BEFORE ARBITRATOR KATHRYN DURHAM

American Federation of Government, Employees, Local 3809, Union,	)	FMCS# 220727-07968 (Holiday Leave Grievance)
and	)	
US Bureau of Prisons, FCI Big Spring, Texas, Agency.	)	

Before: Kathryn Durham, ARBITRATOR

Appearances:

For the Union: Thomas F. Muther, Jr.
Minahan Muther Klinger, P.C.

For the Agency: John W. Weeks
Labor Relations Specialist

Date of Hearing: February 15, 2023
Location of Hearing: Via Videoconference
Date Record Closed: April 8, 2023
Date of Award: April 26, 2023

AWARD SUMMARY

The grievance is arbitrable and sustained. The Union made its case by showing that the Agency violated 5 USC § 6104 when it failed to pay three members of the bargaining unit the same pay for a federal holiday as for a day on which they would have performed their ordinary work. The Agency's failed to rebut the Union's case with evidence to show that it was not legally required to pay the employees ten hours of holiday pay rather than eight.

I. ISSUES

(1) Whether the grievance is procedurally defective because the Union failed to comply with the Formal Grievance Form's requirement for specificity and, if so, whether the grievance should be dismissed.

(2) Whether the grievance is procedurally defective because the Union failed to comply with the requirement in Section 31(b) of the Master Agreement that it attempt to resolve the dispute at the lowest appropriate level and, if so, whether the grievance should be dismissed.

(3) Whether the grievance was untimely as to any employees other than the two named on the Formal Grievance Form and, if so, whether the grievance should be dismissed.

(4) Whether the Agency violated any law, regulation, policy or contract with bargaining unit members who were required to take two hours of leave for the Memorial Day holiday on May 30, 3033, or alternatively not paid proper overtime for the week of May 30, 2022. If so, what should be the remedy?

II. FACTS

The Union represents staff at FCI Big Spring, Texas. This grievance pertains to employees, all Union officials, who used official time the week of May 22, 2022, to attend a Union caucus in San Antonio, Texas. The employees covered by this grievance normally work what are called compressed work schedules; specifically, they work four ten-hour shifts per week rather than five eight-hour shifts. Their schedules are not flexible; the employees have set hours and are scheduled to work the same specific days each week.

On the week of May 22, 2022, six bargaining unit employees were permitted to alter their schedules to be paid official time eight hours per day over five days, Monday through Friday, to travel to and from and to attend the Union caucus. Upon their return to Big Spring, these employees resumed working their normal compressed schedules. The weeks of May 22 and May 29 were part of the same biweekly pay period.

Monday, May 30, 2022, was the Memorial Day federal holiday. Two of the members of this class, Pedro Chavez and Paula Chavez, normally worked Mondays as part of their regular four-day work weeks. Another employee, Walter Soto-Ruiz, normally worked Sundays and had Monday through Wednesday as his scheduled days off. While Mr. and Mrs. Chavez were entitled to have the day off and receive holiday pay for the holiday on Monday, Mr. Soto-Ruiz had the day off on Sunday and was entitled to pay for that day in lieu of pay for the Monday holiday.

There is no dispute that the employees were entitled to holiday pay. The issue in this case is whether they were entitled to ten hours of holiday pay for the Memorial Day holiday, or only eight hours of holiday pay. Each was paid eight hours of holiday pay and, upon learning that they were not being paid for the additional two hours of their normal shift, were asked to use accrued leave to cover those remaining hours. The employees submitted their time sheets for the weeks of May 22 and May 29, 2022, on or about June 6, 2022.

Mrs. Chavez, who is a teacher as well as the local President, testified that her immediate supervisor, Supervisor of Education and Recreation Yadira Ibave, certified the time record she submitted for the weeks of May 22 and 29, but the certification was rejected. Mrs. Chavez spoke to Time and Attendance Clerk Billy Roper, who told her that he had received guidance from Human Resources that they could not key her time as submitted because she was on a flexible schedule for the weeks of May 23 and 30.

On June 6, 2022, Mrs. Chavez emailed Roper, Ibave, and Human Resources Manager Richard Montoya regarding the rejection of her certification for ten hours of holiday pay, stating, “All I know is that if all of ya’ll keep this up, you’ll all be on an arbitration stand in a year explaining it. There is NOTHING in the Education MOU allowing for anything that’s being done.” It was HR Manager Montoya who responded to Chavez’ email, explaining that if an employee on a compressed schedule works anything other than their fixed schedule for one week of the pay period, he or she is no longer on a compressed schedule; the schedule becomes a flex or variable schedule. Montoya stressed that, “Per Program Statement 3630.02, the BOP only recognizes Compressed

Work Schedules, not Flex or Variable Schedules." Chavez and Montoya exchanged several more emails between June 6 and June 9, 2022, but did not resolve the issue.

The Union filed this grievance in writing on June 23, 2022. The grievance was brought on behalf of Local 3809 Bargaining Staff. It listed Montoya as the person with whom information resolution was attempted. The substance of the grievance stated as follows:

> This is a violation of 5 USC 6104 and Implementing OPM regulations; Article 3, 18, and 19 of the parties [sic] MLA, and any other applicable laws, rules or regulations.
>
> On June 3, 2022, the Union learned that the Agency was requiring certain bargaining unit employees to take two hours of leave for the Veterans Day holiday. The Union knows of the following employees being adversely effected [sic]: Pedro J. Chavez, Paula K. Chavez. However, it is believed that the Agency's actions have been widespread throughout FCI Big Spring and this grievance is intended to include all similarly situated bargaining unit employees unknown to the Union at this time.

On July 21, 2022, Warden Cully Stearns responded to the grievance in writing. The response asserted that the grievance was procedurally deficient because it did not specifically identify laws, rules and regulations alleged to have been violated or detail the ways in which the alleged violations occurred. It also stated that the Union had failed to submit the grievance on a negotiated BOP Formal Grievance Form. Notwithstanding those objections, the Warden's response explained that the BOP only recognizes fixed compressed and regular (5/8) schedules, and that staff who revert from a compressed schedule to a regular schedule for part of the pay period must remain on a regular schedule for the entirety of the applicable pay period. The Warden denied the grievance.

Because the parties were unable to resolve the grievance, the Union appealed to arbitration, and an arbitration hearing took place via videoconference on February 15, 2023. The parties had full and fair opportunity to present evidence and witness testimony. The hearing was transcribed by a certified court reporter. The parties submitted written closing briefs. It is upon this record that the following findings and conclusions are based.

III. POSITIONS OF THE PARTIES

Arbitrability

Agency's Position

The Agency argues that the grievance should be dismissed because it was procedurally defective for three reasons. First, it claims that the grievance lacks the specificity required by the BOP Formal Grievance Form, which requires the party filing the grievance to identify "In what ways were each of the above [System Directives, Executive Orders, or Statutes] violated? Be specific." According to the Agency, the Union was not sufficiently specific when it identified "5 USC any other laws rules and regulations" as the allegedly violated provisions. Section 32(f) of the parties' Master Agreement provides that "Formal grievances must be filed on Bureau of Prisons Formal Grievance forms." The Agency maintains that the Union failed to specifically state how the Agency violated the Master Agreement or any of the statutes or regulations listed.

Section 31(b) of the Master Agreement requires the parties to "attempt informal resolution at the lowest appropriate level" before filing a grievance. The Agency contends that the Union failed to make a reasonable attempt to resolve the issues at the lowest appropriate level because the "lowest appropriate level" would have been the impacted employees' immediate supervisors, not HR Manager Montoya.

Finally, the Agency maintains that the Union violated the time limitations for filing a grievance as the grievance pertains to any employees other than Pedro and Paula Chavez. Section 31(d) of the Master Agreement provides that grievances must be filed within 40 calendar days of the date of the alleged grievable occurrence or 40 days from the date the affected staff could reasonably be expected to have become aware of the alleged grievable event. The Agency claims that the other allegedly affected employee, Walter Soto-Ruiz, was never named as a grievant until the arbitration hearing, but that he would have been aware of this alleged violation when he submitted his time card on June 6, 2022.

Union's Position

The Union contends that the Master Agreement does not contain any requirements regarding specificity of allegations in a grievance. Further, it cites the Agency's grievance response, as well as the e-mails exchanged by Montoya and Mrs. Chavez, as evidence that the Agency knew and understood the subject matter of the grievance.

Next, the Union insists that Mrs. Chavez attempted to seek information resolution at the lowest possible level prior to filing the grievance, it claims that Montoya was the appropriate person with whom to discuss this matter because he was the "chief architect and staunchest proponent" of the underlying issues.

Finally, the Union contends that the impacted bargaining unit employees were properly identified in the grievance because the grievance was brought as a class action, on behalf of a group of employees, and because there is no contractual requirement to name all affected employees in a class action grievance.

Merits of the Grievance

Union's Position

5 USC § 6104 provides that, "when an employee is relived or prevented from working on a day . . . solely because of the occurrence of a legal public holiday under 6103 of this title . . . he[/she] is entitled to the same pay for that day as for a day on which an ordinary day's work is performed. It is undisputed that May 30, 2022, was a federal holiday recognized under § 6103. The Union's position is that, because these employees would have been scheduled to work ten hours on May 30, 2022 (or, in the case of Soto-Ruiz, on his "in lieu of" holiday on May 29, 2022), but for the federal holiday, they were entitled to be paid ten hours of holiday pay for that day.

The Union argues that, at the time this grievance arose, the members of this class worked compressed schedules, defined in 5 USC § 6127(a) as schedules "which use a 4-day workweek or other compressed schedule." Conversely, 5 USC § 6122(a) defines flexible schedules as possessing both (1) designated hours and days during which an

employee on such a schedule must be present for work; and (2) designated hours during which an employee on such a schedule may elect the time of such employee's arrival and departure from work.

Because the employees worked fixed compressed schedules, the Union contends that the number of hours in their "ordinary day's work" is just as easily determined as for employees working a 5/8 regular schedule. If a holiday lands on a regular workday where the employee is scheduled by the Agency to work ten hours, the Union maintains that the employee's entitlement to ten hours of holiday pay is known and calculable by the Agency in advance.

The Union insists that allowing the affected employees to split between a 5/8 standard schedule the first week of the pay period and a 4/10 compressed schedule the second week did not take them off of a "fixed" schedule and place them on a "flexible work schedule because the employees were still required to work specific hours on specific days; the employees did not have flexibility to work hours or days other than those they were scheduled. Moreover, the Union cites the Agency's assertion that, per BOP policy, flexible and variable schedules are not recognized; the Agency only uses fixed compressed and regular schedules.

The Union asks that the grievance be sustained, and that Paula Chavez and Pedro Chavez be reimbursed the two hours of leave each was required by the Agency to take on May 30, 2022, and that Walter Soto-Ruiz be reimbursed the two hours of leave he was required to take on May 29, 2022, as his "in lieu of" holiday. If the Arbitrator finds that employees cannot properly work on a 4/10 schedule for one week of any given pay period, the Union requests in the alternative that the Agency be ordered to pay them overtime compensation for any hours of work in a day they worked (to include taking paid leave) in excess of eight hours.[1]

[1] Here, the Union cites 5 CFR § 551.501(a), which provides that Agencies must compensate non-exempt employees for all hours of work in excess of eight in a day at a rate equal to 1.5 times the employee's regular rate of pay); and 5 CFR § 551.401(b), which provides that hours in a paid nonwork status, such as paid leave, holidays, compensatory time off or excused absences are "hours of work" under the FLSA.

The Union asks the Arbitrator to retain jurisdiction to address any ancillary matters including compliance with and enforcement of the award and the appropriateness of an award of attorney fees.

Agency's Position

The Agency contends that, while the affected employees normally elect to work compressed schedules, Section 11(h) of the Master Agreement requires them to work a standard 5/8 Monday through Friday week when attending Union training. The compressed work schedules executed by these employees provide that, ". . . the employee(s) agree to work a compressed (CWS) 80-hour work schedule. The employee understands that this schedule consists of four (4) ten (10) hour days a week, in a bi-weekly pay period."

The Agency's position is that the employees could have worked a standard 5/8 work week the week following the Union caucus, but that they *elected* to work a compressed schedule the second week of the pay period. According to the Agency, deciding to work compressed schedules the second week and not stay on a standard schedule, they created a variable schedule. The Agency's timekeeping software is not able to record a variable work week because the BOP does not recognize variable schedules.

According to 5 USC § 6124, the maximum hours that can be credited for holiday pay is eight. Regarding the Union's alternative request for overtime pay, the Agency points out that employees are only entitled to overtime if they work over 80 hours in a pay period. These employees did not work more than 80 hours in the applicable pay period and thus, says the Agency, not entitled to overtime.

The Agency requests that the grievance be dismissed for procedural deficiency or denied on its merits.

IV. FINDINGS & CONCLUSIONS

In a grievance alleging a violation of the CBA, the Union carries the burden of proof to show that a violation occurred. When one party raises an objection to arbitrability, as the Agency has done here, that party carries the burden of proof on that issue.

Arbitrability

The Agency raises three challenges to arbitrability on procedural grounds, all related to the Union's alleged failure to adhere to the formalities for filing a grievance set forth in the Master Agreement and on the BOP Formal Grievance form. First, it claims that the Union failed to comply with the Formal Grievance form's requirement for specificity. Section 31(f) of the Master Agreement provides that grievances must be filed on Formal Grievance forms. The Formal Grievance forms in turn instruct those authoring the grievance to "Be specific" in describing the alleged contract terms, statutes, etc. violated and in describing how those terms or laws were violated. The Agency contends that the Union's inclusion of the phrase "And any other applicable laws, rules and regulations" was unspecific. It also claims that the Union did not specifically explain how it alleges any laws, rules or regulations were violated.

The Union specifically cited 5 USC § 6104 on the grievance form. Section 6104 is the provision of the statute that requires employees to be paid "the same pay for [an unworked federal holiday] as for a day on which an ordinary day's work is performed." This is the appropriate law for the Union to have cited in its brief. The undersigned does not understand the Union to be asserting that any other law, rule or regulation was violated. The other statutes and regulations that have been referenced at the hearing and in briefs have been raised for definitional or interpretive purposes. The grievance form also specifically cites Article 3 of the Master Agreement, which provides that administration of the contract is governed by "existing and/or future laws, rules, and regulations." Therefore, the Union was sufficiently specific in describing the contract terms, laws, rules and regulations it claims were violated.

The Agency next argues that the Union failed to attempt to resolve the grievance "at the lowest appropriate level" before filing a formal grievance, as required by Section 31(b)

of the contract. Union President Paula Chavez first raised this issue by sending an email to her immediate supervisor, the time and attendance clerk, and HR Manager Montoya. It was Mr. Montoya who stepped in to respond to her. Previously, Mrs. Chavez testified that she had submitted her time records requesting 10 hours of holiday pay and her immediate supervisor had approved the time record, but the time and attendance clerk told her that the approval was rejected by HR. Mr. Montoya was the *appropriate* person for the Union to bring the grievance to at the lowest possible level because he runs the HR office, which is where the denial of ten hours occurred. Mrs. Chavez' immediate supervisor had already done what Mrs. Chavez requested; it was the HR office that overrode the supervisor's approval. The Agency has not established that the Union failed to attempt to resolve the grievance at the lowest appropriate level.

Finally, the Agency argues that the grievance was untimely as it pertains to any employees who were not specifically named in the grievance filed on June 23, 2022. There is no dispute that the grievance was filed within the 40-day time limit set forth in the Master Agreement. The grievance was filed as a class grievance on behalf of "Local 3809 bargaining staff." A class grievance is not required to identify every individual member of the class; it is only required to describe the class of persons affected and how they were affected.

This grievance identifies "certain bargaining unit employees" who were required "to take two hours of leave for the Veterans Day [sic] holiday." It goes on to identify the persons known to have been affected, Mr. And Mrs. Chavez, but says that "this grievance is intended to include all similarly situated bargaining unit employees unknown to the Union at this time." Ultimately, the Union identified one additional class member, Mr. Soto-Ruiz, who also works a compressed schedule and was required to take two hours of personal leave for his "in lieu of" holiday on May 29, 2022. Mr. Soto-Ruiz falls into the class of persons identified in the grievance as having been harmed by the Agency's actions. The grievance was timely filed as it pertains to him.

Merits of the Grievance

The Union contends that the Agency violated 5 USC § 6104, which provides:

> When a regular employee as defined by section 2105 of this title or an individual employed regularly by the government of the District of Columbia, whose pay is fixed at a daily or hourly rate, or on a piece-work basis, is relieved or prevented from working on a day—
>
> * * * *
>
> (3) solely because of the occurrence of a legal public holiday under section 6103 of this title, or a day declared a holiday by Federal statute, Executive order, or, for individuals employed by the government of the District of Columbia, by order of the Mayor;
>
> he is entitled to the same pay for that day as for a day on which an ordinary day's work is performed.

It is undisputed that, had the class members worked a compressed schedule the week of May 22, 2022, and another compressed schedule the week of May 29, 2022, they would each have been entitled to ten hours of holiday pay for the Memorial Day holiday, which is recognized as a legal public holiday under Section 6103. It is only because they modified their schedules the week of May 22 to standard 5/8 schedules that the Agency denied their requests for ten hours of holiday pay on the week of May 29.

The Agency's position is that these employees work bi-weekly schedules and because their schedules in the first week of the pay period were not compressed, they were not entitled to holiday pay as if they were working compressed schedules the second week of the pay period.

The Agency has little support for its argument. It simply relies upon the testimony of HR Manager Montoya, who said that modifying their schedules the first week put these employees on a flexible or variable schedule. Importantly, Montoya also testified that the Agency does not recognize or approve flex or variable schedules, only standard or compressed work schedules. This apparent conflict begs the question, how does the Agency's payroll system apply payroll functions to what Mr. Montoya says are flex or

variable schedules when it does not recognize those kinds of schedules in the first place?

These employees were scheduled for, and worked/received holiday pay/took leave for, four ten-hour days the week of May 29, 2022. They worked five eight-hour days the week before. The Agency has not identified law, rule or regulation that provides that employees must work the same schedule the second week of a pay period as they did the first week of the pay period. Nor has it identified any recognized definition of flexible or variable schedules that support the idea that a split within one pay period of standard and compressed schedules makes the entire pay period a flexible or variable schedule.

What both parties have identified is 5 USC § 6121, the definitional provision of the Federal Employees Flexible and Compressed Work Schedule Act. That provision defines a compressed schedule as follows:

> (5) "compressed schedule" means—
>
> > (A) in the case of a full-time employee, an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays.

Here, the employees worked their 80-hour biweekly work requirement on a total of nine days – five days the week of May 22 and four days the week of May 29. This fits the definition of a compressed schedule as set forth in the statute.

The Union presented additional evidence to support its position that reverting to a regular schedule for one week does not change the schedule the employee works in the second week of a pay period. The May 14, 2021, MOU regarding compressed work schedules (CWS) states at Paragraph 10:

> Temporary reversion to non-compressed schedules – Employee: It is understood that there may be times when an employee must revert back to a regular work schedule . . . When this occurs, the employee shall resume the CWS when said activity concludes. . ..

Further, Ms. Chavez testified that, when she returned to work after the holiday on the Week of May 29, she took Tuesday off work and was charged ten hours of leave, not eight. On Wednesday she worked a half day and was charged five hours of leave. The

Agency was obviously able to deduct leave as if Mrs. Chavez was working her normal, compressed schedule on the week of May 29. The idea that it could not pay holiday pay on the same basis does not make sense.

The Union made a *prima facie* showing that the members of this class were entitled to ten hours of holiday pay for the 2022 Memorial Day holiday. The Agency failed to show an applicable rule or regulation that changed the applicability of 5 USC § 6104 regarding their holiday pay. Therefore, Union has met its burden of proof.

The affected employees – Pete Chavez, Paula Chavez, and Walter Soto-Ruiz – shall each be reimbursed for the two hours of leave they were required to use in relation to the Memorial Day 2022 holiday.

V. AWARD

The grievance is arbitrable and is sustained. The class members are each to be reimbursed two hours of leave. The undersigned shall retain jurisdiction for 30 days to resolve any issues regarding the remedy and to accept an application for attorney fees from the Union. Should the Union submit an application for attorney fees within that time, the Agency shall have two weeks to respond.

Arbitrator
Kathryn Durham, JDPC