benefit of an agency and under the direction and control of the agency."[45] However, § 551.401(b) provides, in relevant part, that "hours of work" also includes "hours in a paid nonwork status,"[46] and § 551.401(d) provides that "[t]ime that is considered hours of work under this part shall be used *only* to determine an employee's entitlement to minimum wages or overtime pay under the [FLSA], and shall not be used to determine hours of work for pay administration under . . . any other authority."[47] By its plain wording, § 551.401 neither defines hours of work for pay administration under COPRA (a different "authority") nor addresses representational activities.[48] Accordingly, the Agency provides no basis for finding that § 5545 or § 551.401 prevents the Agency from paying night pay for the time that officers spend performing representational activities during their "regularly scheduled" night shifts.[49] The Agency's argument, therefore, provides no basis for finding the award contrary to law.

[25] Exceptions Br. at 10-30.
[26] Opp'n at 9.
[27] *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)).
[28] *USDA, Forest Serv.*, 67 FLRA 558, 560 (2014).
[29] *Id.* (citation omitted).
[30] Exceptions Br. at 10.
[31] 19 U.S.C. § 267(b)(1); *see also* 19 C.F.R. § 24.16(g)(3) ("A [c]ustoms [o]fficer who performs any regularly-scheduled night work shall receive [night pay] for that work . . . .").
[32] 19 U.S.C. § 267(b)(1).
[33] *Id.* § 267(e)(1) (internal quotation marks omitted).
[34] Exceptions Br. at 12 (citing 19 U.S.C. § 267(e)(1)) (internal quotation marks omitted).
[35] 19 U.S.C. § 267(e)(1).
[36] Exceptions Br. at 13.
[37] *Id.*
[38] 100 F.3d 157 (D.C. Cir. 1996).
[39] *Id.* at 161.
[40] *See id.* at 161-62 (rejecting an argument that employees who performed the functions listed in the position description for a customs officer, but who were not assigned to one of the job descriptions enumerated in 19 C.F.R. § 24.16(b)(7), were entitled to premium pay under 19 U.S.C. § 267).
[41] 19 U.S.C. § 267(b)(1).
[42] Exceptions Br. at 26.
[43] 5 U.S.C. § 5545; *see also* 5 C.F.R. § 550.121 ("nightwork is regularly scheduled work performed by an employee between the hours of 6 p.m. and 6 a.m.").
[44] 5 U.S.C. § 5545.
[45] Exceptions Br. at 26 (quoting 5 C.F.R. § 551.401(a)).
[46] 5 C.F.R. § 551.401(b).
[47] *Id.* § 551.401(d) (emphasis added).
[48] *Id.* § 551.401.
[49] 5 U.S.C. § 5545.

The Agency also argues that the award is contrary to law because the Arbitrator "wrongly concluded that 5 C.F.R. § 551.424 implements COPRA."[50] But the Arbitrator did *not* find that § 551.424 implements COPRA. Instead, consistent with the Agency's acknowledgement that the meaning of "work" under COPRA is "undefined," the Arbitrator turned to other authorities, including § 551.424, to help guide her decision.[51] Moreover, because the Agency has not demonstrated that *COPRA* prohibits the Agency from paying the officers night pay, it is immaterial whether *§ 551.424* provides further support for the Arbitrator's interpretation of COPRA.

Relatedly, the Agency argues that the award conflicts with Authority decisions concerning the entitlement to premium pay for official time, some of which discuss § 551.424.[52] For example, the Agency cites *AFGE, Local 2022* (*Local 2022*),[53] in which the Authority held that, under § 551.424, "an agency may not schedule union representatives for overtime in order to permit them to conduct representational functions."[54] In *Local 2022*, the Authority held that § 551.424 prohibits agencies from scheduling union representatives for overtime work if the only purpose for the overtime is to perform representational work.[55] And the Agency neither argues nor demonstrates that those circumstances exist here. Thus, *Local 2022* does not demonstrate that the award conflicts with § 551.424. Moreover, as stated previously, § 551.424 provides that "'[o]fficial time' granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work."[56]

In addition, the Agency argues that court and administrative decisions – including Authority case law – support finding that representational activities are not "work" for purposes of entitlement to night pay.[57] But none of the decisions that the Agency cites involve COPRA. Further, most of the decisions concern employees seeking premium pay for performing representational duties at times when they were not otherwise on duty.[58] For example, the Agency cites[59] *U.S. Department of Transportation, FAA* (*FAA*).[60] In *FAA*, the Authority held that grievants were not entitled to premium pay for the performance of representational activities on Sundays and holidays.[61] But there is no indication in *FAA* that the employees at issue worked on Sundays and holidays as part of their "regularly scheduled" administrative workweek.[62]

Similarly, the Agency cites[63] *Warner Robins Air Logistics Center, Warner Robins, Georgia*[64] and *Wright-Patterson Air Force Base, Ohio, 2750th Air Base Wing*.[65] However, in both of those decisions, the Authority held that in order for representational activities to be considered "hours of work" for purposes of earning overtime pay, a union representative must perform those activities during his or her *regularly scheduled work hours* or otherwise already be in an overtime status at the direction of the agency when the need to perform the representational activities arose.[66]

Likewise, the non-Authority decisions that the Agency cites discuss a prohibition on premium pay for time spent performing representational activities that fell "outside" the "regular working hours" of the employees at issue.[67]

As mentioned previously, here, the Arbitrator found that the officers' official-time requests concerned periods when the officers "were otherwise in a duty status, during their regular working hours."[68]

[50] Exceptions Br. at 24.
[51] Award at 36-37.
[52] Exceptions Br. at 14-15, 17-20, 22-25.
[53] 40 FLRA 371 (1991).
[54] *Id.* at 376.
[55] *Id.* at 375-76.
[56] 5 C.F.R. § 551.424(b); *see also Ass'n of Civilian Technicians, Old Hickory Chapter*, 55 FLRA 811, 813 (1999) (*Old Hickory*).
[57] Exceptions Br. at 17-19, 22-23 (citing *HUD*, 60 FLRA 311; *FAA*, 60 FLRA at 23-34; *Wright-Patterson*, 23 FLRA at 392; *Warner Robins*, 23 FLRA 270; *NTEU v. Gregg*, No. 83-546, 1983 WL 31224 (D.D.C. Sep. 28, 1983); *Matter of Union Training*, B-256485, 1994 WL 441360 (Comp. Gen. 1994) (*Training*)).
[58] *FAA*, 60 FLRA at 22-24 (no entitlement to premium pay for the performance of representational activities on Sundays and holidays); *Wright-Patterson*, 23 FLRA at 392 ("a union official's performance of representational activities on nonduty time, *outside regular work hours*, was not the performance of . . . work . . . that constituted overtime work for which overtime pay . . . could be granted.") (emphasis added); *Warner Robins*, 23 FLRA at 272 ("because the grievant . . . *was not already in an overtime duty status* . . . there was no entitlement to overtime compensation under 5 C.F.R. § 551.424(b)") (emphasis added).
[59] Exceptions Br. at 17-18.
[60] 60 FLRA 20.
[61] *Id.* at 22-24.
[62] 19 U.S.C. § 267(b)(1).
[63] Exceptions Br. at 22-23.
[64] 23 FLRA 270.
[65] 23 FLRA 390.
[66] *Wright-Patterson*, 23 FLRA at 392; *Warner Robins*, 23 FLRA at 271.
[67] *NTEU*, 1983 WL 31224 at *3; *Training*, 1994 WL 441360 at *2.
[68] Award at 37.

Thus, the decisions that the Agency cites to support this argument are inapposite in this case,[69] and provide no basis for finding the award contrary to law.

Moreover, the Authority has stated that official time is a type of time, distinct from regular duty time, in which an employee's activities are not directed by the agency but for which an employee is nevertheless entitled to compensation from the agency.[70] In this connection, the Authority has explained that both official time and regular duty time – unlike non-duty time such as periods of leave – "shall be considered hours of work."[71] Additionally, the U.S. Supreme Court explained that "Congress used the term 'official time' [in § 7131 of the Statute] to mean 'paid time.'"[72] Applying the Court's reasoning, the Authority has explained that an employee "on official time under [§] 7131 is permitted to engage in particular activities, designated by the Statute, during the time when the employee otherwise would be in a duty status" because "[t]he purpose of official time is to permit employees to engage in these activities without loss of pay or leave."[73] And the Authority has found that official time "is time [that] counts toward the fulfillment of an employee's basic work requirement."[74]

Therefore, the Authority has held that employees who perform representational duties while on official time during their regularly scheduled work time are entitled to their regular compensation.[75] And the Authority has noted that an agency's failure to compensate employees fully for their use of official time has the foreseeable effect of chilling participation in representational activities.[76] This principle is particularly relevant in this case, as the Arbitrator found that the Agency's action "affect[ed] approximately two-thirds of the bargaining[-]unit employees . . . , who [were] no longer able to act in a representational capacity[] or seek the [U]nion's assistance to pursue grievances unless they . . . [were] willing to forego premium pay to which they are entitled."[77] Thus, Authority decisions concerning official time support – rather than undermine – the Arbitrator's conclusion that the Agency could lawfully pay the officers night pay for official time under the circumstances of this case.

Additionally, the Agency cites[78] *AFGE, National Council of HUD Locals 222, AFL-CIO* (*HUD*).[79] However, as *HUD* involved whether representational activities constituted "officially assigned duties" within the meaning of a telecommuting statute,[80] and did not involve COPRA in any way, it does not provide a basis for finding the award contrary to law.

Further, the Agency argues that a different arbitrator found that *FAA* forecloses night pay for the officers' official time.[81] But arbitration awards are not precedential,[82] and, thus, the Agency's reliance on a different arbitrator's award provides no basis for finding the Arbitrator's award contrary to law.

Finally, the Agency's suggestion that this case concerns internal-union-business issues[83] is not accurate. This case concerns only pay issues for officers for time that they spend performing representational activities that qualify for official time.

In sum, none of the Agency's arguments establish that it is unlawful for the Agency to pay night pay to officers for time that they spend performing representational activities on their "regularly scheduled" night shifts.[84] Accordingly, we find that the Agency has not established that the award is contrary to law.

IV. Decision

We deny the Agency's exceptions.

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[69] *Cf. NTEU, Chapter 65*, 25 FLRA 373, 376-77 (1987) (*Chapter 65*) (stating that the "prerequisite" to premium pay is that representational activities "must be performed on duty time").

[70] *Old Hickory*, 55 FLRA at 813; *see also Ass'n of Civilian Technicians, Tony Kempenich Mem'l Chapter 21 v. FLRA*, 269 F.3d 1119, 1122 (D.C. Cir. 2001) (stating that official time is a "distinct third category of time" that is considered to be "hours of work" (citation and internal quotation marks omitted)).

[71] *Old Hickory*, 55 FLRA at 813 (quoting 5 C.F.R. § 551.424) (internal quotation marks omitted).

[72] *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 99 (1983) (citing H.R. Rep. No. 95-1403, at 58 (1978)).

[73] *Old Hickory*, 55 FLRA at 813.

[74] *SSA, Inland Empire Area*, 46 FLRA 161, 175 (1992) (*SSA*) (quoting *Chapter 65*, 25 FLRA at 376 n.3) (internal quotation marks omitted).

[75] *Id.*; *Chapter 65*, 25 FLRA at 376-77 (employees can earn credit hours for representational work performed on official time).

[76] *SSA*, 46 FLRA at 176.

[77] Award at 39.

[78] Exceptions Br. at 19-20.

[79] 60 FLRA 311.

[80] *Id.* at 313 (internal quotation marks omitted).

[81] Exceptions Br. at 20.

[82] *E.g., U.S. Dep't of the Air Force, Warner Robins Air Logistics Complex, Robins Air Force Base, Ga.*, 68 FLRA 102, 106 (2014) (stating that arbitration awards are not precedential); *AFGE, Council 236*, 49 FLRA 13, 16-17 (1994) (citing *U.S. Dep't of the Treasury, IRS, Se. Region, Atlanta, Ga.*, 46 FLRA 572, 577 (1992)) (arbitrator is not bound to follow previous arbitration awards with similar issues when deciding a dispute before him or her).

[83] Exceptions Br. at 14.

[84] 19 U.S.C. § 267(b)(1).

Member Pizzella, concurring:

The late Johnny Carson once said, "If life was fair, Elvis would still be alive and all the impersonators dead."[1]

Here, the Agency makes an intuitive and compelling argument in its contrary-to-law exceptions: "Put simply, filing grievances and [unfair labor practice charges], reviewing union emails, and handling internal Union issues do not constitute work on behalf of the Agency."[2]

That is a proposition which, though intuitive, is not supported by existing regulations of the Office of Personnel Management (OPM) that are recited at length throughout the majority's decision. Congress imbued OPM with primary responsibility to establish "*the regulations*, criteria, and conditions"[3] of employment required to implement the provisions of the Fair Labor Standards Act "to any person employed by the Government of the United States."[4]

Consistent with the deference that OPM's regulations are due, I agree with the majority that the Arbitrator's interpretation of the regulations is a plausible interpretation of those regulations and is consistent with the Authority's precedent. Accordingly, I concur that the Agency does not provide a "basis for finding the award contrary to law."[5]

As noted above, the Agency's argument that internal union business does not constitute "work on behalf of the government" is both intuitive and compelling. I would go so far as to say that internal union business *should not* constitute work on behalf of the agency.

However, that is a change that must come from Congress or OPM.

Thank you.

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[1] www.goodreads.com/quotes/287661-if-life-was-fair-elvis-would-still-be-alive-and.
[2] Exceptions at 14.
[3] 5 C.F.R. § 551.101(b) (emphasis added).
[4] *Id.* at § 551.102.
[5] Majority at 7.