

UNITED STATES OF AMERICA
FEDERAL MEDIATION AND
CONCILIATION SERVICE IN THE
MATTER OF ARBITRATION BETWEEN

AFGE, Local No. 1034,

Union

and

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Complex
FCC Pollock, LA,

Agency

FMCS 16-52343

Interim Award
Sustained Superior
Performance Awards;
Absence of Quality
Step Increases

Before: Kathryn Durham, Esq. Arbitrator

Appearances: John W. Weeks,
Labor Relations Specialist, FBOP
John Bishop, Esq., Whitehead Law Firm
Attorney for AFGE Local 1034

Hearing: December 14, 2017
Briefs Submitted: February 12, 2018
Decision Dated: March 1, 2018

INTERIM AWARD SUMMARY

Grievance Sustained. As described herein, the Warden actions resulted in a violation of the Back Pay Act. As a result, certain Bargaining Unit members will be awarded Quality Step Increases for FY 2015. The Union is entitled to attorney fees and expenses in connection to processing this grievance. The Arbitrator retains jurisdiction to assist in implementation of the QSIs and to resolve outstanding issues.

Kathryn Durham

Arbitrator,
Kathryn Durham, J.D.,P.C.

I. ISSUE

(1) Was the grievance timely filed in accordance with Article 31, Section D of the Master Agreement?

(2) Does the grievance comply with the specificity requirements set forth in Article 31, Section F of the Master Agreement?

(3) Did the Agency violate the Master Agreement, past practice, or Agency policy when it awarded only Sustained Performance Awards, and no Quality Step Increases, to bargaining unit employees who received “outstanding” performance ratings during the 2014-2015 ratings period.

II. RELEVANT CONTRACT, STATUTE, AND POLICY PROVISIONS

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 4 RELATIONSHIP OF THIS AGREEMENT TO BUREAU POLICIES, REGULATIONS, AND PRACTICES

Section b. On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this Agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties.

ARTICLE 6 RIGHTS OF THE EMPLOYEE

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right: * * * *

2. to be treated fairly and equitably in all aspects of personnel management;
3. To be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, disabling condition, genetic information, participation in protected activity, Union membership, or Union activities; * * * *

ARTICLE 31 GRIEVANCE PROCEDURE

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control. * * * *

Section f. Formal grievances must be filed on Bureau of Prisons “Formal Grievance” forms and must be signed by the grievant or the Union. . .

CHAPTER 1

101. PURPOSE OF PROGRAM

1. The purpose of the Bureau of Prisons Incentive Awards Program is to recognize and reward promptly employees who perform in an exemplary manner or make significant contributions to the efficiency and effectiveness of Bureau operations and to honor those who have served the government faithfully and well.

The integrity of the program will be preserved when meritorious awards are given expeditiously and only to those who are truly deserving of recognition. Merit will be the sole basis for granting any award. This will diminish inequities that could undermine the credibility of the awards program. Awards should be granted without regard to grade level or type of position. * * * *

106. RECORDS AND REPORTS * * * *

2. **Incentive Awards Register.** Each award nomination and employee suggestion is to be assigned a log number and recorded in an Incentive Awards Register. The register should be maintained on a fiscal year basis and include sufficient information to track the status of awards and suggestions. At a minimum, the register must include the employee's name, grade, type of award nomination, date received, date approved/denied, the dollar amount for cash awards and the number of hours for TOA awards. Written documentation is required for each incentive award, whether approved or disapproved.

Records of incentive award actions must reflect the status and disposition of each case initiated, and process towards must include the actions of recommendations of Incentive Awards Committees. Specific documentation requirements are described in sections for each type of award. Files must be maintained to substantiate expenditure of funds. * * * *

109. FUNDING

1. Funds will be issued to each facility at the beginning of each fiscal year. Should a facility require additional awards funding, other budgetary institution resources must be utilized

Note: Approved award recommendations may be deferred or denied due to budget curtailment or other unforeseen factors in such cases, the affected employees should be so informed.

* * * *

CHAPTER 2: GUIDELINES FOR MONETARY AND NON-MONETARY AWARDS

200. GENERAL INFORMATION * * * *

201. QUALITY STEP INCREASES (QSI)

1. **Introduction.** QSIs are additional within-grade increases which augment the employees' basic pay and reward future performance. A QSI is appropriate when faster than normal advancement is warranted. Only General Schedule employees are eligible for QSIs. (Wage grade and temporary employees are not eligible for

QSIs.)

2. **Evaluation Criteria.** A QSI may be considered only when the employee's most current overall performance rating of record is "outstanding."

The employee must not have received a QSI during the past 52 weeks.
* * * *

Some employees who are eligible for QSIs may actually benefit more from an SSP. In many circumstances when the employee is about to be promoted, the employee will benefit more from an SSP award than from a QSI because the latter may not provide a greater step in the grade to which they will be promoted. This should be discussed with the recommending official. An employee who is close to retirement will only benefit from a QSI for a short time. (Being close to retirement does not preclude an employee from receiving a QSI, but consideration should be given to the benefit to the employee. * * * *)

5. **Selection Procedures.** Only nominations for employees who are within one month of eligibility for a QSI may be submitted to the approving official. The approving official (in accordance with Chapter 1) will make the determination regarding the nominations. Disapproved recommendations will be discussed with the supervisor and returned.

202. SPECIAL ACHIEVEMENT AWARD FOR SUSTAINED SUPERIOR PERFORMANCE (SSP)

1. **Introduction.** This is a lump sum cash award granted in recognition of an employee's sustained superior performance which exceeds normal job requirements for period of at least six months.
2. **Evaluation Criteria.** An SSP award may be given only to an individual (rather than a group).

One or more job elements of an employee's position must be performed for a period of at least six months in a matter which clearly exceeds normal job requirements. The SSP award must be supported by current performance rating of "**exceeds**" or **higher**.

The employee must not have received another cash performance award, i.e., SSP or QSI, within six months preceding the date of nomination. The same period of performance may not be used as justification for more than one SSP or QSI award.

AWARDS PROGRAM, INCENTIVE AWARDS PS 3451.05

109. FUNDING * * * *

Note: Approved award recommendations with the exception of QSIs may be deferred or denied due to budget curtailment or other unforeseen factors. In such cases, the affected employees will be informed. A letter indicating the type that would have been given will be placed in the eOPF and will have the same point value as a cash award for merit promotion purposes.

HUMAN RESOURCE MANAGEMENT MANUAL P3000.03

CHAPTER 4 ...

430.1 PERFORMANCE EVALUATION PROGRAM FOR BARGAINING UNIT EMPLOYEES * * * *

12. FINAL RATING * * * *

b. Overall Rating * * * *

- (7) An overall rating of outstanding is demonstrated by a rating of outstanding in a majority of the elements and no element rated less than excellent. When an outstanding rating is approved by the approving official, the rating official must also recommend the granting of additional recognition in the form of a cash or non-cash award or a quality step increase for those employees who are otherwise eligible. Refer to the Incentive Awards Manual for the criteria for performance awards.

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; and
- (B) for all purposes, is deemed to have performed service for the agency during that period, except that—
- (i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and
 - (ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

III. FACTS

The Agency operates a federal corrections complex at Pollock, Louisiana. The Union represents bargaining unit employees at the complex. The parties' relationship is governed by a Master Agreement dated July 21, 2014 – July 20, 2017.

On September 2, 2015, the Union submitted a **Formal Grievance** stating in relevant part:

5. Federal Prison System Directive, Executive Order, or Statute violated:

Master Agreement, in its entirety, and most notably in:

Article 4, Section b; Article 7, Section b; Article 6, section b, 1, 2, & 3; Article 14, sections a & c;

Human Resource Manual, PS 3000.03; Awards program Incentive Awards, PS 3451.04

5 U.S.C. 7116; 5 U.S.C. 4302; 5 U.S.C. 5596 (Back Pay Act);

Any other Directive, Executive Order, or Statute that may apply

Related Cases: GSA and AFGE Local 2431, 55 FLRA 493

6. In what way were each of the above violated? Be specific.

On July 31, 2015 this Local received the response to a data request in which it was revealed that numerous bargaining unit employees at FCC Pollock received a Sustained Superior Performance (SSP) award in contrast to their receiving the more coveted Quality Step Increase (QSI) award even though these employees were entitled to the latter.

Program Statement 3451.04 states "A QSI is appropriate when faster than normal advancement is warranted" and that "Some employees who are eligible for QSIs may actually benefit more from an SSP ... But consideration should be given to the benefit (emphasis added) to the employee."

An analysis of the response to the data request shows that no employee at FCC Pollock received a QSI and that, therefore, no employee received any consideration to the benefit of the employee in the distribution of these awards. This shows that the Agency

violated the aforementioned Program Statement. In addition, the Agency also violated the Master Agreement, Preamble in which it states that the parties "... Recognize that the employees are the most valuable resources of the Agency, and are encouraged, and shall be reasonably assisted, to develop their potential as Bureau of Prisons employees to the fullest extent possible." The Agency's unilateral denial of the issuance of the QSI award is detrimental to the full development of their employees.

The Union also contends that this is a violation of the Master Agreement, Article 6(b)(2) that states employees have "... The right to be treated fairly and equitably in all aspects of personnel management."

In an informal meeting it was stated by Warden Carvajal that no QSIs were given due to budgetary constraints. However, a QSI for an employee costs the Agency no additional monies as this is already funded by the yearly allocated budget for FCC Pollock. In contrast, the monetary awards issued to the staff at FCC Pollock do impact the budget to include the \$12,300.00 award that Warden Carvajal received during this rating period.

In addition, this Local contends that this denial of QSIs, which are normally issued as an award for an outstanding performance rating, violates the Master Agreement, Article 4, Section b, as this was a change in practices that was not negotiated with this Local. This change in the performance award practices must be negotiated prior to implementation as proven in case number 55 FLRA 493.

* * * *

8. Request remedy (i.e., what you want done)

1. That the agency and the Union shall review all affected employee's 2015 yearly award issuance and rectify any found discrepancies by awarding these individuals with a QSI unless an SSP would be more beneficial.
2. That the Agency ensures that all corrections are to be made on the Employee's EOPF page as well as the Employee's NFC page.
3. That the Agency establishes a listing of all affected employees with the corrections that were conducted which is to be presented to the Local for the final resolution.
4. That the Agency follows PS 3000.03, PS 3451.04 and the Master Agreement in its entirety, including the requirements

established for the issuance of awards.

5. That the Managers/supervisors at FCC Pollock be trained on all aspects of the Master Agreement and PS 3451.04
6. That the Agency give the employees of FCC Pollock and this Local a written apology to be posted on all bulletin boards for a period of no less than 90 days in via an email submitted to all staff at FCC Pollock.
7. The Agency makes whole all employees affected by awarding them the highest monetary award allowable by policy
8. That the grievant(s) will suffer no reprisals, harassment, or intimidation as a result of filing this grievance
9. That the Agency pay for any and all attorney fees and/or legal costs
10. Any other appropriate relief that may be requested at the hearing
11. Any other action(s) or sanction(s) deemed appropriate by the Arbitrator
12. The Arbitrator retain jurisdiction over this case until all affected staff at FCC Pollock have been made whole.

This grievance was denied by the Agency and was properly before the Undersigned for resolution. The grievance arises out of the Agency's issuance of performance awards for the 2014-2015 performance ratings period. The Agency issues performance awards to recognize and reward employees who perform in an exemplary manner or make significant contributions in the workplace, as well as to recognize those who have served the government faithfully and well. PS 3451.04 § 101 ("Awards Policy")

Each ratings period, an employee is assigned an overall performance rating by his or her rating official – usually a direct supervisor. The ratings are: Unacceptable – Minimally Satisfactory – Fully Successful/Achieved Results – Exceeds/Excellent – Outstanding. The ratings official then recommends, or nominates, eligible employees for performance awards. Pursuant to policy, an employee who receives a rating of "outstanding" must be

nominated for a cash or non-cash¹ Sustained Superior Performance (“SSP”) award, or for a Quality Step Increase (“QSI”). Eligible employees typically prefer a QSI, which augments their overall level of pay. However some employees who are eligible for QSIs prefer an SSP if they are already “stepped out” (meaning that they have already achieved the highest possible step within their grade) or planning to retire shortly. The Awards Policy states that consideration should be given to each employee’s preference in this regard. After an employee is nominated for a performance award, the nomination is reviewed by a ratings committee and, if approved at that step, is ultimately approved or denied by the Warden.

The testimony presented by both parties’ witnesses at the hearing established that, other than in 2015, the Agency regularly awards both SSPs and QSIs to eligible employees. On June 12, 2015, FCC Pollock conducted a recall meeting, where performance awards are announced and employees are recognized for their contributions. Bargaining unit employee Jala Byrd, a Time & Attendance Clerk, testified that recall meetings are held in the complex’s training center, and that there is an attempt made to relieve employees so that they can attend. However, only about 75 to 100 of 700 employees attended the 2015 recall meeting due to shift scheduling and other conflicts. Ms. Byrd expected to receive a QSI in recognition of her “outstanding” performance rating, but was issued a \$750 cash SSP award instead. She testified that, during the meeting, Warden Carvajal gave a speech in which he said something to the effect that “the reason no one got QSIs was because he was – he had to pay out so much money to the Union through grievances, things like that.”

Ms. Byrd, who is not a Union official but is married to one, left the recall meeting and immediately went to the Union office, where she told Executive Vice President Richard Logan “her feelings” about not receiving a QSI. She testified that this was the only time she did not receive a QSI for an “outstanding” rating other than her first year at the institution. Ms. Byrd received a certificate commemorating her SSP award on June 14, 2015, and the payment of the award was processed during the pay period which

¹ Non-cash SSPs normally take the form of paid time off.

concluded in the latter half of June 2015.

The Union submitted evidence that, in July 2015, FCC Pollock was in the process of retroactively issuing performance awards as ordered by Arbitrator Bruce Ponder in an October 2014 award for a grievance over the Agency's issuance of performance ratings and awards for 2011-2012 ratings period.

On July 8, 2015, the Union submitted this Data Request to the FCC Pollock HRM:

Information Being Requested

An unsanitized listing of all awards granted to all staff members for 2015. As these awards should be issued in a public environment, especially since PS 3451.04, Bureau of Prisons Awards Program Incentive Awards states that "All human resource offices are encouraged to publicize awards through newsletters and recalls" the privacy act is not a factor and as such, the listing should not be sanitized.

The Agency responded on July 31, 2015, with data showing that no FCC Pollock employee – bargaining unit or non-bargaining unit – received a QSI for the 2014-2015 ratings period. The Union filed the above-quoted grievance on September 2, 2015.

IV. POSITIONS OF THE PARTIES

Union's Position

The Union argues that the grievance was timely filed in accordance with Article 31 (d) of the Master Agreement. The contract requires that a grievance be filed within 40 days of the date the Union could reasonably be expected to have become aware of the underlying occurrence. Here, the basis of the grievance is the fact that no bargaining unit employees at FCC Pollock received a QSI award during the 2014-2015 ratings year, despite many being eligible for such awards. The information provided to the Union immediately following the awards ceremony on June 12, 2015 was insufficient to place the Union fully on notice of the existence of a basis for this grievance. It was not until the Union received the Agency's response to its data request on July 31, 2015 that it became aware that no

employee had received a QSI award for 2015. The Union filed an informal resolution on August 5, 2015 and, when the matter was not resolved informally, it filed its grievance on September 2, 2015, which it insists was within 40 days of its becoming aware of the basis for the grievance.

Regarding the specificity of the grievance, the Union maintains that there is no specificity requirement set forth in the Master Agreement, much less a prescribed level of specificity. There is no limit to the amount of policies, contract provisions or statutes that may be cited in a grievance. According to the Union, the wording of the grievance was sufficient to place the Agency on notice that its failure to give any QSI awards in 2015 was a violation of the Master Agreement, policy, and past practice.

On the merits of the grievance, the Union argues that the class is entitled to a remedy under the Back Pay Act, 5 U.S.C. § 5596, for the Agency's refusal to award any QSI awards to eligible employees for the 2014-2015 ratings period, which the Union claims violated established and binding past practice as well as negotiated provisions of the Master Agreement and an Agency Program Statement.

The Union asserts that the evidence presented at the hearing established that there is an established practice, over many years at FCC Pollock, of issuing both SSP and QSI awards to employees each year. Executive Vice President Richard Logan testified that, typically, an employee who receives an "outstanding" performance rating will be awarded a QSI unless it would be more beneficial to the employee to receive a SSP cash award (if the employee is already at the maximum step level or is approaching retirement). Both Logan and HR Specialist Michael LaCaze testified that they could not recall a year when no QSIs were awarded. The Union cites Article 4(b) of the Master Agreement, which provides that any changes to "practices or understandings between the parties," which are negotiable, must be mutually agreed to in writing, and asserts that the Agency violated this provision by abandoning the practice of awarding QSIs in 2015.

The Union next contends that the Agency's failure to award QSIs violated Article 6(b)(2) and 6(b)(3) of the Master Agreement. Article 6(b)(2) provides that all bargaining unit employees will be "treated fairly and equitably in all aspects of personnel management."

6(b)(3) prohibits the employer from any actions that constitute “restraint, harassment, intimidation, reprisal or [] coercion” against employees in the exercise of their rights under the Master Agreement, and from discriminating against employees on the basis of several characteristics, including Union membership and Union activity. The Union asserts that Warden Carvajal’s statement at the recall meeting proves that the Agency’s withholding of QSIs in 2015 was an act of retaliation against the Union and its bargaining unit members for pursuing previous grievances related to the issuance of performance awards, and that it amounted to discrimination, harassment and reprisal against the employees for engaging in Union activity as is their right under the Master Agreement.

The Union further maintains that the Agency’s actions violated Program Statement 3451.04, the policy that governed the BOP Awards Program at the time this grievance arose. PS 3451.04 provides that merit is the sole basis for the granting of any award. According to the Union, it was a violation of policy for the Agency to apply budgetary or any other considerations, besides merit, to the issuance of QSI awards. It continues that PS 3451.04 prohibits the Agency from deferring recommended QSI awards due to budget curtailment or other factors. Again, the Union cites Warden Carvajal’s statement as evidence that the Agency withheld QSI awards for budgetary reasons.

Because the Agency violated past practice as well as the express provisions of the Master Agreement and Agency policy, the Union maintains that it committed an unjustified or unwarranted personnel action. It further asserts that the Agency’s action caused a withdrawal or reduction in all or part of the affected employees’ pay, allowances or differentials. Accordingly, the Union contends that the employees are entitled to a remedy under the Back Pay Act. The remedy requested by the Union is that all employees who received “outstanding” ratings for the 2014-2015 ratings period be retroactively issued QSI awards for 2015, unless an SSP award was actually more beneficial to the employee.

Finally, the Union argues that it is entitled to an award of attorney fees and costs under the Back Pay Act because (a) the Agency’s action was clearly without merit or wholly unfounded; (b) the Agency’s actions were taken in bad faith and intended to harass or exert improper pressure on employees; and (c) the Agency knew or should have known

that it would not prevail on the merits. The Union proposes to file a request for attorney fees, along with supporting documentation, within 30 days of the issuance of this Award.

Agency's Position

The Agency argues that the grievance is not arbitrable for two reasons: first, because it lacks the requisite specificity required by the Master Agreement; second, because it was not timely filed within 40 days of the Union becoming aware of the basis for the grievance.

On the issue of specificity, the Agency cites Article 31, Section (f), which provides that formal grievances must be filed on a "Formal Grievance" form. Form BP-S 176.037, Formal Grievance Form, instructs the filer to list the directive, order or statute violated, and then asks "In what way were each of the above violated? Be specific." According to the Agency, the Union's response to both of these elements was general and generic, not specific.

Regarding the timing of the grievance, the Agency maintains that the Union was on notice as of the date of the recall meeting, June 12, 2015, that no employees were going to receive a QSI award. Jala Byrd testified that Warden Carvajal announced as much during the meeting, and that she immediately reported the Warden's statement to the Union. Ms. Byrd's SSP award was paid out in pay period 12, which was dated June 14, 2015 – June 27, 2015. According to the Agency, the Union knew by June 27 at the latest that no employee was going to receive a QSI. The grievance was filed 67 days later, which the Agency insists was untimely pursuant to Article 31(d) which does not provide for tolling of the filing time limit for any reason.

On the merits of the grievance, the Agency contends first that the Agency's decision not to issue QSI awards in 2015 was not a change in working conditions. It insists that the contract gives it the discretion to determine what performance awards will be issued and to whom. In other words, no employee is entitled to a QSI, regardless of his or her performance rating. The Agency maintains that the Union failed to present evidence of a binding past practice, and that there are too many variables at play in this case to allow the Arbitrator to find the existence of a past practice. There was no evidence presented

regarding what percentage of staff may receive QSIs, whether that percentage remains the same every year, or how the maximum allotment of QSIs is divided among departments according to the alleged past practice.

The Agency maintains that the white-out markings on some of the award nomination forms are not dispositive that employees were nominated for QSIs but issued SSPs instead. It urges that some of the employees may have been nominated for SSPs of a certain dollar amount and the dollar amount changed, or that there could have been other administrative errors, and that there is no prohibition against using white-out in order to prevent confusion when awards are being processed.

The Agency claims that no bargaining unit staff were harmed because none were entitled to receive QSIs. It insists that there was no violation of policy because the policy only required that each employee who received an “outstanding” be *nominated* for *any* type of award, which was what occurred. Further, the Agency maintains that bargaining unit staff were treated exactly the same as non-bargaining unit employees in 2015, as no employee from either group received a QSI.

Regarding the Union’s requested remedy, the Agency argues that the Union cannot require the Agency to award specific types of awards to specific employees where neither the contract nor policy requires such. It continues that policy prohibits the Agency from considering employee preference in assessing performance awards, as the Union urges it to do. Further, because the employees have already received SSP awards for 2015, the Agency asserts that the awards policy prohibits them from being awarded a QSI in addition to the cash awards. Article 32(a) of the Master Agreement provides that the remedy requested in the written grievance may not be modified except by mutual agreement, and the Agency states that it will not agree to any modification.

On the issue of attorney fees, the Agency claims that the Union’s request is unwarranted because the Union failed to prove that any bargaining unit member was affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of all or part of their pay, allowances or differentials, and thus the Back Pay Act does not apply.

V. OPINION

Arbitrability

The threshold issues that must be determined are whether the grievance was filed within the time limits set forth in the Master Agreement, and whether it was stated with sufficient specificity. The Agency bears the burden of proof on both of these issues.

Article 31(d) provides that a grievance must be filed within 40 calendar days from the alleged grievable occurrence, or 40 calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. The parties dispute when the Union became aware of the grievable occurrence – the Agency’s failure to award any QSIs to eligible employees in 2015. Jala Byrd reported to the Union on the day of the recall meeting, June 12, that she did not receive a QSI. Other than Ms. Byrd, there is no evidence that the Union had any other source tell them what happened in the recall meeting.

Although Ms. Byrd was not asked whether she shared with EVP Logan what the Warden had said about “no one getting QSIs” because of payouts on Union grievances, the Agency assumes that she did, and that this placed the Union fully on notice that, in fact, no employee received a QSI award for the 2014-2015 ratings period. Even if Ms. Byrd told EVP Logan about the Warden’s comments, the undersigned is not persuaded that the Union was fully on notice of the occurrence underlying this grievance on June 12. The recall meeting was apparently attended by approximately 10-15% of the FCC Pollock employees. It is not clear that when the Warden said “no one” was getting a QSI, he meant no employees at all, as opposed to no one present at the meeting. The Union also could not be certain that the Warden was not exaggerating or making a hyperbolic off-handed comment.

Additional investigation by the Union, before filing a class action grievance², was both reasonable and responsible. While the Agency suggests that the Union could have

² In a different context, the undersigned might have been persuaded that the Union had sufficient information to file an individual grievance on Ms. Byrd’s behalf on the date of the recall meeting.

confirmed that no bargaining unit employees received QSIs when the SSPs were paid out in the second pay period in June, it did not present any evidence to show whether or how the Union would have had access to payroll information for all the employees. The Union submitted a reasonable data request, tailored to ascertain whether the comments reported to have been made by the Warden at the June 12, 2015 were accurate. When it received the Agency's response on July 8, 2015, the Union had the information it needed to proceed with filing a formal grievance, which it did within 40 calendar days.

Based upon the foregoing facts and evidence, the grievance was timely filed in accordance with Article 31(d) of the Master Agreement.

Article 31(f) does not mention anything about the level of specificity required for a grievance, but it does refer to the BOP "Formal Grievance" form that must be used for formal grievances. The Formal Grievance Form issued by the Agency instructs the filer of a grievance to "be specific" in describing how policies, directives or statutes were violated. Other than this instruction, there is nothing in any contractual or policy provision that establishes a required level of specificity. In the absence of such guidance, arbitrators generally require that a grievance be specific enough to place the employer on notice of the grounds of the complaint and the remedy sought. The Union's grievance contains five paragraphs explaining how it believes the Master Agreement and Agency policy were violated when the Agency failed to issue any QSI awards in 2015. This was sufficiently specific to satisfy the requirements of the Master Agreement.

The grievance is arbitrable and shall be resolved on the merits.

Liability Under the Back Pay Act

In order to establish liability under the Back Pay Act, the Union must prove that (1) the aggrieved employees were affected by an unjustified or unwarranted personnel action and (2) the personnel action resulted in the withdrawal, or the reduction of an employee's pay, allowances or differentials. 5 U.S.C. §5596. A violation of the Master Agreement or of an Agency rule or policy would constitute an unjustified or unwarranted personnel action. *FCC Coleman, FL*, 65 FLRA 1040 (2011).

The Union argues that the Agency violated the Collective Bargaining Agreement Article 6, Sections (b)(2) and (3) when it withheld all QSI awards in 2015 because the Warden's stated reason for withholding the awards – the fact that the Agency was paying out money in response to Union grievances – constituted unfair or unequal treatment and/or discrimination, harassment or reprisal based upon the employees' participation in protected (collective bargaining) activity, Union membership or Union activity.

The evidence of record establishes that the Warden made the decision to withhold QSIs in 2015 as a form of reprisal against the Union and its bargaining unit members³ for filing previous grievances over the payout of performance awards – specifically the grievance resolved by Arbitrator Ponder in 2014. The record establishes that the Agency was still in the process of making the payments ordered by Arbitrator Ponder as of July 2015, just weeks after Warden Carvajal made his comments about no one getting a QSI because he had to pay out so much money to the Union over grievances. The Agency did not dispute or rebut Ms. Byrd's testimony about the Warden's comments, nor did it offer any other explanation or justification for the Agency's failure to award any QSIs in 2015 – despite evidence showing that 169 bargaining unit employees were rated "outstanding" and at least 34 appear to have been nominated for QSIs before the nomination forms were whited-out and re-marked with nominations for SSPs.⁴

The Union also asserts that the Agency violated PS 3451.04 and PS 3451.05 when it

³ The fact that non-bargaining unit members were also denied QSIs does not absolve the Agency of its liability for violating Article 6(b)(2) or (3). The non-bargaining unit employees may have been collateral damage in what appears to be the Warden's retaliation against the Union and its members for filing grievances.

⁴ The Agency argues that the Arbitrator should not take any adverse inference from the white-out on the nomination forms, because it could have been used merely to correct "administrative errors" and because there is no prohibition against using white-out. The undersigned finds it highly unlikely that there could have been so many "administrative errors" in the year when the Agency decided to break with its common practice of issuing at least some QSIs, and when the complex Warden made comments specifically attributing the lack of QSIs to his having to pay out money on Union grievances. Common sense, and some of the whited-out nomination forms where the white-out did not cover all of the original markings, indicates that the white-out was used to modify forms on which the employee was nominated for a QSI but the ultimate decision maker, the Warden, rejected the recommendation and ordered an SSP instead.

used criteria other than merit as the basis for not granting QSI awards. The unrebutted testimony establishing the Warden's public statements is credited as proof that he deemed the Agency's need to pay out on successful Union grievances as reason not to award QSIs. Such payouts obviously had nothing to do with the merit of each employee eligible for such an award.⁵

The Agency is correct when it argues that nothing in the Master Agreement or Agency policy *entitles* any employee who is rated "outstanding" to a QSI award as opposed to a cash or non-cash SSP. However, the Agency's Program Statements make clear that, in deciding whether to award a QSI to an eligible employee, the Agency may *only* consider merit, and specifically *may not* consider budget curtailment or other issues. Further, the Master Agreement requires the Agency not to harass, discriminate or retaliate against bargaining unit members based upon their Union membership or Union activities, or their participation in protected activities – such as the filing of grievances through their Union.⁶ The evidence establishes that the Agency violated both the Master Agreement and its own policies in regard to the non-issuance of any QSIs in 2015.

Therefore, the evidence establishes that the Agency committed an unjustified or unwarranted personnel action when it discriminating and retaliating against bargaining unit employees for their Union membership and Union activity – filing grievances.

The Agency also committed an unjustified or unwarranted personnel action when it violated PS 3451.04 and PS 3451.05 by using criteria other than merit when determining employees' eligibility for QSI awards in 2015. The result of these unjustified and unwarranted personnel actions was the withdrawal or reduction of the pay, allowances or

⁵ Further, the Union correctly points out that PS 3451.05, which was intended to clarify PS 3451.04, explicitly states that QSIs may not be deferred or denied due to budgetary issues. The payment on Union grievances was, at best, a budgetary issue which was not appropriate consideration in the approval or denial of QSI awards according to Agency policy.

⁶ **Article 6, Section b.** The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right: 2. to be treated fairly and equitably in all aspects of personnel management; 3. to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, disabling condition, genetic information, participation in protected activity, Union membership, or Union activities; ...

differentials of the affected employees. Therefore, the Union has established liability under the Back Pay Act.

The evidence was insufficient to establish a binding past practice relating to this grievance.⁷

Remedy

The Union requests the Arbitrator to order that all bargaining unit employees who received an “outstanding” performance rating in 2014-2015 and were otherwise eligible for a QSI be retroactively issued a QSI for 2015 and made whole for any losses associated with the denial of that award – except for those employees for whom it was more beneficial to receive an SSP.

The evidence establishes that at least approximately 34 Bargaining Unit employees in this class grievance were nominated for QSIs and that the QSI designations on the appropriate forms were whited-out in a consistent manner. The Undersigned takes an adverse inference and finds that but for the violations discussed above, those employees would have been awarded, and are entitled to the QSI - except for those employees for

⁷ The Union argued that the Agency violated binding past practice, and Article 4(b) of the Master Agreement, when it unilaterally decided not to award QSIs to all employees who received an overall rating of “outstanding,” and for whom a QSI would be more beneficial than an SSP. The Union’s evidence on past practice was not strong. EVP Logan and HR Specialist LaCaze agreed that neither could remember a year in which no QSIs were awarded. Mr. Logan added that employees nominated for QSIs are typically always issued that award, unless they are stepped out or approaching retirement. The Union also submitted a portion of a transcript from a hearing over a grievance involving performance awards at FTC Oklahoma City, which indicated that department heads in that facility are advised that only ten percent of their employees should be nominated for QSIs, regardless of how many receive “outstanding” ratings. This undercuts the Union’s argument that there is a binding practice wherein all employees rated “outstanding” are awarded QSIs. The evidence was insufficient to establish the existence of the specific past practice that the Union seeks to use as the basis for its claim under the Back Pay Act. However, the evidence did establish that there is a practice at FCC Pollock of awarding at least some QSIs to eligible employees each year, and that the Agency unilaterally suspended that practice in 2015.

whom it was more beneficial to receive an SSP. There was insufficient evidence to support the Union's contention that all 169 employees who received "outstanding" performance ratings would have been nominated for and received QSIs but for the Warden's across-the-board denials.

Adjustments will be needed for those employees who have received the SSP for year 2014-15 and will now receive the QSI. Each impacted member of this class will have to pay back the SSP received if s/he wants the QSI. Jurisdiction is retained over disputes over this process.

Attorney Fees and Costs

The Union asserts that it is entitled to recover reasonable attorney fees and costs under the Back Pay Act because it is the prevailing party in this action and based upon the above finding that the class of employees represented in this grievance were affected by an unjustified and unwarranted personnel action which resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials. The factors for determining whether an award of attorney fees is appropriate are:

- (1) The Agency engaged in a prohibited personnel practice;
- (2) The Agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of the charges brought by the Agency;
- (3) The Agency's actions are taken in bad faith to harass or exert improper pressure on an employee;
- (4) The Agency committed gross procedural error which prolonged the proceedings or severely prejudiced the employee; or
- (5) The Agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

Attorney fees may be awarded if the Arbitrator finds that any one of the above factors is met. *AFGE Local 3020 and FCC Minersville, PA*, 64 FLRA 596 (2010).

In this case, factors two and three are most persuasive to the undersigned as reasons the Union is entitled to recover reasonable attorney fees. As described above in the Facts

and Opinion Sections, the Agency's actions were taken in bad faith, to retaliate against bargaining unit members for grievances filed by the Union on their behalf. The Warden's comments at the June 12, 2015 recall meeting, that no one was getting a QSI because he had to pay out so much money to the Union on grievances are illustrative of this. The Warden's comments further demonstrate that the criteria he used in denying QSIs to eligible employees, which had nothing to do with the merit of each employee, were entirely inappropriate and in clear violation of the Master Agreement and Agency Program Statements. This establishes that the Agency's actions were entirely without merit and wholly unfounded.

The Agency asserts that the Master Agreement provides that the parties will share the costs of arbitration equally. If this is intended as an argument why the Union should not be awarded attorney fees it is without merit. The Arbitrator's fee and the costs of the arbitration are wholly separate from attorney fees. The Union is not entitled to recover its equal share of fees and expenses of the Arbitrator.

The Union is entitled to recover reasonable attorney fees.

VI. INTERIM AWARD

The grievance is sustained.

The Agency is ordered to correct the records of those (approximately at least 34) Bargaining Unit employees in this class grievance who were originally nominated for QSIs as described in this Opinion. Those employees shall be appropriately awarded QSIs for Year 2014-15.

The Union is entitled to recover its reasonable attorney fees and costs. The Union shall submit a full application for attorney fees and costs, along with supporting documentation, within 35 days of the issuance of this Award. The Agency shall respond to the Union's application either by paying the sums requested or by submitting its written response in Opposition to the Union's application to the Undersigned and Union Counsel within 35 days from the date of the Union's application.

The Undersigned retains jurisdiction over this grievance to resolve any issues resulting in the processing of the QSIs, to correct any error in the body of this decision document, and to rule, as necessary, on disputes over the payment of attorney fees and costs.

Nothing contained in this Opinion or Award substitutes the judgement of the Agency's management to lawfully direct employees, evaluate employee, rate employees, reward/award employees, promote employees and/or assign work in accordance with federal statute, federal regulation, negotiated program statements or the Master Agreement.

Credibility of the witnesses, their testimony, and the documentary evidence introduced by the parties in this matter was weighed, objectively considered, and form the basis of the undersigned's factual determinations. The legal conclusions set forth herein are consistent with all applicable standards of the laws controlling the Agency's conduct in this matter. This Award does not contain a citation of all authorities and facts that were considered by the undersigned in the deliberation of this matter. All motions and/or objections, by either party, not addressed herein or during the hearing of this matter, have been considered and denied.

Kathryn Durham

Arbitrator
Kathryn Durham, JDPC