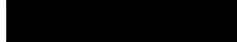


BEFORE THE FOREIGN SERVICE GRIEVANCE BOARD

In the Matter Between


Grievant

Record of Proceedings
FSGB Case No. 2015-051

And

March 30, 2016

Department of State

DECISION
EXCISION

For the Foreign Service Grievance Board:

Presiding Member:

William E. Persina

Board Members:

Bernadette M. Allen
J. Robert Manzanares

Special Assistant:

Joseph Pastic

Representative for the Grievant:

Pro se

Representative for the Agency:

Laurie Younger, HR/G

Employee Exclusive Representative:

American Foreign Service Association

OVERVIEW

Held – Grievant requested compensation for overtime hours she worked during her two-year tour of duty at an embassy and restoration of annual and sick leave she charges was deducted erroneously from her leave balances. The Board rejected grievant’s claim because the overtime work for which she sought compensation had not been officially ordered or approved in writing, and the documentation she provided to restore her leave balances was deficient.

Summary – Grievant was a Fair Labor Standards Act (FLSA)-exempt Foreign Service Specialist serving as a consular officer at a U.S. Embassy. She claimed, and it was not disputed, that she worked a few hundred hours of overtime during her two-year tour of duty at the embassy. Grievant argued that embassy management expected that she would have to work overtime in her position, and was aware of the fact that she was actually working overtime hours. She claimed that for these reasons she is entitled to overtime compensation. However, she had not been officially ordered or approved by an appropriate supervisory official to perform the overtime work. When the embassy denied the grievant’s request for overtime compensation, which she made at the end of her tour, her request was denied. Grievant then filed an agency-level appeal and the State Department (Department, agency) denied the appeal under the Federal Employee Pay Act (FEPA), specifically 5 U.S.C. § 5542 and § 5543, which establish the written authorization requirement.

Grievant then appealed to this Board which rejected her appeal, holding that under FEPA, the Department correctly ruled that compensatory time off (the only form of compensation grievant could receive for overtime work) could be granted only if the overtime work had been “officially ordered or approved” in writing. It was undisputed that grievant had not received written authorization, thus she had no legal entitlement to compensation for the overtime hours worked. The fact that management expected grievant would have to work overtime and was aware of the fact that she was actually working overtime was not sufficient to create entitlement to compensation for the work.

DECISION

I. THE GRIEVANCE

Grievant claims that she worked 321.6 hours of overtime, for which she was not compensated, during a two-year period while stationed at the U.S. Embassy in [REDACTED]. She claims that management was aware of her having performed this overtime work, and requests compensation in the form of compensatory time off or salary, or some combination thereof, as a remedy. She also requests restoration of annual and sick leave that she charges was erroneously deducted from her leave balances.

II. BACKGROUND

Grievant is a Foreign Service Specialist who served as the sole consular officer at the U.S. Embassy in [REDACTED] from November 2011 to August 2013. A few months prior to grievant's arrival at post she met with the Deputy Chief of Mission (DCM) in Washington, DC, to discuss her prospective duties. Among other things, the DCM informed grievant that, based on the previous consular officer's experience, the position would likely require several hours of overtime work each week. Upon arriving at post, grievant ascertained that the visa workload which was part of grievant's portfolio, was in fact considerable. According to grievant, this workload increased approximately 60% during her tenure at post. It appears undisputed that she performed her duties in a commendable manner and worked a significant number of overtime hours during her tenure at the embassy. Further, grievant worked with her Regional Consular Officer (RCO) to develop procedures to reduce the amount of time she had to work daily. Grievant claims, and it is not disputed, that the RCO discussed these efforts with embassy management. In the end, the increase in workload reached a level that enabled the ambassador to justify the later transfer of the immigrant visa workload to another post.

Grievant had weekly one-on-one meetings with the DCM and on occasion at these meetings, she would submit to the DCM a leave request for compensatory time off. At these meetings grievant failed to discuss the overtime hours she was working. Moreover, according to the grievant, the DCM would also either visit grievant in her office or call her on the telephone outside of regular work hours to discuss work matters. Further, the embassy had a sign-in/out log that each embassy staff member, including grievant and the DCM, was required to use. This log was maintained in a place accessible to all staff, thus any staff member could find out the hours worked by any other staff member by examining the log.

In June 2013, approximately one month prior to her departure from post, grievant became aware that her compensatory time off requests, previously approved by the DCM, had in fact been charged to grievant's annual leave balance. She also avers that annual and sick leave was either misappropriated or charged when she was actively working. Grievant discovered this by reviewing her biweekly pay and leave statement. She raised the issue at a meeting with the DCM and the ambassador in early July 2013. The ambassador responded that "the FAM was very clear on this," and that a prerequisite for receiving compensatory time off was written authorization to perform overtime work from an appropriate supervisory official. Grievant had not obtained such written authorization. The ambassador therefore said he would not discuss the matter further with grievant. Further, the DCM said she had approved grievant's compensatory time off requests based on her belief that grievant had a compensatory time off balance from a previous assignment. Grievant did not have any such pre-existing balance, consequently this caused her leave requests to be charged to annual leave.

Upon her return to the United States grievant pursued the matter with the Regional Human Resources Office (R/HRO). The R/HRO informed the grievant, among other things, that

she was required to complete a Form DS-3060 prior to performing overtime work. This form constitutes written authorization from an appropriate supervisor for an employee to perform compensable overtime work. Grievant averred that she was unaware of the need to submit such a form, as she had not had to work significant overtime hours previously in her ten-year career in the Foreign Service. Grievant then prepared a series of DS-3060s, based on her reconstruction of the overtime hours she worked during her time in Suriname, and submitted them for approval by the DCM. The DCM declined to approve these forms because she did not believe grievant, as a Foreign Service Specialist, was entitled to compensation for overtime hours worked. The DCM further indicated that if she had known that grievant's duties required overtime hours to be worked, she would have taken steps to ensure that grievant did not have to work more than eight hours a day. Grievant subsequently filed a grievance with the Department, in which she alleged that she was entitled to 321.6 hours of compensation. In support of her claim she pointed to, among other things, the fact that the DCM approved her compensatory time off leave requests; and the sign-in/out logs that established she had in fact worked the overtime hours claimed.

The Department denied the grievance on the ground that the overtime hours grievant claimed were not officially ordered or approved by an appropriate supervisor, as required under the FEPA, 5 U.S.C. § 5542 and § 5543, and 3 FAM 3133.3.¹ The Department argued that in

¹ 5 U.S.C. § 5542(a) provides in relevant part that "hours of work officially ordered or approved in excess of 40 hours in an administrative work week, . . . performed by an employee are overtime work and shall be paid for"

5 U.S.C. § 5543(a)(2) provides in relevant part that an agency may "provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 . . . shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work" under section 5542.

3 FAM 3133.3 provides in relevant part that:

order for overtime to be “officially ordered or approved,” it must be authorized by means of a DS-3060 form signed by the employee and an appropriate supervisory official. The Department pointed out that the DS-3060 forms submitted by grievant were not signed by the DCM or any other authorized supervisory official. Further, the Department referred to the DCM’s statements that if she had known that grievant was working more than eight hours per day, she would have implemented changes to mitigate the need for overtime. Grievant then appealed to this the Board for relief.

III. POSITIONS OF THE PARTIES

A. THE GRIEVANT

Grievant contends that she worked a substantial number of overtime hours during her tenure at the embassy, and that this fact was known to embassy supervisory staff, including the DCM. She points to several factors in support of this claim, including the following:

- her meeting with the DCM prior to beginning her service at the embassy, at which the DCM informed grievant that the position could entail long work hours;
- the Visa Section’s heavy work load, which was known to the DCM among others;
- the RCO development of measures to reduce grievant’s work hours, and his discussion of those measures with embassy management;
- the sign-in/out log that enabled any employee, including the DCM, to become aware of the hours grievant worked;
- the DCM’s occasional visits to the grievant in her office or her telephone calls to the grievant outside of normal work hours; and

[f]or irregular overtime work scheduled after the beginning of the administrative workweek, eligible Foreign Service and Civil Service employees whose basic annual pay exceeds the maximum rate for GS-10 (i.e., above the salary of a GS-10, step 10) *must* be granted regular compensatory time off instead of overtime pay. (Italics in original.)

- grievant’s weekly one-on-one meetings with the DCM at which grievant, on occasion, would present leave slips to the DCM requesting compensatory time off, and which slips the DCM would invariably sign.

Based on these factors, grievant asserts that she, in effect, satisfied the requirements for compensation for her overtime work. She argues not having submitted a Form DS-3060 is a mere “technicality.” She therefore claims that she is entitled to “compensation in time, or salary, or some combination thereof,” for the 321.6 hours of overtime she alleges she worked. She also argues that restoration of her annual and sick leave is justified.

B. THE AGENCY

The Department argues that by virtue of her FS rank as a Foreign Service Specialist, the grievant is exempt from the overtime provisions of the FLSA. Rather, her entitlement to compensation for overtime hours worked is governed by FEPA, 5 U.S.C. § 5542 and § 5543, as well as its implementing regulations, 5 CFR § 550.111.² The Department asserts that the overtime hours grievant claims to have worked were not “officially ordered or approved” in writing by the DCM or any other appropriate management official, as is required under FEPA. Moreover, the Department contends, it is irrelevant whether or not the DCM was aware of the fact that grievant was working overtime hours. Under the FEPA, overtime work can only be

² 5 CFR § 550.111 provides in relevant part:

- (a) . . . overtime work means work in excess of 8 hours in a day or in excess of 40 hours in an administrative work week that is –
 - (1) officially ordered or approved; and
 - (2) performed by an employee

* * * * *

- (c) Overtime work in excess of any included in a regularly scheduled administrative workweek may be ordered or approved only in writing by an officer or employee to whom this authority has been specifically delegated.

compensated if it is ordered or approved in writing by use of the DS-3060 form, and such authorization was not obtained here.

The Department also claims that the DCM's approval of grievant's requests for compensatory time off does not establish that the overtime hours grievant worked were ordered or approved pursuant to FEPA. The DCM stated she believed that these requests were based on compensatory time grievant had accrued prior to her time at the embassy. Moreover, the Department notes that the DCM referred the grievant's claim to the R/HRO and the R/HRO pointed out that compensatory time should be agreed upon for each pay period in which overtime and compensatory time occurs. The fact that grievant submitted at the end of her tenure her request for compensation for hundreds of overtime hours is, the Department argues, "improper according to regulations."

IV. DISCUSSION AND FINDINGS

In all grievances other than those concerning disciplinary actions, the grievant has the burden of establishing by a preponderance of the evidence that that the grievance is meritorious. 22 U.S.C. § 4131(b)(2); 22 CFR § 901.18(c)(2). For the reasons that follow we find that grievant has failed to satisfy her burden of proof, and we therefore dismiss her grievance appeal.

There does not appear to be any dispute that grievant did in fact work a substantial number of overtime hours on an irregular basis during her tenure at the U.S. Embassy in [REDACTED]. She avers that she worked 321.6 overtime hours during that time, based on her review of the sign-in/out log that she used at the embassy. The Department does not dispute that claim. Rather, the issue is whether this overtime work is compensable because it was "officially ordered or approved" pursuant to the procedures specified under FEPA and its implementing regulations.

We find, in agreement with the Department, that it was not and grievant therefore has no legal entitlement to compensatory time off for those hours.

The Department asserts, and grievant does not dispute, that grievant is exempt from the overtime provisions of the FLSA. Although the basis for the exemption is not articulated by the parties, it is presumably based on the fact that grievant's job duties and salaried pay level qualify her as an FLSA exempt professional employee. *See* 5 CFR § 551.207 (describing federal employees who are exempt from coverage of the FLSA by virtue of their professional status). Accordingly, grievant's entitlement, if any, to compensatory time off for overtime hours worked would come from FEPA, 5 U.S.C. § 5543.³

We find the requirements for granting compensatory time off for Foreign Service officers in grievant's position who have worked irregular overtime hours to be straightforward: the employee must obtain written authorization to perform the overtime work, in the form of the DS 3060 form signed by both the employee and an authorized supervisor. These requirements come in particular from 5 U.S.C. § 5542(a), which establishes the "officially ordered or approved" requirement; and 5 CFR §550.111(c), which establishes the requirement that supervisory authorization for the overtime work must be in writing.⁴ It is beyond dispute in this case that

³ We note that Foreign Service officers are excluded from the definition of an "employee" covered under FEPA. 5 U.S.C. § 5541(2)(xiv). However, 22 U.S.C. § 3972(c) specifies that nothing in FEPA "shall preclude the granting of compensatory time off for Foreign Service officers." It appears that the Department has construed these provisions to mean that while FLSA exempt Foreign Service officers cannot receive monetary compensation under FEPA for overtime hours worked (*see* FSGB Case No. 1997-090 (May 16, 2001) at p. 32), they can be granted compensatory time off under 5 U.S.C. § 5543 if the procedures for establishing that the overtime was "officially ordered or approved" are met. We find no basis to conclude that the Department's construction of these provisions is unreasonable.

⁴ In contrast, under the FLSA, an employee may be eligible for compensation for overtime worked without official direction or approval if the employer "suffers or permits" the overtime work to be performed, that is, if the work is for the employer's benefit, the employer knew or should have known that the work was being done, and the employer was able to stop the work from being performed. 5 CFR § 550.104 and § 401(a).

such written authorization to perform the overtime work was not obtained, and thus it is not compensable in the form of time off.

Grievant makes the equitable argument that since there is no question that she in fact performed overtime work, she is entitled to compensation for it. However sympathetic we may be to this claim, the clear provisions of law we have discussed above bar us from providing the relief she requests. In this connection, we find very significant the Federal Circuit's decision in *Doe v. Department of Justice*, 372 F.3d 1347 (Fed. Cir. 2004). In that case a class of some 9,000 Justice Department (DOJ) attorneys filed suit against DOJ for compensation under FEPA for overtime hours worked over a period of years. The record showed that agency management made clear to the attorneys, in various written and oral statements, that they were expected and encouraged to perform considerable amounts of overtime work. The record also showed that DOJ maintained time logs that reflected the actual number of overtime hours worked by the attorneys, thus establishing that DOJ management was aware of the amount of overtime attorneys were working. However, the court found that these sources did not satisfy the FEPA requirement for written authorization of the overtime work. As an example the court pointed to the United States Attorneys' Manual for DOJ attorneys, which said that "Assistant United States Attorneys are professionals and should expect to work in excess of regular hours" without compensation. 372 F.3d at 1363. The court said that this provision and others like it did not satisfy the FEPA written authorization requirement because they did not order attorneys to work any specific amounts of overtime, nor did they order an indefinite number of overtime hours to be worked. Accordingly, the court denied the attorneys' claim for compensation.⁵

⁵ The court was not unsympathetic to the attorneys' situation of effectively being coerced into performing uncompensated overtime work. The court concluded by saying that "[t]he problems that this case has exposed suggest that DOJ and other affected agencies might do well to reexamine the whole overtime question for employees

We find that *Doe* has a number of important similarities to the present case. Among other things, as here, management in *Doe* sent clear messages to employees that their job would require a considerable number of overtime hours to be worked, and that it was expected that employees would in fact work those hours. Further, as here, management in *Doe* knew that employees were in fact working overtime hours without compensation. We also note that, as in *Doe*, the record does not show that the DCM ever ordered specific hours of overtime to be worked on specific dates and projects. Rather, it appears the DCM talked in general terms about the need for overtime to be worked. Nonetheless, the court in *Doe* upheld the requirement that under FEPA only overtime hours authorized in writing by an appropriate supervisory official are compensable. We believe the court's ruling in *Doe* strongly supports our holding here. *See also*, FSGB Case No. 1996-039 (May 20, 1997) at p. 11 (“the requirements that overtime be approved in writing, and that it, again in writing, be scheduled and used within a given period of time, are reasonable, and impose enforceable obligations on the part of agencies and employees alike”).

We reject grievant's argument that her overtime hours were in effect “officially ordered and approved” because the DCM acknowledged that she had a “very similar experience” when the DCM's office management specialist (OMS) departed the embassy a year prior to grievant. Accordingly, grievant argues that the DCM should have understood that when she was approving grievant's requests for compensatory time off, it was not because grievant was drawing on a compensatory time off balance from a prior posting. Rather, grievant claims, the DCM should have realized that grievant was experiencing the same “major problem” with her compensatory time as was the OMS. Grievant provides no basis for us to conclude, however, what exactly the

not subject to the FLSA and seek a government-wide legislative solution.” 372 F.3d at 1364. We endorse those sentiments.

OMS's "major problem" was with the DCM; nor does grievant provide any basis for us to find that the DCM should have realized that grievant's time off requests were based on overtime hours worked at the U.S. Embassy in [REDACTED]. In any event, under Department rules the only recognized means for obtaining compensation for overtime hours worked is through use of the DS-3060 form. Grievant did not pursue this avenue until after she had left the embassy, and the DCM never signed those forms. Accordingly, grievant has failed to sustain her burden on this point.

In conclusion, we note that while we have expressed some sympathy for grievant's situation, it should also be pointed out that grievant herself bears some responsibility for it. The grievant is "a ten year veteran" of the Department who is expected to be aware of the personnel rules. She could have at any time inquired of the R/HRO as to her right to compensation for overtime worked. She received almost two years of pay and leave statements that reflected the fact that her leave requests were being charged against annual leave, and not compensatory time off. If she had exercised due diligence in checking her leave record, she would have been able to address the discrepancy in her leave balances in a more timely manner. Further, grievant could herself have raised the issue of her compensation for overtime hours worked with either the R/HRO or the DCM much earlier in her tenure during the weekly one-on-one meetings. Instead, she first raised the issue on the eve of her departure from post. Raising the matter at the end of tour created a much larger problem than it need have been had she been more prompt in raising the matter with appropriate Department personnel. We note in this connection that 4 FAH-3 H-533.4-3 requires that "compensatory time off must be recorded on the biweekly time and attendance report when it is earned or used." The Department therefore correctly points out that grievant's submission of her DS-3060 forms after completion of her tour of duty was untimely.

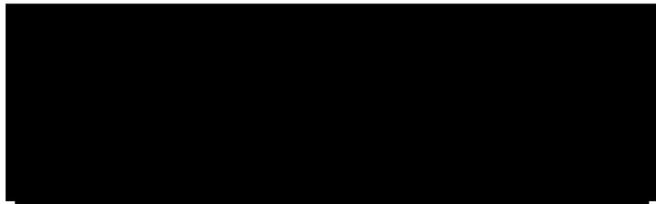
V. DECISION

Grievant has failed to sustain her burden of proof, thus her grievance appeal is denied.

For the Foreign Service Grievance Board:



William E. Persina
Presiding Member



Bernadette M. Allen
Member



J. Robert Manzanares
Member