In the Matter of Arbitration Between:

DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION

"Agency,"

- and -

NATIONAL TREASURY EMPLOYEES UNION

"Union."

(Eight-Hour Rule)

OPINION
AND
AWARD

Before
James W. Mastriani
Arbitrator

Appearances:

For the Agency:
Bud Davis, Esq.
Ashley Drexel, Esq.
Office of Chief Counsel
U.S. Customs and Border Protection

For the Union:
Julie M. Wilson, General Counsel
Paras N. Shah, Associate General Counsel
Jessica Horne, Assistant Counsel
National Treasury Employees Union

This proceeding arises out of a dispute over the U.S. Customs and Border Protection's [the "Agency" or "CBP"] application of a statutory provision the parties refer to as the "eight-hour rule". The National Treasury Employees Union [the "Union"] contends that the Agency has failed to pay night differential to employees covered by the Customs Officer Pay Reform Act ["COPRA"] who perform night work in violation of their collective bargaining agreement [the "Agreement"], a prior arbitration award and applicable law. The Agency denies this claim. Their disagreement resulted in the submission of the dispute to arbitration under the terms of the Agreement and my appointment to serve as arbitrator. As will be set forth below, because the relevant facts as to the disposition of this case are not in dispute, the parties agreed to develop a full factual record through the submission of Stipulations in lieu of testimony accompanied by post-hearing and reply briefs, the last of which was received on or about June 25, 2022.

The parties did not jointly agree on how to frame the issue to be heard and decided. In order to provide proper context to the parties' disagreement on the issue, I first set forth the Stipulations of the parties which form the main basis of the evidentiary record. They are as follows:

1. The "eight-hour rule" refers to the proviso in subparagraph (a)(2) of 5 U.S.C. § 5545 that the definition of "nightwork" in that section "includes . . . periods of leave with pay during these hours if the periods of leave with pay during a pay period total less than 8 hours."

2. CBP Overtime Scheduling System ("COSS") is the time and attendance system utilized by employees assigned to U.S. Customs and Border Protection's ("CBP") Office of Field

Operations. COSS records employees' shifts, leave, and paid absences, and calculates an employee's pay based on grade, locality, duty time, overtime and premium pay, applicable pay caps, and other requirements.

3. COSS communicates time and attendance information to the U.S. Department of Agriculture, National Finance Center ("USDA NFC") for payment to employees.

4. USDA NFC instructs agencies, including CBP, to use specific timekeeping codes representing paid and unpaid duty hours. These codes are programmed into and utilized in COSS.

5. When an employee covered by COPRA performs nightwork, COSS timekeepers must enter transaction code ("TC") 11 (Base Pay With Night Differential) with prefix code 15 or 20. The prefix code reflects the applicable premium pay differential, either 15 percent or 20 percent.

6. COSS is not programmed to apply the eight-hour rule for employees who use annual or sick leave.

7. USDA NFC's timekeeping code for the use of paid parental leave is TC 62 (Sick Leave) with prefix codes 70, 71, or 72, depending on the qualifying reason for the employee taking paid parental leave. This coding does not permit the payment of night differential. There is no other timekeeping code that will provide for paid parental leave in COSS. Accordingly, employees covered by COPRA do not receive night differential who take any amount of paid parental leave given the timekeeping code required by USDA NFC.

8. CBP has not paid night differential to any employee covered by COPRA who is regularly scheduled for nightwork and has taken eight or more hours of paid parental leave in a pay period.

9. USDA NFC's timekeeping code for the use of emergency paid leave is TC 01 (Regular Time – Base Rate) with descriptor code 87. This coding does not permit the payment of night differential. There is no other timekeeping code that will provide for emergency paid leave in COSS. Accordingly, employees covered by COPRA do not receive night differential who take any amount of emergency paid leave given the timekeeping codes required by USDA NFC.

10. CBP has not paid night differential to any employee covered by COPRA who is regularly scheduled for nightwork and has taken eight or more hours of such emergency paid leave in a pay period.

11. USDA NFC's timekeeping code for the use of court leave is TC 66 (Other Paid Absence) with descriptor code 32 (Court Leave).

12. COSS is not programmed to apply the eight-hour rule for employees who take paid absences from duty, including court leave and military leave.

13. This National Grievance is limited to claims of underpayment for COPRA night differential pay as a result of the eight-hour rule. It does not include claims of underpayment of COPRA night differential pay on a Sunday as a result of any other premium pay restrictions, including claims made by NTEU under a separate national grievance known as the Sunday Night Premium Pay grievance, filed on September 24, 2021. Employees may not recover COPRA night differential backpay under both grievances for the same hours of paid leave.

ISSUE

As stated above, the parties were unable to agree on how to frame the issue to be heard and decided. The Union proposed to frame the issue as follows:

1. Whether CBP's failure to pay night differential to COPRA-covered employees who take eight or more hours of paid parental leave or 16 emergency paid leave in a pay period constitutes noncompliance with Arbitrator Vaughn's 1995 award and thus an unfair labor practice under 5 U.S.C. § 7116(a)(1) and (8), and a violation of Article 28, Section 12 of the parties' collective bargaining agreement.

2. Whether CBP's failure to program COSS to pay night differential to COPRA-covered employees who take eight or more hours of paid parental leave or emergency paid leave in a pay period violates the Stipulated Procedure and Timetable for Backpay and Future Payments and constitutes a

repudiation of that agreement and an unfair labor practice under 5 U.S.C. § 7116(a)(1) and (5).

3. Whether CBP's failure to pay night differential to COPRA-covered employees who take eight or more hours of paid parental leave or emergency paid leave in a pay period violates COPRA and the "leave with pay" statutes.

4. If the answer to any of the above questions is yes, what shall be the remedy?

The Agency proposed to frame the issue as follows:

A. Whether the eight-hour rule applies to employees covered by COPRA.

B. Whether CBP has committed an unfair labor practice by applying the eight-hour rule to employees covered by COPRA when they take annual or sick leave.

C. Whether CBP has committed an unfair labor practice by applying the eight-hour rule to employees covered by COPRA when they take paid parental leave (PPL) under the Federal Employee Paid Leave Act.

D. Whether CBP has committed an unfair labor practice by applying the eight-hour rule to employees covered by COPRA when they take emergency paid leave (EPL) under the American Rescue Plan Act of 2021.

E. Whether CBP has committed an unfair labor practice by implementing new COSS codes for new paid leave entitlements which do not permit the payment of COPRA night pay differential to employees covered by COPRA who take eight or more hours of paid leave per pay period.

F. Whether employees covered by COPRA can receive backpay pursuant to the Back Pay Act for COPRA night pay differential for hours they did not work and that were in pay periods in which they took eight or more hours of PPL or EPL.

The parties agreed to defer to the discretion of the arbitrator for the purpose of determining the issue based on the record stipulated to by the parties and their respective arguments presented in their briefs. The determination of the issue will be set forth in the Discussion section of this decision.

RELEVANT CONTRACT PROVISIONS

ARTICLE 28 – ARBITRATION

Section 12. Either Party may file exceptions to an arbitrator's award to the FLRA under regulations prescribed by the FLRA for this purpose. If neither Party timely files exceptions, the arbitrator's award will be binding. In adverse action arbitrations, the impacted employee may file an appeal to the Federal Circuit. In addition, the parties recognize that the Agency may request that the Director of OPM file a petition for judicial review in the Federal Circuit. If an exception or appeal is filed, the arbitrator's award will not be implemented until all appeals are exhausted and a final decision is rendered by the FLRA or the court of highest authority to which the case has been appealed.

CITED LAWS & REGULATIONS

5 U.S. Code § 7116 - Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S. Code § 5545 - Night, standby, irregular, and hazardous duty differential

(a) Except as provided by subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m., and includes—

(1) periods of absence with pay during these hours due to holidays; and

(2) periods of leave with pay during these hours if the periods of leave with pay during a pay period total less than 8 hours.

Except as otherwise provided by subsection (c) of this section, an employee is entitled to pay for nightwork at his rate of basic pay plus premium pay amounting to 10 percent of that basic rate. This subsection and subsection (b) of this section do not modify section 5141 of title 31, or other statute authorizing additional pay for nightwork.

BACKGROUND

The subject matter of this dispute centers on the extent of the Agency's obligation, and the Union's rights, as to the payment of night differentials when COPRA-covered customs officers are on paid leave. This issue was raised in a grievance that resulted in an arbitration award issued by Arbitrator M. David Vaughn in 1995. The question before Arbitrator Vaughn involved the statutory requirement in the Federal Employees Pay Act (FEPA) to pay night differentials to CBP employees on paid leave as that topic was later addressed in 1993 by the passage of the Customs Officer Pay Reform Act (COPRA) which also addressed the payment of night differentials. In that case, Arbitrator Vaughn framed the issue before him as "whether Customs officers are entitled to premium pay for night work under the 1993 Customs Officer Pay Reform Act for time periods of eight hours or more when they are on leave."

The Vaughn Award provided a comprehensive history of the statutory framework for the payment of customs officers. Prior to 1993, officers were paid a 10% differential for night work, which was defined precisely by FEPA. That statute also provided that "an employee is paid the FEPA night differential when on leave 'if the periods of leave with pay during a pay period total less than 8 hours'" ("the eight-hour rule"). Then, in 1993, Congress enacted COPRA which, among other things, increased the night differential from 10% in FEPA to 15% or 20%, depending on certain other factors. COPRA was silent with respect to FEPA's eight-hour rule. In April of 1994, the Agency promulgated a written policy providing that it would pay the COPRA-specified night differential pay rate, but it would also apply FEPA's eight-hour rule. The Union grieved that policy contending that the eight hours did not apply to COPRA.

Arbitrator Vaughn held that the Agency incorrectly applied FEPA's eight-hour rule to the payment of night differential to COPRA-covered customs officers taking paid leave, including annual leave, court leave, sick leave and military leave. He held that "compensation when on leave must be the same as when at work," relying on *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987) and *Armitage v. United States*, 991 F.2d 746 (Fed Cir. 1993). He cited *Lanehart* for the proposition that "leave with pay" means "total compensation or remuneration normally and regularly received by an employee." Although the Agency argued that Congress's intent in passing COPRA was to reign in payroll costs under FEPA, and therefore

Congress did not intentionally supersede FEPA's eight-hour rule with COPRA's silence, the Arbitrator disagreed. He held that "Congress could have explicitly excluded or limited premium pay, such as the night differential, but it did not." The Arbitrator also dismissed the Agency's other arguments: that COPRA and FEPA could be harmonized without conflict by paying out COPRA's enhanced premium rates, but maintaining FEPA's eight-hour rule; and that the Arbitrator must give "great deference" to the Agency's determination.

The parties implemented the Vaughn Award in 1996 by Stipulated Agreement. Pursuant to the Award and the Agreement, CBP did not apply the eight-hour rule to paid leave taken by COPRA-covered employees working at night in the categories of annual leave, sick leave, court leave, and military leave. In December 2019, President Trump signed the National Defense Authorization Act for Fiscal Year 2020, which, among other things, provided Federal employees up to twelve (12) weeks of paid parental leave (PPL). The PPL Payroll Guidance, appearing in the record, provides that "PPL" is a type of leave in 5 U.S.C. § 5545(a) "… that determines whether night pay is payable during periods of leave so night pay differential is not included in its value when using 8 hours or more per pay period."

More recently, in 2021, President Biden signed the American Rescue Plan Act which, among other things, entitled Federal employees to use up to 600 hours of emergency paid leave (EPL) between March and September of 2021, to be used

under certain circumstances related to the Covid-19 pandemic. The EPL Payroll guidelines provide that “the value of pay an employee receives for EPL will be at the rate of pay the employee would receive if using annual pay.” However, the guidelines also provide that the value of annual leave for EPL purposes does not include “the value of night differential pay when using 8 or more hours of this leave type in a pay period.”

The Union filed a grievance challenging the Agency’s most recent application of the eight-hour rule from FEPA. It stated:

> **I. Failure to Comply with 1995 Arbitration Award in NTEU’s National Night Pay Grievance, in Violation of 5 U.S.C. § 7116(a)(1) and (8) and Article 28, Section 12 of the CBA.**
>
> In April 1994, a few months after COPRA went into effect, Customs issued a written policy to NTEU stating that, in accordance with 5 U.S.C. 5545(a)(2) (FEPA), it would not pay night differential to employees on leave when the hours subject to the differential exceeded seven per pay period. NTEU filed a grievance challenging that policy. The matter was submitted to arbitration before Arbitrator M. David Vaughn, who sustained the grievance. Arbitrator Vaughn held that the agency’s policy violated COPRA. He ordered the agency to cease and desist from further violation of COPRA and to pay back pay to affected employees. Customs did not challenge Arbitrator Vaughn’s decision. It instead entered into an agreement with NTEU to effectuate the award.
>
> On July 26, 2021, CBP told NTEU that its position has now changed. CBP’s position, at the national level, is that Arbitrator Vaughn’s award should not be followed by ports and timekeepers. In direct conflict with Arbitrator Vaughn’s award, CBP’s newly announced view is that FEPA’s eight-hour rule applies to COPRA-covered employees. According to CBP, several of its ports have been applying—and will continue to apply—FEPA’s eight-hour rule to COPRA-covered employees, despite Arbitrator Vaughn’s award.

CBP's failure to comply with Arbitrator Vaughn's award is a ULP under 5 U.S.C. § 7116(a)(1) and (8). It also violates Article 28, Section 12 of the CBA, which states that unchallenged arbitration awards are binding.

II. Breach of Agreement Implementing Arbitrator Vaughn's Award and Repudiation of that Agreement in Violation of 5 U.S.C. § 7116(a)(1) and (5).

After Arbitrator Vaughn issued his award, NTEU and Customs executed a Stipulated Procedure and Timetable for Back Pay and Future Payments—an "agreement explain[ing] the procedure that the Customs Service and NTEU will follow to comply with [Arbitrator Vaughn's] arbitration award." The agreement states, among other things, that "[t]he agency will make every reasonable effort to change its payroll accounting procedures to pay employees the night differential for periods of leave in excess of 8 hours by pay period 11 (pay date June 20, 1996)."

CBP has indicated that its payroll accounting procedures no longer allow for the payment of night differential to COPRA-covered employees in pay periods in which they take eight or more hours of leave. CBP has thus breached its agreement with NTEU. Moreover, CBP's breach is clear and patent and goes to the heart of the agreement. CBP has therefore not only breached the agreement but also repudiated it. Such a repudiation is a ULP under 5 U.S.C. § 7116(a)(1) and (5).

III. Violations of COPRA and the Paid Leave Statutes and Regulations.

In addition to committing ULPs, CBP violates COPRA and the various paid leave statutes when it denies night differential to COPRA-covered employees who take eight or more hours of leave in a pay period. The paid leave statutes include 5 U.S.C. §§ 6303 (annual leave), 6307 (sick leave), 6322 (leave for jury or witness service), and 6323 (military leave); Section 4001 of the American Rescue Plan Act, Pub. L. No. 117-2 (2021); and the Family Medical Leave Act, 5 U.S.C. § 6382, as amended by the Federal Employee Paid Leave Act (subtitle A of title LXXVI of division F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, December 20, 2019) and implemented by 5 C.F.R. § 630.1704.

Under the paid leave statutes, employees on leave are entitled to the pay, including premium pay, that they regularly receive. COPRA-covered employees who are assigned to work between the hours of

3:00 p.m. and 8:00 a.m. regularly receive night differential amounting to 15 to 20 percent of basic pay under 19 U.S.C. § 267(b)(1). As explained in Arbitrator Vaughn's award and made clear in the text of FEPA itself, the eight-hour rule in the definition of "nightwork" under FEPA does not apply to night work under COPRA. FEPA states that subsections (a) and (b) of § 5545, including the eight-hour rule in paragraph (a)(2), "do not modify" any "other statute authorizing additional pay for nightwork." 5 U.S.C. § 5545(a).

Therefore, applying the eight-hour rule in FEPA to deny employees the night differential that they are owed under the paid leave statutes and COPRA is contrary to law.

Remedies Requested

1. Immediate compliance with Arbitrator Vaughn's 1995 arbitration award, including by ceasing and desisting from applying the eight-hour rule in FEPA to COPRA-covered employees.

2. Immediate compliance with the agreement implementing Arbitrator Vaughn's 1995 arbitration award, including by reforming payroll systems to provide for the payment of night differential to COPRA-covered employees who take eight or more hours of leave in a pay period.

3. Payment to affected employees of back pay, interest on back pay, and other benefits under the Back Pay Act, 5 U.S.C. § 5596, and its implementing regulations.

4. Posting of a notice and transmission of an email, drafted by NTEU, to all bargaining unit employees stating that CBP violated federal statute and the parties' CBA by not paying night differential to COPRA-covered employees who took eight or more hours of leave in a pay period.

5. Payment to the NTEU Legal Representation Fund of reasonable attorney's fees.

6. Any other appropriate relief permitted by law, rule, or regulation.

[Jt. Ex. #2].

AGENCY RESPONSE TO GRIEVANCE

The Agency responded to the grievance with its denial. It stated:

This letter is in response to the grievance that the National Treasury Employees Union (NTEU or Union) filed on July 27, 2021, concerning an allegation that U.S. Customs and Border Protection (CBP or Agency) is not in compliance with a 1995 arbitration award from Arbitrator David Vaughn concerning the payment of night differential for employees that take eight hours or more of paid leave within a pay period.

The parties met on August 31, 2021 for the grievance meeting.* During the grievance meeting, the parties discussed NTEU's allegation that CBP is not paying night differential in compliance with the 1995 Vaughn arbitration award. After thoroughly looking into the matter, CBP disagrees that it is not in compliance with the law. With respect to the Vaughn arbitration award, CBP explored with Payroll whether there have been any changes to how COSS pays out night differential for employees who take eight hours or more of paid leave in a pay period, and Payroll confirmed it has not made any changes.

* On September 15, 2021, via email, NTEU's representative in this matter granted CBP's representative in this matter additional time to provide the grievance response, until close-of-business October 14, 2021.

As such, CBP denies the various contractual and statutory violations alleged throughout the grievance response in their entirety. For example, CBP denies it has committed any contractual or statutory unfair labor practice or other contractual violations (e.g., NTEU's allegation that CBP has violated Article 28 Section 12 of the CBP-NTEU National Collective Bargaining Agreement concerning the binding nature of arbitration awards). Also, CBP denies it has violated any of the various paid leave statutes listed near the bottom of page two of the July 27, 2021 grievance.

Furthermore, the plain language of 5 U.S.C. § 5545(a), governing pay for Executive branch employees who take eight hours or more of paid leave in a pay period, expressly says under (a)(2), "*periods of leave with pay during these hours if the periods of leave with pay during a pay period total less than 8 hours*." In other words, an employee is entitled to night differential pay only if the period of paid leave taken within the pay period is less than eight hours. *See also* 5 C.F.R. § 550.122(b). The Office of Personnel Management's Fact

Sheet: Night Pay for General Schedules Employees reiterates this statutory language as well.

Arbitrator Vaughn's 1995 arbitration decision found that the absence of statutory language limiting the payment of night differential in COPRA meant that employees could earn night differential notwithstanding 5 U.S.C. § 5545(a)(2), meaning COPRA was the exclusive system of payment. The U.S. Court of Federal Claims, however, subsequently rejected this very assertion and held that COPRA is not the exclusive pay system for COPRA covered employees. *Bull v. United States,* 63 Fed. Cl. 580, 589 (2005) (holding that COPRA is "mutually compatible" with, and not exclusive of, other pay statutes, such as the Fair Labor Standards Act). *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

For example, in *Curry v. United States*, employees of the Department of Veterans Affairs Health Administration (VHA) sought back payments for time during which they were regularly scheduled for night and weekend duty but were on paid leave. 66 Fed. Cl. 593, 599 (2005). Similar to CBP Officers, VHA personnel are compensated with night and weekend premium pay under provisions separate from Title 5. *See generally* 38 U.S.C. §§ 7401-74. VHA's premium pay statute, however, also contains a clause explicitly stating that it supersedes Title 5's provisions. *See* 38 U.S.C. § 7425(b) ("notwithstanding any other provision of law, no provision of title 5 . . .which is inconsistent with any provision of . . . this chapter shall be considered to supersede, override, or otherwise modify such provision unless the former specifically references the provision of Chapter 74 to be superseded, overridden, or otherwise modified."). Based on this language, the court determined that the VHA's premium pay statutory language superseded Title 5's premium pay provisions. *Curry*, 66 Fed. Cl. at 607. Notably, it also found that in the absence of a contrary provision, employees were still generally subject to Title 5's provisions.

Similarly, in the absence of a contrary provision in COPRA, CBP employees are still generally subject to Title 5's provisions. *See James v. Von Zemensky*, 284 F.3d 1310, 1320 (Fed. Cir. 2002) (explaining interaction between Title 5 and other personnel systems and holding that "it is [generally] assumed that, absent other overriding provisions of law, title 5 applies to executive agencies [and its employees]."). As there is no superseding language in COPRA

that would exempt CBP employees from Title 5's provisions, the statutes must be construed in a way that best resolves any possible conflict between them. *See Morton*, 417 U.S. at 551; *see also* 5 C.F.R. § 550.101(b) ("employees to whom this subpart does not apply").

In summary, moving from analogy to the matter at hand, COPRA enhances the amount of premium pay, but employees remain subject to Title 5's limitations. Specifically, 5 U.S.C. § 5545(a) authorizes the payment of night differential and provides that night differential may be paid during periods of paid leave "*if the periods of leave with pay during a pay period total less than 8 hours*." Accordingly, employees are entitled to COPRA night differential pay while on paid leave, provided they do not take 8 hours or more of paid leave during the pay period. As such, CBP Officers have remained subject to Title 5's limitations on premium pay.

Also, I want to note in this grievance response, as part of the dialogue that arose following the filing of the July 27, 2021 national grievance, the parties agreed that several local grievances would become part of this national grievance matter. This was memorialized via email correspondence between you, the NTEU representative in this matter, and me on August 19, 2021. The parties agreed and acknowledged that CBP and NTEU are agreeing to hold the following the local grievances in abeyance from the following field offices/ports: Boston Field Office – Port of Boston, MA; Buffalo Field Office – Port of Buffalo, NY; Chicago Field Office – Port of Minneapolis, MN; Detroit Field Office – Port of Sault Ste Marie, MI; Laredo Field Office – Ports of Hidalgo & Progreso, TX; San Francisco Field Office – Dalton Cache, AK (Area Port of Anchorage); Seattle Field Office – Port of Pembina, ND; Detroit Field Office – Port of Detroit; and Detroit Field Office – Detroit Metropolitan Airport, pending the outcome of NTEU's national grievance filed on July 27, 2021. The parties also agree the outcome of the national grievance will serve as the resolution for those grievances filed locally. Concerning any subsequent local grievances that arise, the parties agreed to take a "wait and see" approach, with the knowledge that the national NTEU grievance is a grievance known about by NTEU locally around the country, so the parties are not expecting subsequent local grievances to be filed.

Lastly, NTEU made a statement on page two of its July 27, 2021, national grievance filing that CBP's position changed on July 26, 2021. CBP has tried to internally confirm what NTEU means by this assertion. However, it has found no indication from the Office of Field Operations, Payroll, Office of Human Resources Management, or its

> Office of Chief Counsel, that any broad policy document has been put out nationally by CBP in any form (e.g. email, muster, etc.) to change any payroll or other premium pay practices in relation to paying night differential when more than eight hours of leave are taken in a pay period.
>
> In summary, CBP denies NTEU's grievance for the reasons outlined above.

DISCUSSION

I initially address and determine the issue to be decided. As previously noted above, the NTEU and CBP disagreed on the presentation of the issues to be decided. The parties' respective proposals as to the framing of the issues and their reasoning have been set forth above and need not be restated. Exercising the discretion delegated to me by the parties, and based on a thorough review of the record and arguments presented, I have framed the issue to be decided as follows:

> Did CBP violate the parties' agreement, applicable law, regulation, policy, or the terms of a prior arbitration award when it applied the eight-hour rule to the payment of paid parental leave (PPL) and emergency paid leave (EPL)? If so, what shall be the remedy?

In framing the issue in this fashion, I have preserved the parties' ability to present argument and evidence consistent with the issues each has proposed, the scope of the grievance, as well as the applicable burden of proof. NTEU has the burden to prove, by a preponderance of the evidence, that CBP violated the parties' agreement, COPRA, the Federal Labor Relations Act's protection against unfair labor practices, or a prior arbitrator's binding decision, when it applied the 8-

hour rule in remunerating any COPRA-covered, night shift employee taking the above-referenced forms of paid leave. Accordingly the record will be reviewed within the framework of the issues to be decided.

I have carefully reviewed and thoroughly considered the arguments and evidence submitted into the record by the Agency and the Union in support of their respective positions on the issue in dispute. The Union has the burden to prove that CBP violated the Agreement, applicable law, regulation, policy, or the terms of a prior arbitration award when it applied the eight-hour rule to the payment of paid parental leave (PPL) and emergency paid leave (EPL).

As previously indicated, the evidentiary record includes the parties' Stipulations and a series of documents concerning rules, regulations and payroll guidelines, the Vaughn Arbitration Award and the Stipulated Procedure and Timetable for Backpay and Future Payments implementing the Award. Based on the record, the parties offer the following statements of position.

Union

NTEU argues that it has proven, by a preponderance of the evidence, that CBP has violated the parties' agreement, and the relevant statutes and policy promulgated by the Federal government, as well as the Vaughn Award, when it did not pay COPRA-covered employees night differential pay when they take eight or more hours of PPL or EPL in a single pay period.

Initially, NTEU argues that CBP has violated, as well as repudiated, the parties' CBA which it alleges constitutes an unfair labor practice under FLRA, by failing to adhere to the Vaughn Award from 1995. NTEU asserts that the Award has binding effect on the parties' continuing interpretation of the contractual issues implicated therein, citing 5 USC § 7122(b), which provides that arbitration awards under FLRA are "final and binding," especially where no exceptions have been filed to the Award, as was the case in 1995. NTEU asserts that the Vaughn Award "unambiguously holds that FEPA's eight-hour rule does not restrict the payment of night differential to COPRA-covered employees," and that a failure to adhere to the explicit terms of the binding Award constitutes a repudiation of the contract. NTEU further argues that although the Vaughn Award did not address PPL and EPL, because they did not exist at the time, the Award's holding extends to "all types of paid leave, including paid parental leave and emergency paid leave." This, it asserts, is because the regulation governing PPL provides that "the pay an employee receives when using paid parental leave shall be the same pay the employee would receive if the employee were using annual leave; the Office of Personnel Management (OPM) guidance for EPL provides that "emergency paid leave is paid at the same hourly rate as annual leave." Additionally, the Union points to the text of the American Rescue Plan Act ("ARPA"), which provides that EPL "shall be paid at the same hourly rate as other leave payments." In sum, the Union contends CBP has violated the Vaughn Award and the parties' contract, as

well as repudiated the parties' contract, when it applied the eight-hour rule to COPRA-covered, night shift employees who took PPL and EPL.

In asserting that CBP has repudiated the parties' agreement, constituting an ULP under 5 USC § 7116(a)(1) and (5), NTEU cites the test from *US Dep't of Com. Pat. & Trademark Off.,* 65 FLRA 290 (2010)("PTO"), which lays out the elements of a repudiation of a contract: "(1) the nature and scope of the alleged breach of the agreement - i.e., was the breach clear and patent?; and (2) the nature of the agreement provision allegedly breached - i.e. did the provision go to the heart of the parties' agreement?" NTEU asserts that it has proven both elements of repudiation here. It also posits *arguendo* that even if the application of the Vaughn Award as to EPL and PPL is ambiguous, it is still a reasonable interpretation that the Vaughn Award applies implicitly to EPL and PPL even though they were not at issue at the time of the Award.

NTEU also argues that even if the Vaughn Award is not applicable to current case, CBP's application of the eight-hour rule to COPRA-covered employees is violative of governing law. NTEU cites *Lanehart v. Horner,* 818 F.2d 1574 (Fed. Cir. 1987)("Lanehart") and *Armitage v. US*, 98 Fed. Cl. 517 (2011) ("Armitage"), which the Vaughn Award originally relied on, in part, in holding that CBP may not apply the eight hour rule to the types of paid leave at issue in that case. NTEU cites *Lanehart* and *Armitage* for the proposition that "employees on leave are entitled to the same regular pay, including premium pay, that they receive while

working." NTEU argues that a direct application of this proposition to the case at hand requires that the eight-hour rule not be applied to PPL and EPL.

Further citing *Lanehart* and *Armitage*, NTEU argues that § 5545(a) of FEPA "modifies the default rule" of those cases, "but *only* for employees who receive premium pay for nightwork *under this section"* (emphasis in original). Thus, it is NTEU's position that FEPA § 5545(a), by providing that "this subsection and subsection (b) of this section *do not modify* section 5141 of title 31, *or other statute authorizing additional pay for nightwork*" (emphasis in original), forecloses CBP's argument that FEPA's eight-hour rule applies to COPRA-covered night shift employees.

The Union also points out differences in the definitions of "nightwork" and "night work" under FEPA and COPRA, respectively. These differences include which hours constitute night work, and whether any periods of leave, like holidays, are excluded from its definition. In short, NTEU argues that COPRA's definition of "night work" supersedes FEPA's definition of the same, and that FEPA's eight-hour rule is thus also superseded by COPRA.

Finally, the Union urges that CBP be ordered to cease and desist from applying the eight-hour rule with respect to COPRA-covered employees' usage of the various forms of paid leave implicated by the issues in this case. The Union also requests back pay for any employee who may have been affected by the

application of the eight-hour rule with respect to PPL and EPL taken by COPRA-covered employees working the night shift.

Agency

CBP argues that NTEU has failed to meet its burden to show that the eight-hour rule should not be applied when COPRA-covered employees on the night shift take paid leave. CBP takes the position that the Vaughn Award "is and always has been contrary to law," but also states that it has and continues to apply it with respect to the forms of paid leave that it addressed. CBP further asserts that even assuming *arguendo* that the Vaughn Award is correctly decided, it still does not apply to PPL and EPL, which were not in existence at the time of the Award.

The Agency first rejects the Vaughn Award, maintaining that it was contrary to law and reasserts many of the original arguments made at the time. CBP argues that Arbitrator Vaughn read the definition of an "employee" in FEPA too narrowly, wrongfully excluding COPRA-covered officers from that definition, and the requirement that all "employees" covered by FEPA are subject to the eight-hour rule. The Agency therefore argues that "there is no statutory basis for finding that the night pay differential language in COPRA supersedes the express provisions of FEPA, making the eight-hour rule applicable to CBP officers." The employer also argues that FEPA and COPRA need not be read in conflict, and are mutually compatible, in opposition to the Vaughn Award's holding that COPRA necessarily

supersedes FEPA for the purposes of allocating the night differential to COPRA-covered employees.

The Agency rejects NTEU's argument that § 5545(a) of FEPA allowed COPRA to supersede FEPA with respect to the payment of the nightwork differential. According to the Agency, this section, which provides that FEPA "does not modify section 5141 of Title 31, or other statute authorizing additional pay for nightwork," does not "override" the application of the eight-hour rule in this case. Rather, it argues, the provisions of FEPA and COPRA must be read together. CBP acknowledges that COPRA is "another statute authorizing additional pay for nightwork" but maintains that COPRA "only modifies FEPA's definition of 'nightwork' insofar as specific shifts and premium pay rates are concerned."

CBP cites *Curry v. United States,* 66 Fed Cl 593 (2005) for the proposition that "the eight-hour rule applies to employees covered by other pay regimes unless expressly superseded." In that case, which precluded the application of the eight-hour rule to a group of VHA employees known as hybrids, the Court of Federal Claims held that a provision of Title 38, which governed additional premium pay to VHA employees beyond FEPA, explicitly superseded FEPA with respect to the application of the eight-hour rule to hybrid employees receiving premium pay. CBP argues that *Curry* requires an explicit supersession of the FEPA language in order to make effective a preclusion of the eight-hour rule; CBP asserts that COPRA,

unlike Title 38, contains "no such overriding provision…and its authorization of additional premium pay does not automatically displace the eight-hour rule."

CBP also cites *Bull v. United States*, 479 F.3d 1365 (Fed Cir 2007) for the proposition that "the plain language of the statute clearly indicates that COPRA is not the exclusive source of overtime pay for covered employees" (internal quotation marks omitted). In *Bull*, the Federal Circuit held that COPRA's supersession of FEPA's definition of hours "officially assigned" rendered COPRA non-exclusive as a source of premium pay for employees nevertheless covered by it. CBP thus relies on *Bull* for the purpose of demonstrating what an explicit supersession of FEPA looks like, and in contrasting that circumstance with the one at bar. CBP thus asserts that "there is simply no provision in COPRA that discusses premium pay while on paid leave."

Next, CBP reasserts the argument, first raised before Arbitrator Vaughn, that its determination with respect to the application of the eight-hour rule is entitled to deference and should not be disturbed. It also argues that the Vaughn Award misapplied controlling precedent in the cases *Lanehart* and *Armitage*, which it contends led the Arbitrator to "erroneously construe COPRA's silence regarding premium pay while on paid leave to mean that the eight-hour rule did not exist for COPRA-covered employees." Simply put, the Agency posits, "COPRA's silence means that the amount of [COPRA night pay differential] that can be received while on paid leave is determined by the 'leave with pay' provisions themselves."

The Agency next asserts that the Vaughn Award is not precedential or controlling with respect to the case at bar. This is because, it contends, the issues in these cases are not identical because EPL and PPL were not at issue there. Notably, the Agency points out, the regulations governing PPL and EPL each provide explicitly for the application of the eight-hour rule, unlike the paid leave categories at issue in the Vaughn Award. CBP also maintains that it has complied with the Vaughn Award with respect to its terms, a contention which it says the Union acknowledges. Finally, the Agency advances the argument that even assuming *arguendo* that a violation is found in this case, any back pay awarded to affected employees who took PPL or EPL and were paid under the eight-hour rule cannot be paid because it would constitute an unconstitutional usurpation of Congress's power to appropriate funds for specific purposes.

As previously noted, NTEU bears the burden of proving, by a preponderance of the evidence, that CBP violated the parties' agreement and relevant statutes when it applied the eight-hour rule in FEPA to COPRA-covered, night-shift employees' use of paid parental leave and emergency paid leave. In its original grievance, NTEU alleged that CBP was in violation because it was alleged to have applied the eight-hour rule when covered employees took other kinds of leave, including annual leave, sick leave, leave for jury service, and leave for military service. It also noted that the parties agreed that the issue of Sunday night premium pay is beyond the scope of this case, as it is being litigated separately. However, NTEU confirmed in its brief that CBP did not apply the eight-hour rule in these cases of leave usage, and the primary contention at issue here is therefore

that CBP is incorrectly applying the eight-hour rule with respect to PPL and EPL. Nevertheless, NTEU maintains that if it is determined that the eight-hour rule does not apply to PPL and EPL, then it "necessarily means that it does not apply to annual leave, sick leave, court leave, or military leave," and urges that the eight-hour rule may not be applied whenever paid leave is taken by COPRA-covered night shift employees.

The parties' disagreement mainly centers on the effect of the 1995 Vaughn Award, which became final and binding with respect to the issues it addressed, and which was implemented successfully by the parties for more than twenty years, pursuant to a subsequent agreement also appearing in the record here. Arbitrator Vaughn framed the issue before him quite broadly, inquiring whether COPRA-covered employees are entitled to premium pay for "leave" taken from assigned night work, when they took 8 or more hours of leave in a biweekly pay period. Vaughn addressed the types of paid leave extant at the time of that case, and did not have the opportunity to address whether PPL and EPL were also to be applied without the eight-hour rule, for the simple reason that those two forms of leave became available after the Vaughn Award.

In accordance with his framing of the issue, Arbitrator Vaughn held that the eight-hour rule did not apply to leave taken by employees covered under the grievance there because "compensation for leave taken is compensation to the employee for what he/she would have earned had he/she been at work." He held that COPRA, a more specific pay statute than FEPA, and also containing no

language addressing whether the eight-hour rule still applied, superseded FEPA's "leave with pay" provisions and did not incorporate or continue to effectuate the eight-hour rule. He reasoned that had Congress wished to carry the eight-hour rule over from FEPA into COPRA, it would have explicitly done so.

As a preliminary matter, I observe that Arbitrator Vaughn's award is not preclusive of the issue here, nor is its holding controlling. CBP forcefully urges that, although it continues to comply with the terms of the Vaughn Award, it is wrongly decided and its reasoning should not be considered with respect to the application of the eight-hour rule to PPL and EPL. NTEU argues that the Vaughn Award is persuasive authority and acknowledges that the Award is not controlling, while maintaining that the Agency violates the Vaughn Award and commits an ULP by failing to abide by its terms and thus repudiating the parties' agreement.

I do not find that in failing to apply the eight-hour rule to PPL and EPL, the Agency has repudiated the parties' agreement and failed to comply with the Vaughn Award. By its explicit terms, the Vaughn Award decided the issue as to annual leave, sick leave, court leave, and military leave, but did not address PPL and EPL because they did not exist at the time. The record before me is clear that the precise issue before me, whether the eight-hour rule applies to these two new forms of leave, is newly presented and therefore cannot form the basis for a retroactive ULP for repudiation. By way of example, such a repudiation may have been presented had CBP explicitly departed from the Vaughn Award and begun applying the eight-hour rule to those forms of leave covered in that case. However,

as noted, PPL and EPL are new and potentially different from prior forms of leave, and were not at issue before Arbitrator Vaughn.

The essence of CBP's argument is that Arbitrator Vaughn's reasoning should not be applied to PPL and EPL because the Award was contrary to law, or because PPL and EPL are not akin to other forms of leave and therefore should be treated differently. NTEU disagrees, and argues that the Vaughn Award, properly decided, is also persuasive authority for the proposition that PPL and EPL should be treated identically to the forms of leave addressed therein. Arbitrator Vaughn relied on the cases *Lanehart* and *Armitage* to find that when a customs officer took leave under COPRA, he or she should receive the same rate of paid leave compensation as they would have received had they actually worked the shift assigned. NTEU maintains that *Lanehart* and *Armitage* "remain valid precedent for the proposition that employees on leave are entitled to the same regular pay, including premium pay, that they receive when working." Their application to PPL and EPL is appropriate, according to NTEU, "because, by statute and regulation, those types of leave are paid at the same rate as any other type."

I have thoroughly reviewed these arguments and find no cause to stray from Arbitrator Vaughn's reasoning with respect to PPL and EPL. The statutes enabling each of those increased allowances, like COPRA itself, are silent as to the applicability of the eight-hour rule in FEPA. Arbitrator Vaughn observed that COPRA, a more specific payroll statute than FEPA, modified FEPA thoroughly

enough that FEPA's eight-hour rule would not be preserved absent an explicit provision by Congress. In the intervening 26-years between the Vaughn Award and the instant grievance, Congress enacted two further leave entitlements for the employees of various Federal agencies governed by FEPA and a constellation of other payroll statutes. Had Congress intended to apply the eight-hour rule to these new leave entitlements for COPRA-covered employees, it would have so provided.

CBP's arguments that the Vaughn decision is contrary to law are unavailing. As NTEU argued before Arbitrator Vaughn as well as in this proceeding, *Lanehart* and *Armitage* stand for the proposition that the "leave with pay" statutes modifying FEPA (*i.e.* annual leave, sick leave, court leave, and military leave, and Sunday premium pay), without explicit language to the contrary, require that paid leave be paid at the same right as regular pay, including premium pay, that they receive while working. Arbitrator Vaughn held that COPRA is akin to these "leave with pay" statutes, modifies FEPA, and does not explicitly import the eight-hour rule. The PPL and EPL statutes are also akin to "leave with pay" statutes, in that they provide an additional source of leave available to COPRA-covered employees, with no independent restriction on how they should be applied to those employees.

NTEU argues that section 5545(a) of FEPA expressly provides that any "other statute authorizing additional pay for nightwork" is not modified by the eight-hour rule. CBP replies that "5 USC § 5545(a) authorizes additional night pay differential for employees when they actually work the required night hours and allows them up to eight hours of that additional night differential payment when

they do not work the hours." CBP thus agrees that "NTEU is in fact correct that 5 USC § 5545(a)'s language 'does not modify' COPRA…because there is no need to modify it in order for the eight-hour rule to apply." I do not agree with CBP's interpretation of this statutory language. As indicated, CBP acknowledges that COPRA "is not modified by" FEPA, and its eight-hour rule. COPRA does not have an independent basis for applying the eight-hour rule, and, as found by Arbitrator Vaughn and established in this proceeding as well, COPRA's similarity to the "leave with pay" statutes at issue in *Lanehart* and *Armitage* requires that Congress evince a showing that the eight-hour rule applied with respect to COPRA-covered employees. Otherwise, as articulated by NTEU in this proceeding, COPRA-covered employees' paid leave entitlements are not bound by the eight-hour rule for night work.

CBP's reading of *Bull* is similarly unavailing. CBP cites *Bull* for the proposition that COPRA is not the exclusive source of authority for paying customs officers; other statutes such as FLSA and, obviously, FEPA, apply when determining how to pay COPRA-covered employees. However, CBP reads *Bull* further, extrapolating that because COPRA and FEPA both govern COPRA-covered employees' pay, FEPA's eight-hour rule is necessarily imported when paying COPRA night differential. NTEU argues that this reading overextends *Bull*'s holding. I agree. Simply put, *Bull* found that where employees performed work covered by FLSA and COPRA, FLSA's provision of time and a half overtime was the correct rate, not double time under COPRA. *Bull* does not stand for the premise that the interaction between COPRA and FEPA is the same as the

interaction between COPRA and FLSA. Other cases cited by CBP are in the same vein and confirm that Congress may explicitly apply the eight-hour rule to more specific pay regimes if it wishes (*Curry*), and that the eight-hour rule itself applies under FEPA (*GSA*).

I therefore find, pursuant to the issue to be decided, that the Agency misapplied the eight-hour rule in FEPA when paying night work PPL and EPL to COPRA-covered employees. Those employees were entitled to the full amount of paid leave charged at the COPRA night work rate.

I turn now to the issue of remedy. CBP argues that any back pay awarded in this case, regardless of the outcome on the merits, cannot be authorized because it would violate the US Constitution's delegation of the power of appropriations to Congress. It also argues that it would violate a series of statutes regulating illegal payment of government funds. I do not find these arguments persuasive for the simple reason that Congress *did* appropriate money to pay employees for paid leave taken under COPRA, and its remuneration is required by both statute and by interpretation of the parties' Agreement. CBP is therefore directed to cease and desist from applying the eight-hour rule with respect to paid leave taken from night work by COPRA-covered employees and, pursuant to 5 U.S.C. § 5596(b)(1), make whole any affected employees by paying them at the rate that they would have received had the eight-hour rule not been applied.

AWARD

Pursuant to the issue to be decided, the Agency misapplied the eight-hour rule in FEPA when paying night work PPL and EPL to COPRA-covered employees. Those employees were entitled to the full amount of paid leave charged at the COPRA night work rate. The CBP is directed to cease and desist from applying the eight-hour rule with respect to paid leave taken from night work by COPRA-covered employees and, pursuant to 5 U.S.C. § 5596(b)(1), make whole any affected employees by paying them at the rate that they would have received had the eight-hour rule not been applied. I retain jurisdiction for the sole purpose of resolving any disputes concerning the implementation of remedy.

Dated: August 12, 2022
Lincroft, New Jersey

James W. Mastriani

State of New Jersey }
County of Monmouth }ss:

On this 12th day of August, 2022, before me personally came and appeared James W. Mastriani to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Madeline R Boone
NOTARY PUBLIC
State of New Jersey
ID # 50196320
My Commission Expires 6/23/2027