

**IN THE MATTER OF THE ARBTRATION
BETWEEN**

AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES,)	
LOCAL 0922,)	
)	
UNION,)	FMCS CASE NO. 14-02898-8
)	
and)	ARBITRATOR: MARK L. REED
)	
)	
FEDERAL BUREAU OF PRISONS,)	
FEDERAL CORRECTIONAL COMPLEX)	
FORREST CITY, ARKANSAS,)	
)	
AGENCY.)	
)	

APPEARANCES:

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ARBITRATION HEARING DATES: October 7 - 8, 2015

LOCATION OF HEARING: FEDERAL CORRECTIONAL COMPLEX
FORREST CITY, ARKANSAS

In accordance with the provisions for arbitration contained in the Collective Bargaining Agreement entered into by the Federal Bureau of Prisons, Federal Correctional Complex (FCC), Forrest City, Arkansas (Agency) and Council of Prison Locals AFGE Local 0922 (Union), an arbitration hearing on this matter was held on October, 7 and 8, 2015, at FCC Forrest City. At the hearing the parties were afforded the opportunity to examine and cross-exam witnesses, to present and submit documentary and other evidence, and to argue their respective positions. Post-hearing briefs were filed, the last being submitted March 14, 2016, and the record was then closed by the undersigned arbitrator.

STATEMENT OF THE CASE

FCC Forrest City is a minimum, low, and medium level security institution, housing approximately 4,000 inmates. The Agency employs 525 bargaining unit employees. The employees in this case work in the Correctional Services Department at FCC Forrest City and are subject to the parties' Master Agreement, a 2001 Local Supplemental Agreement (LSA), and various Memoranda of Understanding (MOUs). The MOU relevant to the instant grievance was signed in 2004.

The Master Agreement requires that the Agency distribute and rotate overtime equitably among bargaining unit employees. The 2001 LSA sets forth the how overtime will be distributed and covers the entire complex at Forrest City, including the Federal Correctional Institution, Federal Prison Industries (UNICOR), and the Federal Prison Camp. The overtime procedures provide for a paper sign-up roster list to be maintained in the lieutenants' office.

Pursuant to the 2004 MOU, the overtime roster sign-up procedures in the Correctional Services Department changed to a computer based system, enabling bargaining unit employees in that department to sign-up for overtime by accessing the overtime sign-up list at any computer terminal at the institution. Except for the computerized sign-up, instead of pen and paper, and the ability to sign-up throughout the quarter instead of just at the beginning of the pay period, the overtime distribution system is the same under the LSA and MOU. The LSA is still in effect and those procedures are followed in departments other than Correctional Services.

On April 17, 2014, Computer Services Manager Karen Street was notified that there was a problem with the computer roster program. On Thursday and Friday, April 24th and 25th, she was contacted by lieutenants informing her that the roster program was malfunctioning again. Over the weekend Ms. Street attempted to repair the system remotely but it continued to malfunction and on Sunday, April 27th, a captain called her to report that the entire system was down.

From April 25, 2014, thru April 29, 2014, Union President Jeff Roberts engaged in a series of conversations with Agency officials. He advised management that it needed to revert to the paper overtime sign-up method, as a number of bargaining unit personnel were being bypassed for overtime assignments because they were not able to access the computer sign-up roster. Individual employees and the Union made numerous complaints to the Agency regarding the roster program malfunctioning. On April 28, 2014, he sent out an email to bargaining unit employees regarding the malfunction and advised anyone affected to submit relevant information to him by May 5, 2014.

In Block 5 the Union alleges violations of 5 U.S.C. 7116, 5 U.S.C. 2302, 5 U.S.C. 5596, the Back Pay Act, FLSA, Master Agreement, Preamble, Article 6 section b, Article 18, Overtime Procedures Agreement MOU dated 11/3/04. Block 6 alleges:

On or about 4/25/2014, the computer based Roster Program would not allow staff at FCC Forrest City to sign up for overtime. The portion of the computer based program that allows bargaining unit staff to sign up for overtime seemed to have went down on Friday (4/25/2014) and was restored around 10:30AM on 4/29/2014. Several staff notified the shift Lieutenants as well as doing magic tickets to Computer Services about the overtime portion of the Roster Program being down. This also resulted in the needless mandated overtime occurrences for numerous officers on the various shifts. Bargaining unit staff was locked out from the sign up portion of overtime program from Friday (4/25/2014) to Tuesday (4/29/2014). Approximately twenty (20) bargaining unit employees contacted the Local stating that they could not sign up for overtime using the computer based roster program and would have worked the overtime given the opportunity. Jeff Roberts, President Local 922 notified Carlos Rivera, Warden, James Robinson AW (Custody), J. Relvas Complex Captain, R. Hinkle Deputy Captain, and J. Petersen AW, of the problem via electronic mail. On 4/27/2014, Mr. Roberts, then called J. Relvas, Captain and told him that a "Paper Sign up list" for OT needed to be immediately implemented. No appreciable action or corrective measure was undertaken and the problem and violation remained. The system problems were substantiated on 4/29/2014 when CSM Karen Street sent an email explain the problems of the roster program, again illustrating the need for a paper list to be implemented. The OT program (sign up portion) remained up and down for thru the following month. As I write this grievance, the Agency proceeded at their own peril by not going to a paper sign up list. I cannot sign up for Overtime nor can Mr. Catlett who is helping me write this document at this very moment. When the OT (sign up portion) program failed, the only available names were those that had been signed up prior to the system failure. For example, Mr. Roberts's can sign up for the entire quarter since his schedule is set. Other staff, such as but not limited to, Correctional Officers cannot do that due to schedules that are not set for the quarter or are subject to change. They must sign up as the weekly schedule comes out from the Administrative Lieutenant. The Agency response to this problem instead of going to a paper list, it to complete "All Call's" via radio from the respective control centers prior to the start of the shift. This means, anybody on their scheduled day off, annual leave, sick leave, or doesn't carry a radio, is never offered the overtime in accordance with Article 18 and the Overtime Procedures Agreement MOU while mechanically locked out of the Agency controlled sign up system. The resulting financial hardship is extreme and the needless mandated overtime occurrences forced on Correctional Officers with a fleet of people begging to work is unforgiveable.

Joint Ex. 2 (Grievance).

PROCEDURAL ISSUE

The Agency argues as a threshold issue that the Union did not comply with the requirements of the Grievance Procedure set forth in Article 31, Section f of the Collective Bargaining Agreement when it filed the instant grievance on May 28, 2014. The grievance was procedurally rejected on June 17, 2014, because it did not specifically identify in Block 5 of the grievance form which provisions of the Master Agreement, policy, or law that had been violated, and because it failed to specifically identify in Block 6 the bargaining unit members referenced in the grievance.

The Agency contends that the twenty (20) bargaining unit employees the grievance identifies came from the “solicitation” made by Jeff Roberts in his April 28th email. Further, in the time between the email being sent out and the filing of the grievance, the Union did not forward any of the information it gathered to the Agency so that it could substantiate and address the alleged violation. This shows that the Union was unwilling to make a reasonable and concerted effort toward an informal resolution.

The Union counters that no specificity requirement exists, and even assuming one did, the information provided on the grievance form is sufficiently specific to provide the Agency notice of the allegations against it, those allegedly harmed, and offers enough detail to enable the

Agency to offer a reasonably informed response. Numerous arbitration decisions are cited by the Union in support of its position regarding specificity.¹

The arbitrator agrees with the Union's position. The arbitration process does not require a strict adherence to what used to be known as fact pleading. Instead, most arbitrators have embraced the concept held by the Federal Rules of Civil Procedures Rule 8 (a) that requires only a "short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the Agency fair notice of what the claim is and grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1955).

The information provided in the grievance form sets out enough detail of the alleged violation to put the Agency on notice that the computerized roster program was not functioning properly and as a result there were bargaining unit employees being denied the opportunity to sign up for overtime. By not being afforded the opportunity to sign-up, overtime was not being distributed in a fair and equitable manner as required by the parties' agreements. It is not necessary to include the entirety of the case or every employee's name on the grievance form to provide sufficient notice to the Agency. As noted by the Union, the party who raises an affirmative defense to arbitrability has the burden of proof to establish that contention by a preponderance of the evidence. The Agency has not shown the grievance to be so procedurally flawed regarding specificity that it should be barred from arbitration.

¹ For example, FCI El Reno, FMCS No. 01-11034; USP Atwater, FMCS No. 05-57849; USP Marion FMCS No. 01-08684; FLS La Tuna, FMCS No. 02-13623.

ISSUE

The Union proposed the issues to be: 1) Did the Agency violate the contracts between the Parties when it prevented employees from signing-up for overtime in April 2014? 2) Did the employees suffer an unjustified reduction in pay because they were denied the opportunity to work overtime? The Agency proposed the issues to be: 1) Did the Agency violate the Master Agreement, laws, or regulations in the way the overtime assignments were administered from April 25, 2014 thru April 29, 2014? If not, deny the grievance. 2) Did the grievance statement comply with Article 31, Section f of the Master Agreement which requires, in Block 6, specificity of charge? If not, deny the grievance.

In the absence of the parties' agreement on an issue statement, the arbitrator finds the issues to be: 1) Whether the Agency violated the Master Agreement, the 2001 Local Supplemental Agreement, the 2004 Memorandum of Understanding, and the Back Pay Act, in the administration of overtime procedures from April 25, 2014 thru April 29, 2014, resulting in bargaining unit employees being denied the opportunity to sign-up for overtime? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

PREAMBLE

This Agreement and such supplementary agreements and memorandums of understanding by both parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union.

ARTICLE 5 – RIGHTS OF THE EMPLOYER

Section a. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and
2. in accordance with applicable laws:
 - a. to hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
 - b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which the Agency operations shall be conducted;

ARTICLE 18 – HOURS OF WORK

Section p.

Specific procedures regarding overtime assignments may be negotiated locally.

1. when Management determines that it is necessary to pay overtime for position/ assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees; and
2. overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and the Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be retained by the Employer for two (2) years from the date of said record.

2001 LOCAL SUPPLEMENTAL AGREEMENT

All articles in the Supplemental Agreement will be numbered and titled as to coincide with the same articles in the Master Agreement. Any articles not referenced in the Supplemental Agreement are understood to reflect the Master Agreement.

ARTICLE 18 – HOURS OF WORK

Section p: Each department will utilize the following procedures for voluntary overtime:

Only one (1) overtime sheet will need to be signed per pay period for each department.

Each staff member desiring overtime should place the shift code of the shift(s) he/she desires to work in the block representing the days. If the staff member desires overtime on his/her days off and is willing to work any shift, he/she may simply place “ALL” in the appropriate block.

When an answering machine is reached, it will be coded with “AM” and the next person on the list will be contacted. Once a message has been left by a supervisor regarding the availability of overtime, it will be the employee’s responsibility to contact the institution as soon as possible.

The following codes will be used on the overtime sign-up sheet:

CODES:	R - Refused Overtime	AM - Answering Machine (left message)
	OT - Overtime Accepted	OW - Overtime Worked
	NC - No Contact	

SHIFTS:	DW - Day Watch
	EW-Evening Watch
	MW-Morning Watch

If the need for hiring overtime is known at least two (2) hours in advance, the overtime sign-up sheet will be utilized. Those staff members who signed up will have the first opportunity to any overtime for the day or the pay period. Any refusal of overtime for reasons other than employee or family illness, will result in the employee’s name being deleted from the overtime lists for the remainder of the pay period.

2004 MEMORANDUM OF UNDERSTANDING

The Federal Bureau of Prisons (the Agency” or “BOP”) and the American Federation Government Employees, Local 0922 (“Council” or “Union”) on behalf of the bargaining unit members herein, pertaining to the utilization of an automated overtime program, hereby agree and stipulate as follows:

- 1) Both Parties agree to utilize a computer based overtime system provided by Central Office.

- 4) All computer terminals will have access to the overtime sign-up program at both the Low and Medium.

- 5) Bargaining Unit staff will be afforded first opportunity for available overtime. Only after all efforts to distribute overtime to bargaining unit members have been exhausted will overtime be offered to non-bargaining staff. Non-bargaining staff will not have access to this program.

- 6) Following all attempts to assign overtime as directed in paragraph 5, the all call method will be utilized followed by the “paper list” of non-bargaining staff. At this point the “list exempt” portion of the program may be utilized. This feature will enable the agency to contact non-bargaining employees, employees not on the sign-up list, by the radio all call or other methods. The “list exempt” feature will not be used for “skipping” individuals. Overtime will be assigned for all staff working overtime via all call or the “paper list.”

- 12) Initial placement on the overtime list will be based on seniority, thereafter the list will be by the last overtime worked. The overtime program will not be reset. A new quarterly sign-up period will be opened for sign-up once a new quarter roster is negotiated, signed by both parties, and posted, at a minimum of 3 weeks prior to the start of the new quarter. The sign up period will begin with the start of the quarter. Each employee will be responsible for providing current contact information.

- 13) Duration of the sign-up period will be for the entire quarter. The staff will be notified of the starting point of the next overtime quarter by the Agency via e-mail at least two weeks prior to the quarterly overtime being opened. There will be no restricted overtime sign-up for any quarter.

- 16) The computerized overtime system will be utilized for the following types of overtime.
 - A. Hospital overtime (inmates who have been admitted into an outside hospital)
 - B. Emergency Overtime (when time permits and instances of medical emergencies)

- C. Mandatory overtime (Correctional Services only)
 - D. Correctional posts
 - E. Medical (to include coverage for medical escorts, inmates on quarantine, suicide watch, etc.)
- 17) Overtime codes as negotiated in the Supplemental Agreement will be used to annotate the remarks.

Codes: R = Refused, AM = Answering Machine, OT = Overtime Accepted,
OW = Overtime Worked, NC = No Contact

Shifts: DW = Day Watch, EW = Evening Watch, MW = Morning Watch

- 25) It is incumbent upon the Lieutenant assigning the overtime to maintain the continuity of the program. No individual will be skipped. The overtime program will be operated as designed and the Overtime Procedures Manual will be followed. The Master Agreement will be followed.

BACK PAY ACT

5 USC §5596 – BACK PAY DUE TO UNJUSTIFIED PERSONNEL ACTION

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, 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 of the employee –

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect –

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title;

5 CFR §550.804 – Determining entitlement to back pay.

(a) When an appropriate authority has determined that an employee was affected by an unjustified or unwarranted personnel action, the employee shall be entitled to back pay under section 5596 of title 5, United States Code, and this subpart only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(b) The requirement for a “timely appeal” is met when—

- (1) An employee or an employee's personal representative initiates an appeal or grievance under an appeal or grievance system, including appeal or grievance procedures included in a collective bargaining agreement; a claim against the Government of the United States; a discrimination complaint; or an unfair labor practice charge; and
- (2) An appropriate authority accepts that appeal, grievance, claim, complaint, or charge as timely filed.

(c) The requirement for an “administrative determination” is met when an appropriate authority determines, in writing, that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

5 CFR §550.805 Back pay computations.

(a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee-

- (1) The employee shall be deemed to have performed service for the agency during the period covered by the corrective action; and
- (2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

(b) No employee shall be granted more pay, allowances, and differentials under section 5596 of title 5, United States Code, and this subpart than he or she would have been entitled to receive if the unjustified or unwarranted personnel action had not occurred.

(c) Except as provided in paragraph (d) of this section, in computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency may not include-

- (1) Any period during which an employee was not ready, willing, and able to perform his or her duties because of an incapacitating illness or injury; or
- (2) Any period during which an employee was unavailable for the performance of his or her duties for reasons other than those related to, or caused by, the unjustified or unwarranted personnel action.

UNION'S POSITION

The parties' agreements relevant to this grievance are the Master Agreement, the 2001 LSA and 2004 MOU. The Union argues that these agreements are not mutually exclusive. Rather, the Master Agreement mandates that overtime must be equitably distributed, the LSA outlines the procedures for using a sign-up list, and the MOU establishes the procedures for maintaining the sign-up list using the computerized roster program. These agreements must be read in conjunction with each other.

The Agency violated the 2004 MOU by failing to maintaining a working computer roster system. It is incumbent that the Lieutenant assigning overtime ensures the computers are accessible and continuity of the program is maintained. This violation alone constitutes an unjustified and unwarranted personnel action within the meaning of the Back Pay Act. Although employees attempted to sign-up, and were ready, willing and able to work overtime, they were prevented from doing so due to the malfunctioning Roster Program.

The Union contends that the Agency violated the Local Supplemental Agreement (LSA) when it failed to revert back to the paper sign-up procedure contained therein. Like the MOU, the LSA is part of the Master Agreement. Until 2004, the paper sign-up procedure was utilized throughout the Forrest City Complex. When the MOU went into effect in 2004, it did

not amend or overrule any of the provisions of the Master Agreement or LSA, but provided a more convenient means for the distribution of equitable overtime. When the computer roster system malfunctioned, the Agency took no meaningful action to repair it until three days after first being notified of the outage. Although management could have returned to the paper sign-up system to ensure overtime would be distributed equitably, it instead continued to rely on the malfunctioning system from April 25 thru 29, 2104. The dilatory response prevented qualified bargaining unit employees from working overtime to which they were entitled. The Agency's defense regarding the impermissibility of returning to the procedures in the LSA is simply a pretext. It was not until it eventually authorized a paper overtime sign-up list on June 5, 2014, that the Agency first articulated its position that it was precluded from using a paper list in April 2014.

The mandate in the Master Agreement is clear. The Agency must distribute and rotate overtime equitably. Each time the Agency filled an overtime shift from an overtime roster list that excluded eligible bargaining unit employees, it violated the Master Agreement. Such a violation constitutes an unjustified or unwarranted personnel action under the Back Pay Act. If the employee is ready, willing and able to work overtime and would have worked but for the unwarranted violation, the employee is entitled to an award of back pay. Additionally, no showing of malice or intent on the part of the Agency is required. The fact that the inequitable distribution of overtime resulted from a malfunctioning computer system does not relieve the Agency of liability.

AGENCY'S POSITION

The Agency argues that management could not unilaterally deviate from the 2004 MOU without prior negotiation with the bargaining unit. The MOU authorizes a computer based sign-up system for bargaining unit members. There is no provision authorizing a paper sign-up list for these employees, the paper sign-up list is used for non-bargaining unit staff only.

A condition of employment has been established by the MOU. The computerized roster program had been in effect for over ten (10) years, consistently exercised, and followed by both parties. Any unilateral change would violate both the MOU and the Master Agreement. Such a change that past practice would also be an impermissible change in working conditions and constitute an unfair labor practice.

There has not been a showing that bargaining unit employees were harmed by the Agency's action. It argues that employees are not guaranteed the right to work overtime. Nothing contained in Article 18 Section p of the Master Agreement mandates or guarantees an identical amount of overtime for each employee. The language in the Agreement does not reference a period of time the Agency has to distribute overtime. The absence of such language allows the Agency reasonable time to allot fair distribution of the available overtime to bargaining unit employees. In fact, the Union failed to present any evidence showing a bargaining unit member was by-passed for an overtime assignment.

The Agency contends that it had no way of knowing that the outage would be continuous or for substantial periods of time. The Agency's Closing Brief provides the following timeline of events regarding the malfunction of the computer roster program:

Karen Street, Computer Services Manager, indicated the complex started having issues with the roster program after they converted computer operating systems from Windows XP to Windows 7. This conversion also caused network issues. According to Ms. Street, on April 17, 2014, at 9:34 pm, she received a call from a Lieutenant (LT.) indicating that the roster program was not functioning. She indicated she repaired it via her remote access and verified with the LT. that it could be accessed. On April 24, 2014, at 5:14 pm, she received a call from a LT. She repaired the roster program and verified with the LT. that the program could be accessed. The LT. indicated that the program was working, but had given him an index error when he tried to back it up. Ms. Street was going to be on leave the following day so she sent Computer Specialist Tim Haltiwanger a text to have Central Office run the full repair on the database. Mr. Haltiwanger requested the repair at 8:38 am on April 25, 2014 and Central Office completed it at 9:23 am. Ms. Street received another call on the 25th at 7:58 pm. She repaired the program and verified with the LT. that it could be accessed. She received a call on Sunday, April 27, 2014 at 4:02 pm. She repaired the roster program and verified with the control center officer that it could be accessed. At 7:24 pm, Captain Relvas called and advised Ms. Street that users were not able to sign-up for overtime. Ms. Street ran the repair utility again. At 7:44 pm, AW Robinson also called Ms. Street to say that users could not sign-up for overtime. At this time, Ms. Street was unable to regain this function of the program. She sent a request to Central Office for the full repair once again. Jeff Hibbs completed it at 10:53 am on Monday morning, April 28, 2014. On Tuesday, April 29, 2014 at 7:15 am, a ticket was opened indicating the roster program was down again. Jeff Hibbs repaired it and it was online at 8:22.

The Agency did not agree to modify the issues, violations and/or remedies in the written grievance filed by the Union. The grievance listed twenty (20) bargaining unit members affected by the alleged violation of the Master Agreement. There was ample opportunity prior to the invoking of arbitration to modify the grievance by enlarging the number of affected employees and the date(s) of the violation of the Master Agreement and the Union did not do so. Therefore,

the affected number of bargaining unit members and the April 25 thru 29, 2014, dates should not be changed.

It would be impermissible to assess the costs of the arbitration to the Agency because the Master Agreement provides that the costs are to be borne equally by the parties. No award of attorney fees is justified under the Back Pay Act because the Union has failed to show bargaining unit employees were affected by an unwarranted or unjustified personnel action resulting in a withdrawal or reduction of their pay, allowances or differentials during the time period in question.

DISCUSSION

The preamble to the Master Agreement states “This Agreement and such supplemental agreements and memorandums of understanding by both parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union. Thus, there are three possible contractual bases for the Union’s position that the Agency failed to equitably distribute overtime to bargaining unit employees: the Collective Bargaining Agreement, the 2001 Local Supplemental Agreement, and the 2004 Memorandum of Understanding.

The dispute centers on the Agency’s distribution of voluntary overtime assignments between April 25, 2014, thru April 29, 2014. The Master Agreement and Local Supplemental Agreement require that bargaining unit employees receive first consideration for the overtime assignments and they are to be distributed and rotated equitably. Under the Master Agreement

and the LSA, whenever overtime is needed to fill any bargaining unit position/assignment, the next qualified bargaining unit employee on the overtime list will be assigned to fill that position/assignment for which the overtime was required. The Agency is not free to call in any qualified bargaining unit employee.

The 2004 MOU states that bargaining unit employees will be afforded first opportunity for available overtime and sets forth the procedures for the administration of the overtime computer roster system. The Agency's failure to maintain the overtime roster system is a per se violation of the MOU. When the outage occurred, bargaining unit members could not access the sign-up list as required by the 2004 MOU. The result was that overtime assignments were not distributed and rotated equitably to bargaining unit employees as required by the parties' agreements. Although it is subordinate to the Master Agreement and LSA, the MOU is a part of the Collective Bargaining Agreement. The Agency's violation of the MOU alone constitutes an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. *See U.S. Penitentiary Atwater, Calif. and AFGE, Local 1242*, 66 FLRA 737, 739 (2012); *AFGE, Local 2608 and U.S. Soc. Sec. Admin., San Juan Teleservice Ctr.*, 56 FLRA 776, 777 (2000); *Dep't of Defense Dependents Schools and Fed. Educ. Ass'n*, 54 FLRA 773, 785 (1998).

The Union requested, through Union President Jeff Roberts, that the Agency stop assigning overtime from the computer generated list until the system could be restored. This approach to the problem would have ensured that overtime assignments continued to be distributed in accordance with the mandates of the parties' agreements. The Agency did not choose to take the Union's suggestion. The arbitrator finds no merit to the Agency's contention

that it would have been an impermissible unilateral change in the MOU if it had gone to a paper list without negotiation. In what appears to be a classic case of not seeing the forest for the trees, the Agency continued to make overtime assignments from the corrupt roster. Continuing to following the MOU was a violation because it conflicted with the Master Agreement and the 2001 LSA mandate of equitable distribution. Elkouri & Elkouri, How Arbitration Works, 5th edition, p. 514 (1997), advises the arbitrator should "look at the language in light of experience and choose that course which does the least violence to the judgment of a reasonable man." Elkouri & Elkouri, How Arbitration Works, 5th edition, p. 514 (1997). Management officials also should choose this course of action that does the least violence. The refusal to deviate from a local memorandum of understanding resulted in the violation of a national agreement.

The arbitrator also disagrees with the Agency's position that a past practice had been established regarding the MOU. The arbitrator most commonly associated with past practice is Richard Mittenenthal, who concluded that in order for a working condition to rise to a level of a binding past practice, one ordinarily would expect it to be clear, consistently followed over a long period of time and to have been mutually accepted by the parties. *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Michigan Law Review 1017 (1961). The key components of a past practice are mutual understanding and recognition of the custom. For a past practice to bind the parties, it must meet certain criteria:

1. Unequivocal;
2. Clearly enunciated and acted upon; and
3. Readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties.

Gas Serv. Co., 81 LA 245, 248 (Penfield 1983).

In order to establish a condition of employment by past practice, there must be a showing that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other. *See USDA Forest Serv., Pacific N.W. Region, Portland, Or.*, 48 FLRA 857 (1993); *see also United States Dep't of Health and Human Serv., Social Security Admin. and Social Security Admin. Field Ops., Region II*, 38 FLRA 193, 207 (1990).

It has been this arbitrator's experience that a past practice is a custom that the parties have acknowledged and accepted over a period of time. The past practice does not appear in any written document, be it a collective bargaining agreement, memorandum of understanding or other written instrument. Rather, it is a working condition or activity that has been acknowledged by the parties over a period of time that has resulted in a routine procedure accepted by both the union and management. A majority of arbitrators have held that while a past practice can help explain a contract, or can fill in the gaps where a contract is silent, it cannot contradict the explicit terms of a contract.

The Agency's right to assign overtime is provided for in the Master Agreement. The arbitrator may not substitute his judgment for that of the agency with regard to whether work shall be performed on an overtime basis or whether the grievant was qualified to work overtime. These determinations are inherent in management's statutory right to assign work. That right however is not absolute and equitable rotation is mandated. Article 18 clearly states "qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees." The MOU

had already been violated when the Agency failed to continuously maintain the roster program and employees could not gain access to the overtime list. When it continued to make overtime assignment **from** that list, the Master Agreement and LSA were violated.

The arbitrator disagrees with the Agency's argument that no bargaining unit employees were harmed by the Agency's actions, in that there is no right of guaranteed overtime and the Union failed to present any evidence bargaining unit employees were erroneously by-passed for overtime. While the Back Pay Act dictates that certain determinations must be made, it does not dictate how these findings are reached. The arbitrator is given broad discretion in making the necessary findings. Often the most difficult requirement for the employee to meet is the "but for" finding - but for the agency's unjustified or unwarranted personnel action, the employee would not have suffered a loss of pay, allowances, or differentials. The arbitrator is required to find a causal link between the agency's actions and the loss of pay justifying a back pay award and the evidence must support the arbitrator's findings. The FLRA has confirmed that an award of back pay is appropriate for an employee who was entitled to perform overtime but was denied the right to do so. *U.S. Penitentiary Atwater, Calif. and AFGE, Local 1242*, 66 FLRA 737 (2012). *See also National Treasury Employees Union Chapter 160*, 67 FLRA No. 151 (2014).

An award under the Back Pay Act requires a finding that the aggrieved employee was affected by an unjustified or unwarranted personnel action, the personnel action resulted in the withdrawal or reduction of the employee's pay, allowances, or differentials, and but for such action, the grievant otherwise would not have suffered such withdrawal or reduction in pay, allowances, or differentials. *See FBP FCI Miami*, 69 FLRA 127 (2015), citing 5 U.S.C. §

5596(b)(1), *U.S. Dep't of the Air Force, Warner Robins Air Force Base, Ga.*, 56 FLRA 541, 543 (2000).

The analysis in cases dealing with the issue of lost opportunity for overtime is more extensive. The arbitrator must not only find the initial requirements for back pay awards, but he/she must make three additional determinations:

1. Was the grievant deprived of the opportunity to work overtime?
2. Was the grievant ready, willing and able to work overtime?
3. Would the grievant have worked the overtime but for the unwarranted violation?

Once the arbitrator has identified the lost overtime opportunity he or she may only award the amount of back pay sufficient to make the grievant whole.

The evidence clearly supports the Union's position that the Agency violated the terms and conditions of the Master Agreement, as well as the Local Supplemental Agreement (LSA) and the Memorandum of Understanding (MOU). Nothing contained in the Master Agreement, the LSA or the MOU prevented the Agency from reverting to a paper roster program during the affected period of April 25 through April 29, 2014. The roster program outage does not relieve the Agency of its contractual obligations nor liability under the Back Pay Act. The Back Pay Act does not require intent in order to find liability, as the employees were affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction in their pay, i.e., inability to sign-up for overtime. But for the inability to sign-up for overtime, employees would have worked an overtime shift or shifts. The Agency was placed on notice early on that there was a problem with the computerized roster program. Agency officials opted to attempt a

remote repair by the Computer Services Manager, which did not resolve the problem. The fact the malfunction occurred during the weekend only served to exacerbate the problem. Although the arbitrator can sympathize with the Agency and understands it may have been a victim of circumstance, the arbitrator is also cognizant of the fact that the Agency was the engineer driving the train and not the members of the rank and file.

AWARD AND REMEDY

The grievance is sustained. The arbitrator finds the Agency violated the Master Agreement and the 2001 LSA when it failed to distribute and rotate overtime equitably to bargaining unit employees between April 25, 2014, thru April 29, 2104. The Agency also violated the 2004 MOU when it failed in its obligation to maintain the continuity of the program and to ensure the employees had access to it. The employees denied the opportunity to sign-up for overtime were subjected to an unjustified and unwarranted personnel action, resulting in a reduction in pay or differential. They are entitled to an award under the Back Pay Act. See *AFGE 1034 and FCC Pollock*, 68 FLRA 115 (2015). The Back Pay Act provides for interest and attorney fees upon the above findings. Therefore, the arbitrator makes the following determination:

1. James Easley, Brandon Cox, Patrick Watson, Karen Austen, Matthew Austen, and the twenty (20) unnamed bargaining unit employees identified in the Union's grievance are entitled to payment under the Back Pay Act;
2. The violation period is limited to April 25, 2014, thru April 29, 2104;

3. The Agency is ordered to provide the Union with any and all necessary records to determine the overtime shift(s) the affected employees, as identified in No. 1 above;
4. The Agency is ordered to grant official time to two (2) Union officials to review any and all documents to determine the back pay damages to the affected employees;
5. The Agency is ordered to pay the aggrieved employees interest computed on the date of the affected employees reduction in pay;
6. The Agency is ordered to pay reasonable attorney fees pursuant to 5 U.S.C. § 5596.

Arbitration fees and expenses are to be borne equally by the parties. The arbitrator will retain jurisdiction in this matter for a period of 120 days.

Mark L. Reed

Date