UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 24

Docket Nos. AT-0752-11-0110-I-1
AT-0752-11-0111-I-1

Kelly J. Smith

and

Stanley M. Walker,

Appellants,

v.

Department of the Army,

Agency.

March 2, 2012

Vicki L. Fuller, Redstone Arsenal, Alabama, for the appellants.

Kathryn R. Shelton, Redstone Arsenal, Alabama, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 This consolidated appeal is before the Board on the agency's petition for review of the initial decision that reversed its actions reducing the appellants' pay. For the reasons set forth below, we GRANT the petition for review and AFFIRM the initial decision AS MODIFIED. The agency's actions are REVERSED.

BACKGROUND

¶2 In an August 19, 2010 memorandum, the Director of Emergency Services proposed to terminate the Law Enforcement Availability Pay (LEAP) of appellant Smith, a Game Warden, GS-1812-09, and appellant Walker, a Supervisory Criminal Investigator, GS-1811-12, based on the determination that there would not be a sufficient amount of work to justify certifying their continued LEAP. Each appellant was afforded an opportunity to reply to the proposal, and each did so. On October 1, 2010, the Garrison Commander issued each appellant a decision stating that his LEAP for the upcoming year would be terminated, and it was terminated, effective October 3, 2010. Under the Law Enforcement Availability Pay Act of 1994 (LEAPA), codified at 5 U.S.C. § 5545a, criminal investigators are authorized availability pay, a premium pay equal to 25% of the rate of basic pay for the position, to ensure their availability for unscheduled duty in excess of a 40-hour work week based on the needs of the employing agency. 5 U.S.C. § 5545a(b). The agency explained to these appellants that it had determined that there was not a sufficient amount of work to justify certifying that they currently met and were expected to continue to meet the substantial excess hours requirement of 5 C.F.R. § 550.183 during the upcoming 1-year period. Smith Initial Appeal File (IAF), Tab 4, Subtabs 4g, 4e, 4b; Walker IAF, Tab 4, Subtabs 4g, 4e, 4b.

¶3 Each appellant challenged the action, arguing, inter alia, that his work situation and its demands were unchanged from the previous year. Smith IAF, Tab 1 at 7; Walker IAF, Tab 1 at 7. Each requested a hearing. Smith IAF, Tab 1 at 2; Walker IAF, Tab 1 at 2. In the absence of an objection by any of the parties, the administrative judge consolidated the appeals and scheduled a hearing. Smith IAF, Tabs 6, 7. At the prehearing conference, he advised the parties of his view that there was a question as to the validity of the agency's decision to terminate the appellants' LEAP for the reason it provided since, under the Office of Personnel Management's (OPM) regulations, the agency could only deny

certification on certain distinct grounds, 5 C.F.R. § 550.184(d), (c), and the reason proffered by the agency was not one of them. Smith IAF, Tab 10. Nonetheless, acknowledging that, under 5 U.S.C. § 5545a(e)(2), the involuntary termination of LEAP is considered a reduction in pay for purposes of 5 U.S.C. § 7512(4), the administrative judge set out the agency's burden of proof in such cases, *id.*

¶4 Prior to the scheduled hearing date, the administrative judge notified the parties that he had determined that the appellants were entitled to prevail in their appeals as a matter of law, whereupon they withdrew their hearing request.[1] Smith IAF, Tab 12, Initial Decision (ID) at 6. The administrative judge found that, under OPM's regulations, an agency may only deny or cancel a certification of the type the agency had previously given to the appellants in their current positions under specific circumstances, *id.* at 7; 5 C.F.R. § 550.184(d), 182(e), but that nothing in OPM's regulations interpreting LEAPA authorizes an agency to deny certification based on its determination that its workload does not justify the need for the hours of unscheduled duty required for a criminal investigator to qualify for LEAP. ID at 7. On the contrary, the administrative judge found that, apart from the specific circumstances noted, OPM's regulations state that each agency shall ensure that each criminal investigator's hours of unscheduled duty are sufficient to enable the investigator to meet the substantial hours requirement and to enable him to make the required annual certification. *Id.* at 7-8. The administrative judge examined the legislative history of LEAPA and the Federal Register notice through which OPM issued the implementing interim regulations and found that they supported the conclusion that the statute should be interpreted as providing criminal investigators a guaranteed source of income, rather than one that is uncertain and dependent on a yearly discretionary judgment by the

[1] Both parties declined the administrative judge's offer to submit additional evidence or argument prior to the close of the record. IAF, Tab 12, Initial Decision at 6.

agency concerning the extent to which its criminal workload in an upcoming year might require a certain amount of unscheduled duty on their part. *Id.* at 8-12. The administrative judge concluded that the agency had not established that its decisions to deny certification in these appeals were based on a valid reason and that therefore it had failed to support its decisions by preponderant evidence. *Id.* at 12. Accordingly, he reversed the actions. *Id.* at 13.

¶5 In its petition for review, the agency argues that the statute is clear in its requirement that the criminal investigator and the supervisory officer must certify that the investigator has met and is expected to meet the substantial hours requirement; that here, the supervisory officers were unable to, and did not, so certify; and that therefore the agency properly terminated the appellants' LEAP. Petition for Review (PFR) File, Tab 1. The agency further argues that, because the statute is clear, Congressional intent is irrelevant, but that, even if the statute were ambiguous, the agency's position that it may terminate the appellants' LEAP under the circumstances here present is a permissible construction of the statute. *Id.* The appellants have not responded to the agency's petition for review.

ANALYSIS

¶6 LEAPA, codified at 5 U.S.C. § 5545a, requires that each criminal investigator receiving availability pay and the appropriate supervisory officer make an annual certification that the investigator has met, and is expected to meet, the requirement that the annual average of unscheduled duty hours worked is in excess of each regular work day by at least 2 hours per day. 5 U.S.C. § 5545a(e)(1), (d)(1).[2] In defining when certification is appropriate, Congress implicitly prescribed the circumstances when certification should be denied as

[2] As noted, the statute provides that an involuntary reduction in pay resulting from a denial of certification shall be a reduction in pay for purposes of 5 U.S.C. § 7512(4). 5 U.S.C. § 5545a(e)(2).

being when the investigator has not met, nor is expected to meet, the statutory threshold of unscheduled duty hours entitling him or her to availability pay. As born out by this case, these tacit parameters for denying certification are unquestionably ambiguous. On the one hand, they could be read as focusing on the investigator's demonstrated and expected ability and willingness to perform unscheduled duty hours. Or, they could be interpreted as requiring consideration of the agency's past and projected workload. In any event, the Board need not reconcile this ambiguity in the first instance because OPM already has.

¶7 Specifically, in 5 U.S.C. § 5548(a), Congress authorized OPM to prescribe regulations necessary for the administration of Subchapter V, Premium Pay, which encompasses § 5545a. Pursuant to that statutory authority, OPM has promulgated regulations governing the administration of law enforcement availability pay. *See* 5 C.F.R. § 550.181-187. In those regulations, OPM set forth two specific circumstances under which an agency may deny certification: (1) when an investigator has failed to perform unscheduled duty as assigned or reported, or (2) when he is unable to perform unscheduled duty for an extended period due to physical or health reasons.[3] 5 C.F.R. § 550.184(d). The regulations also require that an employing agency ensure that each investigator's hours are sufficient to meet the threshold number of unscheduled duty hours required to earn availability pay. 5 C.F.R. § 550.182(e). The agency challenges OPM's interpretation of 5 U.S.C. § 5545a(e) insofar as it precludes consideration of the agency's projected workforce needs in determining whether certification for availability pay is warranted under that provision.

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[3] The regulations also provide that a certification "shall no longer apply" when the employee separates from federal service, is employed by another agency, moves to a position that does not qualify as a criminal investigator position, or begins an opt-out period. 5 C.F.R. § 550.184(c), 182(f). These circumstances are distinguishable as they are based on voluntary action by the investigator.

¶8 To address the agency's challenge to OPM's interpretation of this portion of the statute, the Board engages in the two-step analytic process articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). *Hawkins v. United States*, 469 F.3d 993, 1000 (Fed. Cir. 2006). We first determine whether Congress has directly spoken to the precise question at issue, *Chevron*, 467 U.S. at 842, examining the statute's text, structure, and legislative history, and apply the relevant canons of interpretation. *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000); *see also Chevron*, 467 U.S. at 843 n.9. If we find that Congress had an intention on the precise question at issue, that intention must be given effect, *Chevron*, 467 U.S. at 843 n.9, and the issue then devolves into whether the agency acted in accordance with that intention. *Delverde*, 202 F.3d at 1363. If, however, we conclude that Congress had no intent on the matter, or that Congress's purpose and intent is unclear, the determination to be made is whether the agency's interpretation is based on a permissible construction of the statutory language at issue. *Id.*, *see also Chevron*, 467 U.S. at 843. As to the latter step, we need not find that the agency's construction was the only one it permissibly could have adopted to uphold the construction. *Chevron*, 467 U.S. at 843 n.11. Rather, so long as the agency's construction is reasonable, *Chevron* requires that we accept it, even if the agency's reading differs from what we believe is the best construction. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 979 (2005).

¶9 The question at issue in this case is whether, under LEAPA, an agency can terminate an employee's certification, and thereby reduce his pay, based on its determination that there does not appear to be a sufficient amount of work to justify certifying that he currently meets and is expected to continue to meet the substantial hours requirement of 5 C.F.R. § 550.183 during the upcoming 1-year period. As noted, the statute on its face is undeniably ambiguous as to the circumstances under which an agency may deny certification and thereby terminate an employee's LEAP. However, the statute's legislative history

provides some insight into Congress's intention. The Senate Committee on Appropriations explained the basis for providing recourse and appeal rights to employees whose agencies terminate their LEAP, recognizing "the right of agencies to ensure that agents are complying with the duties required to receive compensation and [that] agencies have the prerogative to remove the availability pay compensation if an agent undertakes such actions, so as to avoid work or availability." S. Rep. No. 103-286 at 100 (1994). Although it did not directly address the issue of an agency's terminating an employee's LEAP, a House Conference Report emphasized that, unlike "Administratively Uncontrollable Overtime," which it replaced, LEAP is a guaranteed, uniformly applied form of compensation. H.R. Conf. Rep. No. 103-729 at 56 (1994). Moreover, the author of the legislation, former Senator Dennis DeConcini, the then-Chairman of the Senate Subcommittee on Treasury, Postal Service, and General Government, provided a statement that appeared in the Congressional Record on November 30, 1994, "to express in clear terms the intent of the LEAP legislation." *See Buckley v. United States*, 57 Fed. Cl. 328, 348 (2003) (while statements by individual legislators should not be given controlling weight, they may evidence Congressional intent when consistent with statutory language and other pieces of legislative history). On the issue of the termination of LEAP, Senator DeConcini explained that it was not the intent of Congress to provide to management the right to arbitrarily remove the compensation from an employee, that termination should result from an investigator's refusal or unwillingness to work unscheduled duty, poor performance and low productivity together with a deficiency in unscheduled duty hours, that common sense should apply, and that managers should be well aware of the performance, attitude and efforts of their personnel and not base a denied certification solely on the accrual of hours. 140 Cong. Rec. S15266-01 (daily ed. Nov. 30, 1994).

¶10 This legislative history supports a finding that Congress intended that LEAP would be the basis for providing guaranteed compensation to covered

employees and that agencies would be able to involuntarily terminate employees' entitlement to LEAP only for inability or unwillingness to perform the unscheduled duty that is a fundamental part of a position that is subject to LEAP. We therefore give effect to that intention and find, by its promulgation of 5 C.F.R. § 550.184(d), that OPM acted in accordance with that intention.

¶11 Even if we were to find that Congress had no intent on this matter, however, or that its purpose and intent is unclear, we would find that OPM's interpretation is based on a permissible construction of the statute and afford *Chevron* deference to it. *Delverde*, 202 F.3d at 1363; *see also Chevron*, 467 U.S. at 843. In the Federal Register notice accompanying its issuance of the interim LEAP regulations, OPM referred to the possibility of an agency's not providing availability pay to otherwise qualified criminal investigators as occurring "under several narrow exceptions." 59 Fed. Reg. 66,150 (Dec. 23, 1994). OPM indicated that the provision that an agency may suspend payment of availability pay when it determines that an investigator has not been performing the required amount of unscheduled duty as assigned or reported reflects the intent of Congress that agencies would have the prerogative to remove availability pay if an investigator avoids work or availability, and that, in addition, availability pay may be suspended if an investigator is in a duty status but unable to perform unscheduled duty for an extended period due to physical or health limitations. *Id.* We would therefore afford *Chevron* deference to OPM's interpretation of the statute and find it reasonable that an agency can only terminate an employee's LEAP for the reasons provided at 5 C.F.R. § 550.184(d).

¶12 Because the agency did not terminate the appellants' LEAP for an authorized reason under OPM's regulations, we further find that it failed to

support its decision by preponderant evidence, and that these actions must be reversed.[4]

ORDER

¶13 We ORDER the agency to direct the appropriate supervisory officer(s) to make the annual certification to the head of the agency attesting that, as of October 2, 2010, each of these appellants met, and was expected to meet during the 1-year period beginning on October 2, 2010, the substantial hours requirement necessary to entitle them to Law Enforcement Availability Pay. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER the agency to pay the appellants the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellants to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellants the undisputed amount no later than 60 calendar days after the date of this decision.

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[4] The statute specifically entrusts heads of law enforcement agencies with the authority to prescribe regulations necessary to administer the certification process. 5 U.S.C. § 5545a(e)(1). We note this not to suggest that OPM's certification regulation is unauthorized, which is doubtful given that agency's general authority to regulate premium pay under 5 U.S.C. § 5548, but rather to respond to the agency's argument in these appeals that it should not have to pay employees availability pay when the workload does not warrant it. There is no indication here that the agency head has exercised the statutory authority to issue regulations administering the agency's certification process. Consequently, even if we agreed that it would be a waste of taxpayer money to pay a premium for nonexistent work, in the absence of an agency-specific regulation governing its certification procedure, we are required to give effect to OPM's regulations which do not contemplate consideration of the agency's projected workloads as grounds for denial or cancellation of certification.

¶15 We further ORDER the agency to tell the appellants promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellants, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶16 No later than 30 days after the agency tells the appellants that it has fully carried out the Board's Order, the appellants may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellants believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellants believe that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶17 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶18 This is the final decision of the Merit Systems Protection Board in these appeals. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANTS REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If

you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANTS REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.