Federal Mediation and Conciliation Service
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In the Matter of the Arbitration between

AFGE, Council of Prisons Locals (AFL-CIO),
Local 420

Union,

And

OPINION AND AWARD

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correction Complex Hazelton
Bruceton Mills, West Virginia

FMCS: 190719-09214

Employer,

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Before: Deborah M. Gaines, Arbitrator

OPINION

Pursuant to the collective bargaining agreement between the Federal Bureau of Prisons (BOP) and the Council of Prison Locals, AFGE, the undersigned was designated as the Arbitrator in this case. The parties scheduled the arbitration hearing for June 11, 2020. However, on March 25, 2020, the BOP filed a motion to dismiss on jurisdiction and procedural arbitrability. The Union filed its opposition to the motion on April 6, 2020.

On June 12, 2019, the Union filed a grievance alleging violation of the "Master Agreement, including, without limitation: Article 3 and 6, Fair Labor Standards Act" [Employer Attachment 1]. In part 6 of the grievance, which requires a description of "what way were each of the above violated" provides:

> On May 2, 2019, the Union was made aware that some employees in the in the Education Department at FCC Hazelton were not being paid equally for overtime work at the facility, despite having overwhelmingly similar job

> duties. Specifically, the Union was contacted by Teacher Rebecca Fike, who advised that she was not receiving the same amount of overtime pay as other staff in her department, because her position had been improperly categorized as "FLSA exempt" by the Agency. The duties and work performed by Ms. Fike are virtually categorized as "FLSA exempt" by the Agency. The duties and work performed by Ms. Fike are virtually identical to the duties and work performed by staff in the Department that are not categorized as "FLSA exempt by the Agency.
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> In 2009 at FCC Victorville, an arbitrator determined that the BOP had misclassified teachers as exempt from the Fair Labor Standards Act (FLSA). The decision was upheld by the Federal Labor Relations Authority (FLRA). Later a similar case was arbitrated at FCC Coleman, in which the same conclusion was reached. Failure to pay employees as required by the FLSA is a violation of the Master Agreement, which constitutes an unjustified and unwarranted personnel action under 5 USC 5596 (the Back Pay Act). Under the Back Pay Act, employees that are found to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials which the employee are entitled to receive an amount equal to all of the pay, allowances, or differentials which the employee would have received during the period if the action had not occurred. Affected employees are also entitled to receive reasonable attorney fees related to the personnel action with respect to any decision related to the grievance process. Finally, the amount payable under the Act shall be payable with interest, computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made. Interest shall be computed at the rate or rates in effect under section 6621(a)(1) if the Internal Revenue Code of 1996 and shall be compound daily. [Employer Attachment 1]

The Employer answered the Grievance at Step 2. It advised the Union that the grievance was inappropriately filed with the Warden rather than the Chief Labor Relations Officer but also provided a substantive response. [Employer Attachment 2]

On July 18, 2019, the Union filed a Notice of Intent to Pursue Arbitration – FLSA Teacher Exemption by letter addressed to Bryan Antonelli, Complex Warden. According to the letter, the Union presented the following issues to be decided by the Arbitrator:

1. Has the agency violated the Master Agreement and/or the Fair Labor Standards Act by failing to pay employees equally for performing the same work? And if so, what shall be the remedy?
2. Has the Agency improperly misclassified Education Staff at FCC Hazelton as being exempt from the FLSA? And if so, what shall the remedy be?

The Remedies requested by the Union in the grievance are as follows:

As resolution, the Union requests that all affected bargaining unit employees be compensated in accordance with the Back Pay Act for overtime wages that are withheld from them due to being improperly categorized as "FLSA exempt" by the Agency since May 30, 2016 (three years prior to this notice, as the recovery period under the FLSA is three (3) years). The Union also seeks interest in accordance with the Back Pay Act, and reimbursement for any attorney fees. [Employer Attachment 3]

Relevant Language:

MASTER AGREEMENT

ARTICLE 31 – GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, though the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

1. When filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;
2. When filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's

institution/facility, the grievance will be filed with the appropriate Regional Director;
3. When filing a grievance against the actions of an employee, supervisor, or manager supervised by a specific BOP division, the grievance will be filed with the Assistant Director of that Division;
4. When filing a grievance against a Regional Director, the grievance will be filed with the DIrecotr of the Bureau of Prisons, or designee;
5. In cases of violations occurring at the national level, only the President of the Council of Prison Locals or designee may file such a grievance. This grievance must be filed with the Chief, Labor Relations Office; and
6. Grievances filed by the Employer must be filed with a corresponding Union official.

Positions of the Parties

Arbitrability

Position of the Agency

The Agency challenges arbitrability of the grievance on two grounds. First, it contends the grievance lacks the specificity mandated by the Bureau of Prison's (BOP) formal grievance form required to verify the alleged violation. It argues Article 31, Section f of the parties' Master Agreement requires formal grievance to be filed on the BOP's formal grievance form. Box 5 of the form requires the specific directive, statute, executive order be cited and box 6 asks, "In what way were each of the above violated."

The Agency contends the statement by the Union that "some employees in the education department were not being paid equally for overtime (OT) work" is merely a conclusory statement. [Agency Brief at 4]. It argues the Union did not specify how, or in what way, the Union alleges the violation occurred. The Agency argues the Union's grievance was insufficient to place it on notice of the allegation it now claims. It argues to the extent the grievance contains any specificity, it

alleges a misclassification under the FLSA, which it maintains is different than what it now argues at arbitration. The Agency cites FCC Allenwood and AFGE, Local 307 (Arbitrator Korch, 2021) to support its position. It argues, the arbitrator, in that case, dismissed the Union's grievance where the Union originally claimed the teachers were misclassified and sought reclassification in its grievance, but changed the grievance at arbitration to argue a violation based on the duties assigned to the Teachers. The arbitrator noted modification of the grievance may only occur by mutual consent, and therefore, dismissed the grievance. The Agency cites several arbitration awards dealing with similar issues at other BOP facilities.

Secondly, the Agency contends the grievance is not arbitrable because it was filed at the wrong level. It argues the Grievance pertains to whether Teachers are properly classified as exempt under the FLSA. It contends classification of positions is not within the authority of the Warden and, therefore, should have been filed at a different level. The Agency cites the testimony of Kristine Joiner, Classification and Compensation Specialist, to support its argument. It contends she testified that no one at the Institution classifies positions or has the authority to do so. As a result, Article 31 requires the grievance to be filed with the Assistant Director of the Classification Division.

The Agency contends there have been several recent arbitration decisions concerning this issue – two filed with the Regional Director and one with a warden. In all three cases, the arbitrator dismissed the grievances as non-arbitrable because the Union failed to comply with the express language of the Agreement.

To be arbitrable, the Agency argues, would require consent to amend the grievance, as the original grievance dealt only with the issue of classification . It avers that to find the Union is really grieving the assignment of duties would require amending the grievance. The Agency argues the Grievance must be dismissed. It stresses that it is not within the Arbitrator's authority to assume jurisdiction of a grievance when the Union fails to comply with the procedural requirements of a grievance. It cites several decisions to support its position.

The Agency argues that recent decision from the FLRA concerning procedural arbitrability make it clear that arbitrators must apply the clear contract language – failure to do so is considered a manifest disregard of the Agreement, which would require the FLRA to overturn an award. In this case, it maintains, the contract is clear. It provides that the grievance "will" be filed at specific levels. Thus, the language is not permissive, and the grievance must be denied.

The Position of the Union

The Union, on the other hand, maintains the grievance is not procedurally defective. With respect to specificity, the Union argues the parties' Agreement does not state any specific requirements for what a grievance must state. Article 31 merely provides the grievance must be filed on the official grievance form and must be signed by the Grievant (or Union) and filed at the appropriate level as described in the Agreement.

The Union contends that to the extent the Arbitrator finds the contract requires specificity; it maintains it has clearly complied with the Agreement. Box 6 of the grievance form asks, "in what way were each of the above violated? Be

specific." The Union maintains the reasonable interpretation of the requirement is that it contains sufficient information included so that the Agency is reasonably aware of the what the Union is alleging. In the instant case, it argues that the Agency was clearly aware of what it was grieving as Warden Antonelli provided a written response to the grievance that clearly showed he understood the complaint.

As to the level the grievance was filed, the Union maintains it was not required to file the grievance at the national level as alleged by the Agency. It argues it is not directly challenging the classification of employees and is not seeking reclassification as a remedy. Rather, it maintains it is challenging the duties these exempt teachers are being assigned. As it is the Warden who ultimately is responsible for assigning individuals at the facility, it argues the grievance is properly filed at the warden level.

Merits

Position of the Union

The Union argues that the testimony and evidence established at the hearing show the primary duties of all employees at FCC Hazelton consist of correctional duties – ensuring the safety and security of the facility and the supervision of the inmates. It argues this requirement was demonstrated to extend to teachers as well. It notes that Marsha Thompkins, former Education Supervisor, testified that the teachers are correctional officers first and all the witnesses stated this understanding as well.

The Union stresses that the educational workers are responsible for a multitude of duties that are not at all related to "teaching" but serve to support the

security mission of the facility, such as responding to emergencies, being "augmented" (reassigned on overtime to correction officer posts), correcting or reporting inmate duties, unsecuring doors in the Education Department, supervising inmates in the Education Department, making rounds, conducting mass searches of the facility, escorting inmates during lockdowns and shower days, searching for contraband, conducting census counts and numerous other correctional related duties.

The Union contends Teachers are assigned to the same duties as those individuals who are non-Exempt and have no cap on their overtime earnings. It notes that all individuals in the education department are rated on the same elements. It notes that the individuals in the Department testified that Teachers and Educational Specialists perform the same duties.

The Union contends the Agency's focus on the Augmentation Agreement is misplaced. It is not the assignments of less than 30 days to duties as a correctional officer it grieves specifically. Rather, it is that the Correctional Officer duties are part of their daily duties and are "baked" into their normal jobs.

The Union relies upon cases from FCC Victorville, FCC Colman and FCI Miami in support of its position.

Position of the Agency:

The Agency argues teachers are correctly classified at FCC Hazelton as FLSA exempt. It argues they fall under the exemption criteria contained in 5 CFR 551.207. It notes that teachers are defined in the statute under 5 CFR 551.208(h)

and are considered exempt when the primary duty of teaching and imparting knowledge comprises at least 50 percent of their duties.

According to the Agency, it ensures compliance with both operational and program reviews through an operational and program review. The operational review is conducted by the institution's staff and the program review by outsider raters with subject matter expertise. It argues the last program review showed no deficiencies at the facility nor any concerns regarding the amount of time teachers spent performing their duties.

The Agency argues the Union did not proffer evidence that it directed or ordered Teachers to perform non-exempt duties for more than 50 percent of their time for more than 30 days. In fact, it cites Ms. Fike's testimony that through the period of October 2018 through September 2021 her augmentation overtime was never more than 30 days. Likewise, Ms. Kinnie also confirmed that she did not work more than 30 consecutive days on augmentation overtime and Mr. Foreman only worked three overtime shifts in three years.

The Agency argues that even if the Union could prove the duties of a teacher were less than 50 percent of their primary duties, under 551.104, teaching would be considered the Alternate Primary Duty and credited as the primary duty for FLSA purposes, so long as it:

1. Constitutes a substantial, regular part of the work assigned and performed;
2. Is the reason for the existence of the position; and
3. Is clearly exempt work in terms of the basic nature of the work, the frequency with which the employee must exercise discretion and independent judgment as discussed in Section 551.206 and the significance of the decisions made.

The Agency argues clearly teachers fall in this category. It notes they were hired as teachers, and that is the primary responsibility of their position.

According to the Agency, the Union's comparison of the teacher position to the Education Specialist position is misplaced. It notes that in a 2003 Arbitration Decision, Arbitrator David Weinstein determined that Education Specialists were non-exempt, but upheld the Teacher exemption even though teachers did not have to be licensed and most of their teaching dealt with remedial learning.

To the extent that direct instruction ceased for a period during the COVID 19 pandemic, the Agency argues that this was clearly a national emergency. Teachers were still required to "teach" but needed to perform departmental duties. To the extent that there is any liability, the Agency maintains that it would be determined from the point all educational programming ceased, and whether teachers performed non-exempt duties for 30 consecutive days or longer.

Decision

After carefully considering the entire record before me, including witness credibility and the probative value of evidence, I find the Grievance arbitrable. With respect to the merits, I find the Agency violated the Agreement by assigning the Teachers to non-exempt duties during the period of Covid-19 lockdown, during which the Teachers were assigned to non-exempt duties for the majority of their hours worked . My reasons follow.

Procedural Arbitrability

The Agency moved to dismiss the grievance as not arbitrable on two grounds. First, that it lacked the specificity required under the Agreement and,

second, that it was filed at the wrong level. I believed it was necessary to have testimony on these issues, and after considering the entire record before me, I find no procedural reason to dismiss the grievance.

As to specificity, Article 31, Section 31(f) provides:

Formal grievances must be filed on Bureau of Prisons "Formal Grievance Forms" forms and must be signed by the grievant or the Union. [Joint Exhibit 4]. The contract does not contain any language requiring the content of the grievance. The form itself indicates in box 5 of the form: Federal Prison System Directive, Executive Order or Statute violated and in box 6 asks, "In what way were each of the above violated? Be specific."

The Union alleged the Agency violated the Master Agreement Article 3 and 6 and the Fair Labor Standards Act. In Box 6 of the grievance form, the Union included the date it became aware of the alleged violations, the allegation the class of employees it believed were not being compensated correctly and why. I find their statements to be sufficiently specific to place the Agency on notice of the violation alleged. In fact, the Union cited other arbitration cases, which would clearly give the Agency notice of the nature of its grievance. That the first step answer discussed the issue indicates the grievance was sufficiently specific and, thus I find no basis to dismiss the grievance.

As to the level at which the grievance was filed, I note that this has been an ongoing subject of dispute between the parties. In fact, both parties have cited different arbitration decisions in support of their positions. In reviewing these cases, I find both lines of cases instructive. In *Ashland*, Arbitrator Fischetti

dismissed the grievance as not arbitrable because it was filed at the wrong level and in *FCI Miami*, Arbitrator Reilly determined the grievance which was filed at the Regional Director level to be appropriate as he determined the grievance was not contesting the classification but rather the manner in the Teachers at FCI Miami were deployed.

After careful review of the evidence, I find the grievance in the instant matter to deal with the duties assigned to Teachers at FCI Hazelton and whether they are inconsistent with the position description. In *Ashland*, the language contained in the grievance form was not contained in the decision. However, it was clear from the arguments raised by the Union in that case that the sole issue was the actual classification of the position itself.

In the instant matter, the grievance stated, "the Union was made aware that some employees in the Education Department . . . were not being paid equally for overtime work at the facility, despite having overwhelmingly similar job duties." It noted the classification but also stated that work performed by Ms. Fike (a teacher) and others "are virtually identical to the duties and work by staff performed by staff in the department that are not categorized as FLSA exempt by the Agency." Based on this submission, I find the Union was grieving the actual duties being performed and whether the individual was properly exempt based on the actual job duties being performed. Thus, the issue was one properly within the control of the warden and, is therefore filed appropriately.

Merits

In finding the grievance arbitrable, I am not reviewing the job description itself as to whether the position it describes therein should be exempt. As written, it is clear the primary duty is to provide direct instruction in the classroom, and as such falls within the learned classification exemption under the FLSA. I note further, the classification also contains responsibilities related to security. Specifically, the position description provides:

> Along with all other correctional institution employees, incumbent is charged with responsibility for maintaining security of the institution. The staff correctional responsibilities precede all others required by this position and are performed on a regular and recurring basis.
>
> Specific correctional responsibilities include custody and supervision of inmates, responding to emergencies and institution disturbances, participating in fog and escape patrols, and assuming correctional officer posts when necessary. The incumbent is required to shakedown inmates, conduct visual searches of inmate work and living areas for contraband, and is responsible for immediately responding to any institution emergencies. The incumbent must be prepared and trained to use physical control in situations where necessary, such as in fights among inmates, assaults on staff, and riots or escape attempts.
>
> Incumbent has the authority to enforce criminal statutes and/or judicial sanctions, including investigative, arrest and/or detention authority on institution property. When necessary, incumbent also has the authority to carry firearms and exercise appropriate force to establish and/or maintain control over individuals. When conditions warrant, the employee may enter into hostile or life-threatening situations and may be required to make decisions affecting the life, well-being, civil liberties, and/or property of others. The actions of the incumbent could result in personal sanctions and legal liability.
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> Incumbent must successfully complete specialized training in firearms proficiency, self defense, management of medical emergencies, safety management and interpersonal communication skills. [Union Exhibit 6]

Thus, by its terms, the position description clearly envisions work that deals with security in the corrections environment. The credible record evidence

establishes that prior to the lockdowns imposed by the Covid-19 pandemic in March 2020, the Teachers were performing duties fitting within the job criteria. Ms. Fike, a Teacher testified that 50 percent of her time was comprised of direct classroom instruction. That comports with the testimony of Ms. Tompkins's and the contend of the Program review conducted prior to the instant grievance.

The Union's primary contention is the primary duty of all Teachers is correctional in nature. It notes the that even Employee Development Manager Thomkins acknowledged the primary duty of all employees is Correctional workers first. The problem with the Union's argument in this case, is that the duties it cites is part of the position description for the Teacher classification. To the extent the Union grieves this assignment, it is then grieving the classification or position description itself, which is not within the purview of the instant case. To the extent it argues that the duties listed in the grievance should be non-exempt, the grievance had to be filed at the level of the administrative director.

However, the analysis does not end here. As noted even in the Agency's brief, the Covid-19 Pandemic had a major impact on the facility. The credible record evidence establishes that for a significant portion of time (approximately one year), no classroom acitivity was taking place. Teachers were merely distributing workbooks and not providing any real instruction. During this period, their duties clearly constituted non-exempt activities. Thus, for the period their classroom and/or teaching duties were less than 50 percent of their time, they should be considered non-exempt and compensated accordingly.

Having found liability for a period, I direct the parties to meet and confer to reach agreement due for the violation. In the event the parties are unable to reach an agreement within 90 days, they shall contact me, and I will make a ruling on the issue of remedy.

Therefore, based on the foregoing, I made the following.

AWARD:

1. The Union complied with the formal grievance form's requirement for specificity in accordance with Article 31, Section f of the Master Agreement.
2. The grievance was filed at the appropriate level in accordance with Article 31, Section (f) (3) of the Master Agreement.
3. The Agency violated the FLSA at the time of the COVID 19 lock down and continuing until teachers were reassigned to their instructional duties constituting at least fifty percent of their duties.
4. The undersigned shall retain jurisdiction on the issue of remedy for a period of 90 days. The parties shall request a ruling on the remedy if they are unable within that time to reach an Agreement due for the Agency's violation of the FLSA.

Dated: February 26, 2023

Deborah M. Gaines

AFFIRMATION

State of New York }
County of New York}

I, Deborah M. Gaines, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Deborah M. Gaines