

IN THE MATTER OF ARBITRATION
BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYERS,
LOCAL 1034 FEDERAL CORRECTIONAL COMPLEX
POLLOCK, LOUISIANA
UNION

AND

FMCS 13-59342

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
POLLOCK, LOUISIANA
AGENCY

OPINION AND AWARD

Arbitrator: Charles G. Griffin

APPEARANCES FOR THE PARTIES

Appearances for American Federation of Government Employers, Local 1034:

Richard Logan, Executive Vice-President
Jason Shannon, Chief Steward
Adam Smith, Treasurer
James Byrd, 1st Vice President Union
Fernando Gaspar De Alba, UNICOR Fabric Worker Supervisor
Jannette Odom, UNICOR Fabric Worker Supervisor
Randy Ryland, UNICOR Fabric Worker Supervisor

Appearances for Federal Bureau of Prisons:

Ruby Navarro, Labor Relations Specialist
Michelle Cottingham, Human Resources Manager
Michael Tigner, UNICOR Factory Manager (Retired)
Jeffrey Pentz, UNICOR Factory Manager

PROCEDURAL HISTORY

The Federal Correctional Complex (hereinafter referred to as FCC) is a federal prison site with the Federal Bureau of Prisons (hereinafter referred to as BOP). The FCC is located in Pollock, Louisiana and includes the United States Penitentiary (hereinafter referred to as USP), the Federal Correctional Institution (hereinafter referred to as the FCI), and the Satellite Prison Camps 1 & 2. Working within these facilities are two (2) Federal Prison Industry, Inc. (hereinafter referred to as UNICOR or Agency) factories. One factory is located at USP and one is located at the FCI. UNICOR is a separate entity of the BOP but is bound by the Master Agreement (Joint Exhibit 1). Qualified employees can work at either FCC factory in accordance with UNICOR's shared services.

On January 14, 2013, the American Federation of Government Employers (hereinafter referred to as AFGE) Local 1034 filed with Agency Representative M.D. Carvajai, Complex Warden BP-S176.037 Formal Grievance Form CDFRM (Joint Exhibit 2). The grievance form stated that Master Agreement, Article 6, Section b (2), (6) and Article 18, Section p (1) as well as any other applicable Directive, Executive Order or Statute that may apply (Joint Exhibit 2). Specifically the grievance states they were violated:

“From December 5, 2012, as well as before and ongoing thru the present, Unicolor overtime has been hired and distributed in an inequitable manner. Unicolor staff has been continuously bypassed for overtime on numerous occasions without following the overtime rotation procedure. Furthermore, certain select Unicolor staff have received a majority of the overtime while other Unicolor staff are not being allowed this opportunity. The affected Unicolor employees were at work on the date(s) of these overtime hiring violations and were willing to work any overtime to be worked. These manipulations in the Unicolor overtime hiring procedures are a violation of the Master Agreement, Article 6, Section b (2) “*to be treated fairly and equitably...*”, and Article 18, section p (1) “*...when Management determines that it is necessary to pay overtime...will be distributed and rotated equitably among bargaining unit employees...*.” (Joint Exhibit 2).

Further stated in the grievance was the following request for remedies:

"1 - All affected staff members receive compensation for missed overtime pay in accordance with the Back Pay Act. 2 - A posted apology to Local 1034 and all bargaining unit staff members posted no less than 90 days on all institutional and union bulletin boards and e-mailed to all staff. 3 - No harassment, intimidation, reprisal or coercion against any employee affected by this grievance. 4 - All fees for this arbitration are paid by the agency. 5 - Any other remedies deemed necessary by the Arbitrator to make the affected employees and Local 1034 whole. 6 - The arbitrator retain jurisdiction until all parties are made whole." (Joint Exhibit 2).

On February 13, 2013 Complex Warden, M.D. Carvajal responded by letter to the grievance addressed to Brian Richmond, President AFGE Local 1034 (Joint Exhibit 3). The Warden stated the following:

"When management recognizes the need to hire overtime for a particular task which requires an individual trained in a specific area, the subject matter experts will be assigned the overtime. In this case,, the FCI UNICOR Foremen are the only staff currently trained on this ninety plus sewing operations, specifications and tolerances required by the contract for Army Combat Uniform Pants. During the past few months, this new product has been developed and production implemented exclusively at the FCI. UNICOR has assigned the overtime to staff that have been trained to produce the Army Combat Uniform Pants by seniority, following the master list from when the last foreman completed overtime. In the future, as additional foreman receive the training on the product, they will be included as subject matter experts and given the opportunity to work overtime when the need exists. For the above noted reasons, your grievance is substantively denied." (Joint Exhibit 3).

On February 18, 2013 J. Shannon, Local 1034 Secretary, in response to the grievance denial addressed a Memorandum with subject matter stated as "invoke arbitration" addressed to Complex Warden, M.D. Carvajal (Joint Exhibit 4). Specifically, the Memorandum stated:

“...Local 1034 is exercising its right to Invoke Arbitration per guidelines listed in Master Agreement Article 32-Arbitration.” (Joint Exhibit 4).

On July 9, 2014 an Arbitration Hearing regarding the above referenced grievance was conducted by Charles Griffin, FMCS Arbitration. Neither party questioned the issue of the grievance being brought before the Arbitrator properly. The Parties were unable to agree upon joint issue(s) for the Arbitrator to address in the Decision and Award. The Parties each presented their own formation of issue(s) and agreed to empower the Arbitrator to form and address the issue(s) accordingly in the Decision and Award. Both Parties were afforded opportunity to present their cases and a transcript provided by Pilant (a Corporation of Certified Court Reporters) is evidence of such. The Parties agreed to waive Closing Statements in lieu of providing Post-Hearing Briefs to be exchanged simultaneously upon receipt to the Arbitrator.

PERTINENT CONTRACT PROVISIONS

Master Agreement
Federal Bureau of Prisons
and
Council of Prison Locals
American Federation of Government Employees
March 9, 1998 – March 8, 2001

PREAMBLE

The Federal Bureau of Prisons acknowledges that the participation of its employees in providing input into the development of personnel policies, practices, and procedures which affect conditions of employment, and their assistance in the implementation of policies, practices, and procedures, contributes to the effective operation of Bureau facilities. The Bureau of Prisons will develop and maintain constructive and cooperative relationships with its employees, through their exclusive representative, where applicable, the Council of Prisons Locals and the American Federation of Government Employees. The parties respect the rights granted to Management, employees, and the Council of Prison Locals by the Civil Service Reform Act of 1978, as amended.

The parties recognize that efficient and effective service is a paramount requirement and that public interest requires the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency.

Moreover, the parties recognize that the administration of an agreement depends on a good relationship. This relationship must be built on the ideals of mutual respect, trust, and commitment to the mission and the employees who carry it out. Therefore, the Federal Bureau of Prisons and Federal Prison Industries, Inc., hereinafter referred to as "the Employer" or "the Agency," and the Council of Prison Locals and the American Federation of Government Employees, hereinafter referred to as "the Union" or "exclusive representative," do hereby agree to:

- (A) focus on problems and ways to deal with them;
- (B) recognize the needs of the other party;
- (C) consider collective bargaining as an opportunity to improve the relationship between the Agency and the Union; and
- (D) recognize that the employees are the most valuable resource of the Agency, and are encouraged, and shall be reasonably assisted, to develop their potential as Bureau of Prisons employees to the fullest extent practicable.

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 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;
- 6. to have all provisions of the Collective Bargaining Agreement adhered to.

Section q. The Employer and its employees bear a mutual responsibility to review documents related to pay and allowances in order to detect any overpayments/underpayments as soon as possible.

2. should an employee realize that he/she has received an overpayment/underpayment, the employee will notify their first line supervisor in writing.

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 positions/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.

Section q. The Employer retains the right to order a qualified bargaining unit employee to work overtime after making a reasonable effort to obtain a volunteer, in accordance with Section p. above.

ARTICLE 21 – TRAINING

Section a. The Employer and the Union agree that the training and development of employees within the unit is a matter of primary importance to the parties and that through the procedures established for employment – Management cooperation the parties will seek the maximum training and development of employees.

Section b. The Union will be afforded membership on the training committee and will be entitled to express its views, make recommendations, and otherwise participate, except in the selection of participants for training, determining the content of training, and determining how the training budget will be spent.

Section c. Requests for annual leave for education and training purposes will be handled in accordance with the provisions of Article 19.

Section d. Mandatory training at the institution level will be conducted while the employee is on duty, during the employee's duty hours. The training is distinguished from training which the employee initiates and/or elects on his/her own in which to participate.

1. if the Employer requires employees to obtain licenses or certification for basic job requirements beyond those required to meet the basic requirements for appointment in their position (specialized technical training), the Employer will pay for any training that may be required for such licenses or certification, which will normally take place while the employee is in a duty status;
2. whenever possible, appropriate training will be conducted prior to certification testing which is required by the Employer; and
3. when assignments change or if new technology or equipment is introduced, and the employee requests training, the Employer will provide such training to the maximum extent feasible, provided the Employer determines that training is needed for affected employees.

Section e. The Employer will provide copies of locally – generated training announcements to the Union as they are posted.

Section f. A record of the employee's detail to other departments will be documented and placed in his/her personnel file to be used as a reference for qualifications for future job openings.

Section g. The Union may request to participate in Annual Refresher Training at the local level.

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 e. If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.

ARTICLE 32 – ARBITRATION

Section d. The arbitrator's fees and all expenses of the arbitration, except noted below, shall be borne equally by the Employer and the Union.

(Joint Exhibit 1)

POSITION DESCRIPTION

**Fabric Worker Supervisor
(Fabric Worker Foreman)**

WS-3105-07

INTRODUCTION

This position is located in the Textiles Factory within UNICOR, Federal Prison Industries, at a Bureau of Prisons (BOP) federal correctional facility. The incumbent in this position serves as supervisor of an inmate detail engaged in the production of various types of textile products which may include any type of sewn product or any type of product made from fabric. The incumbent is responsible for the quality of work under his/her supervision by assuring economical and efficient accomplishment of assignments as mandated by contract and specific product orders.

MAJOR DUTIES AND RESPONSIBILITIES

The incumbent provides direct supervision to federal inmates of various ages and skills levels assigned to the Textile Factory. All inmates must be trained by the incumbent to cut, assemble and package a finished product which meets rigid Department of Defense and other government and private sector specifications in sufficient quantity and quality. The details vary in size and the duties cover such diverse areas as supervising cutting processes (e.g., pattern & marker development, spreading, cutting and shade numbering), sewing processes (e.g., setting collars, hemming, side seaming, button hole, manual operations), packing processes and clerical functions.

Since the position is located in a correctional environment and the incumbent supervises a workforce comprised of federal criminal offenders, law enforcement responsibilities compound those duties normally related to a manufacturing operation.

Along with all other correctional institution employees, incumbent is charged with responsibility for maintaining security of the institution. The staff correctional responsibilities precede all others required by this position and are performed on a regular and recurring basis.

Specific correctional responsibilities include custody and supervision of inmates, responding to emergencies and institution disturbances, participating in fog and escape patrols, and assuming correctional officer posts when necessary. Incumbent may be required to shakedown inmates and conduct visual searches in their work or living area for contraband. Incumbent must be prepared and trained to use physical control in situations where necessary, such as in fights among inmates, assaults on staff, and riots or escape attempts.

Incumbent has the authority to enforce criminal statutes and/or judicial sanctions, including investigative, arrest and/or detention authority.

When necessary, incumbent also has the authority to carry firearms and exercise appropriate force to establish and/or maintain control over individuals. When conditions warrant, the employee may enter into hostile or life threatening situations and may be required to make decisions affecting the life, well-being, civil liberties, and/or property of others. The actions of the incumbent could result in personal sanctions and legal liability.

Incumbent must successfully complete specialized training in firearms proficiency, self defense, management of medical emergencies, safety management and interpersonal communication skills.

The duties of this position require frequent direct contact with individuals in detention suspected or convicted of offenses against the criminal laws of the United States. Daily stress and exposure to potentially dangerous situations such as physical attack are an inherent part of this position; consequently, it has been designated as a law enforcement position. Accordingly, the incumbent is covered under the special retirement provisions for law enforcement officers contained in Chapters 83 and 84 of Title 5, United States Code.

FACTOR I – NATURE OF SUPERVISORY RESPONSIBILITY

Planning: Through utilizing a computerized production application system, the incumbent schedules production on a daily, weekly, and monthly basis, establishing project priorities to meet work demands and contract deadlines. He/she has full responsibility for assignment and training of inmate workers for specific jobs within their skill and ability levels, while maintaining guidelines of security, safety and

sanitation. The incumbent is responsible for scheduling work orders for production and setting up new production lines for different products, which includes planning for specification requirements, equipment needs, raw material requirements, training needs of inmates, the meeting of Quality Assurance Standards, and the determination of inmate manpower levels. The work force will both increase and decrease as such product requirements fluctuate. This fluctuation causes changes in the type of equipment, material and supplies needed. **Work Direction:** Incumbent must be completely familiar with the specifications for each textile product and must possess a good working knowledge of the mechanics of the machinery used in manufacturing those products in order to properly supervise inmates engaged in maintenance and repair of equipment. He/she explains work requirements, methods and procedures as necessary in order to effectively accomplish the mission, supervise and instruct inmate workers in the proper and safe use of tools and equipment. Incumbent must coordinate material flow to insure production and quality standards are met, may require the shifting of inmates based on work load priorities and inmate skill levels. The incumbent also participates in inter-department staff meetings and is expected to contribute ideas and changes that will help make the factory operation more efficient.

Administration: Incumbent is responsible for the establishment of performance objectives for the work detail and must recommend promotions and demotions of assigned inmate workers. The incumbent is also responsible for making appraisals and complete evaluation of their work performance for the Unit Team and Quarterly Progress Reports. Promotes management programs, such as Safety, Security, Incentive Awards, and Equal Opportunity Employment. Incumbent is responsible for ensuring that formal on-the-job training is conducted for inmate workers. Must periodically review training needs and modify them to current needs. Must counsel inmate workers and initiate disciplinary action when required. The incumbent must schedule inmate vacations to meet individual and factory requirements. Must maintain issuance and control of all Class "A" and Class "B" tools with foreman and inmate tool check system. Must maintain production reports which are vital to management cost accounting, and check inmate productivity and meet production requirements.

FACTOR II – LEVEL OF WORK SUPERVISED

Occupations Involved: The work assignments change depending on the type of contract, but generally there are multiple operations going on at one time to manufacture as product. The occupations usually consist of cutting operators, sewing machine operators, manual assembly operators, packers, and clerks. The incumbent is responsible for the supervision and training of inmates in safe, efficient machine operation and maintenance, and for the quality and workmanship of the items produced. Defective materials must be sent back to the point of origin for repair and analysis to prevent the problem from recurring, which means the incumbent must be able to perform each individual operation to make corrections. The incumbent is primarily responsible for manufacturing a high quality product in a safe manner which meets all the specifications agreed to in the contract. If one step is omitted from the construction of the product it can render each and every item produced useless to the contractor and the agency would have to absorb the cost.

Knowledge and Responsibility of Subordinates –

Skill and Knowledge: The workers must know about how fabric items are made and must be able to use a variety of common materials and components such as wool, nylon, cotton, broadcloth, canvas, buttons, grommets, etc. The workers cut material to specified lengths and widths; assemble and sew parts together and attach fasteners and fittings such as snaps, zippers, eyelets, drawstrings, and cords. The inmate workers are also allowed to use shears, ripping aids, needles and sewing machines. The inmate workers must be aware of the packing and packaging procedures; labeling, stenciling, and marking of all shipments as required by specifications.

Responsibility: Inmate workers are responsible for producing textile articles such as but not limited to mattresses, military shirts and battle dress uniforms, gloves, sheets and pillow cases, towels, blankets, bags, body armors and duty belts. It is their responsibility to assemble and sew parts together, attach fasteners and fittings in accordance with contract specifications. The workers must be able to operate the various pieces of equipment because their work assignments change in accordance with the contracts received.

FACTOR III – SCOPE OF WORK OPERATIONS SUPERVISED

Scope of Assigned Work Function and Organizational Authority: The purpose of the work is to hire and train inmates in various types of

products and jobs, in hopes that with this training the inmates will be able to return to society with the skills necessary to acquire employment. Supervisors must be able to instruct and train the inmates to produce a product of high quality. The product must be of equal quality to those produced in the private sector. Failure to accomplish this would result in significant financial loss. All profits are invested in salaries of staff and inmate workers, supplies, machines and equipment, and the expansion of related vocational programs. Supervisors have the responsibility for training their works crews, and making sure that items produced meet all the required specifications. Since all the profits and losses acquired by any one factory affects all the others in the organization, the successful or unsuccessful work of the supervisor is realized nationwide.

Variety of Functions: The trade practices and work functions vary depending on the type of products manufactured, however most textile factories will have cutting, assembling and packaging. This adds to the difficulty of the position, its inconsistency with the types of sewing machines, patterns required, hem specifications, fastening machines, cloth marking and cutting machines, and bar tacking machines to name a few. The level of difficulty does vary per item manufactured but each supervisor must be flexible enough to learn any unfamiliar or new machine well enough to train others on its operation in a short amount of time. The supervisor must be able to explain work requirements, methods of procedures as necessary in order to effectively accomplish the mission and coordinate material flow to insure production and quality standards are met.

Workforce Dispersion: UNICOR has factories located nationwide at numerous sites. Due to the nature of the BOP and its workforce of inmates the ability to move work crews from one area to another area does not exist. The work at each facility is done locally, however, projects on occasion are started at one factory and completed at another due to the equipment needed and expertise of staff and inmate workers at various locations. The work sites do vary and supervisors on occasion are required to change work sites for the completion of a particular phase of a project in order to maintain quality consistency. The need to monitor work in dispersed areas is not ongoing but it does exist. A variety of products require the interaction of staff at various locations to complete

(Joint Exhibit 5)

U.S. Department of Justice
Federal Bureau of Prisons

PROGRAM
STATEMENT

OPI: HRM/TSD
NUMBER: P3906.20
DATE: 1/24/2007
SUBJECT: Employee Development
Manual

1. **PURPOSE AND SCOPE:** To establish comprehensive training procedures, specify training management responsibilities, and provide employees with access to the training process.
2. **PROGRAM OBJECTIVES:** The expected results of this program are:
 - a. Employees will receive the training needed for their current position, as well as for professional growth and advancement.
 - b. Employee Development Department responsibilities will be clearly defined.
3. **DIRECTIVES AFFECTED**
 - a. Directives Rescinded
P3906.16 Employee Development Manual (3/21/97)
 - b. Directive Referenced
P3000.02 Human Resource Management Manual (11/1/93)
P3713.22 Upward Mobility Program (8/26/02)
P3906.18 Staff Mentoring Program (3/29/02)
P3939.07 Chaplains' Employment Responsibilities, and Endorsements (10/26/01)
Master Agreement
4. **STANDARDS REFERENCED**
 - a. American Correctional Association, Standards for Adult Correctional Institutions, 4th Edition, 4-4073, 4-4074, 4-4075, 4-4076, 4-4077, 4-4078, 4-4079, 4-4080, 4-4082

P3906.20

1/24/2007

Chapter 3, Page 3

g. Program Review. Operational and program reviews of the Employee Services office are maintained until the next program review is completed.

h. Mandatory Standards Temporary Exemption. Defined as, a temporary release from a mandatory training requirement.

Documentation (i.e., medical documentation, military orders) for temporary exemptions must be provided to the ESM and approved by the CEO.

i. Budget Information. Each Employee Services Office must maintain a budget monitoring system.

j. Other Administrative Records. Strategic Planning documentation and lesson plans are maintained as hard copy or electronic files for routine office functions.

Training Opportunity Announcements (TOA) (Attachment 1)

A TOA is required for locally developed programs for which participants have not been identified through mandatory standards, needs assessment, or other means.

Criteria for determining whether a TOA will be used to select participants depends on who has training oversight. If a training requirement exists, a TOA is used. Collateral-duty positions are also announced on a TOA.

A TOA is used for all training for which participants are competitively selected. The announcement is created by the ESD and posted in areas of high visibility.

The TOA is open for 15 working days. The Union receives a copy per the Master Agreement.

Use the following format (additional information may be added):

- Opening and closing dates of announcement.
- Title.
- Number of vacancies to be filled.
- Date and location of the training.
- Description of the training.
- Eligibility group/qualifications required.
- Application procedures.
- Impact statement regarding promotion potential.

For continual or recurring training, TOAs may be posted on an open-continuous basis and selections made when necessary. Open-continuous TOAs are closed out each fiscal year.

Application Process. Employees submit, through their supervisor, a memo stating their interest in the training and its relevance to their work. If required by the TOA, employees document their qualifications.

P3906.20

1/24/2007

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After the closing date, submit the file to the CEO (final selection authority). Keep these documents for three years:

- Memo documenting official selection. The ESM prepares the document for the Warden (or designee) indicating, in alphabetical order, which applications are eligible. The document must allow the Warden to make an obvious mark by the name of the employee(s) being selected and provide a signature blank.
- Copy of the TOA.
- All applications.

Notify applicants and selectees' supervisors via memorandum, of the CEO's selection (kept in the TOA file).

Certified Instructors. Use these procedures to announce, select, and train certified instructors. An institution must select at least two instructors for a specialty program area.

(Joint Exhibit 9)

The Back Pay Act, 5 USC § 5596

(a) For the purpose of this section, "agency" means – (1) an Executive agency; (2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28; (3) the Library of Congress; (4) the Government Printing Office; (5) the government of the District of Columbia; (6) the Architect of the Capitol, including employees of the United States Senate Restaurants; and (7) the United States Botanic Garden.

(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.

(2)(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest - (i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made; (ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and (iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.

(5) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

ISSUE

Did the Agency misapply the application of the Agreement, Article 18, Section p (1) and (2), on or around December 2, 2012 when filling overtime assignments? If so, what is the appropriate remedy?

DISCUSSION

The Arbitrator recognizes that the evidence and testimony established the following set of facts and occurrences surrounding the grievance:

- A) The UNICOR factories at the FCI and USP were making Physical Fitness Uniform shorts (hereinafter referred to as PFUs).
- B) At an undetermined date in November 2012, the FCI factory changed the product they were making to Army Combat Uniform trousers (hereinafter referred to as ACUs).
- C) At an undetermined date in December 2012, the PFU production ceased at the USP.
- D) Beginning sometime on or around the first week in December 2012 through an undetermined date at the end of December 2012 the Agency initiated a need for overtime to work at FCI on the production of the ACU.

The issue that the Arbitrator is to consider is the manner in which the Agency filled the overtime in accordance with the Agreement, Article 18, Section p (1) and (2)(Joint Exhibit 1). Arbitrator first will address Agency Exhibit 4 which is an email dated January 15, 2013 from Michael Tigner, UNICOR Factory Manager to Ron Martinez, Associate Warden of Industries and Education. The email states the following:

“Prior to December of 2012, the last UNICOR Overtime worked was July 2013. I have attached a roster for that time period. The FCI UNICOR Factory began filling the overtime within the FCI Factory on Monday, December 03, 2012, utilizing the three (3) Fabric Worker Supervisors, which were assigned to the ACU Trouser Product line. From Monday, December 03, 2012, through Monday, December 10, 2012, only one (1) of the Fabric Worker Supervisors, who have expertise with the new ACU Product Line, were utilized. Beginning on Tuesday, December 11, 2012, additional supervision was required due to the increased amount of inmate operations; therefore, one (1) additional UNICOR Staff, not currently assigned as Fabric Worker Supervisor in the ACU Trouser Product line was added to the FCI UNICOR Overtime Rotation. The decision was made by Randy Price Associate Warden I&E to utilize one (1) Fabric Worker Supervisor, which possessed ACU knowledge to ensure the required expertise were available during the overtime requirements. When the inmate operations needed on overtime increased to a level which

required 2 (two) staff, (1) one additional UNICOR staff was offered the overtime opportunity. The overtime was offered by rotating through the UNICOR overtime roster. I have also attached the rosters used to rotate the overtime. I will probably need to sit down and walk you through the process. Let me know if you need additional info. Mike”.

Arbitrator acknowledges the Agency’s above statement as an explanation of how the overtime was filled but acknowledges it contradicts the Agreement, Article 18, Section p (1) which states:

“1. when Management determines that it is necessary to pay overtime for positions/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; ...” (Joint Exhibit 1).

Arbitrator will now address the issue of “qualified employees” which was a contention for the Parties. The Agreement makes no further reference to the term “qualified employee”. Arbitrator does acknowledge that the Position Description Fabric Worker Supervisor (Fabric Worker Foreman) WS-3105-07 (Joint Exhibit 5) states the following on page one (1):

“This position is located in the Textiles Factory within UNICOR, Federal Prison Industries, at a Bureau of Prisons (BOP) federal correctional facility. The incumbent in this position serves as supervisor of an inmate detail engaged in the production of various types of textile products which may include any type of sewn product or any type of product made from fabric. The incumbent is responsible for the quality of work under his/her supervision by assuring economical and efficient accomplishment of assignments as mandated by contract and specific product orders.

MAJOR DUTIES AND RESPONSIBILITIES

The incumbent provides direct supervision to federal inmates of various ages and skills levels assigned to the Textile Factory. All inmates must be trained by the incumbent to cut, assemble and package a finished product which meets rigid Department of Defense and other government and private sector specifications in sufficient quantity and quality. The details vary in size and the duties cover such diverse areas as supervising cutting processes

(e.g., pattern & marker development, spreading, cutting and shade numbering), sewing processes (e.g., setting collars, hemming, side seaming, button hole, manual operations), packing processes and clerical functions.”

And continues on page two (2) as follows:

FACTOR I – NATURE OF SUPERVISORY RESPONSIBILITY

Planning: Through utilizing a computerized production application system, the incumbent schedules production on a daily, weekly, and monthly basis, establishing project priorities to meet work demands and contract deadlines. He/she has full responsibility for assignment and training of inmate workers for specific jobs within their skill and ability levels, while maintaining guidelines of security, safety and sanitation. The incumbent is responsible for scheduling work orders for production and setting up new production lines for different products, which includes planning for specification requirements, equipment needs, raw material requirements, training needs of inmates, the meeting of Quality Assurance Standards, and the determination of inmate manpower levels. The work force will both increase and decrease as such product requirements fluctuate. This fluctuation causes changes in the type of equipment, material and supplies needed.”

The job description above as stated for the affected Employee’s involved in this grievance specifically addresses the long range of possible skills that Fabric Worker Supervisor (Fabric Worker Foreman) would address in the performance of their job duties (Joint Exhibit 5). The Arbitrator concludes that the job description which is extremely detailed, specifically five (5) pages for the Fabric Worker Supervisor (Fabric Worker Foreman) is a strong indication that the Parties anticipated these Employee’s being involved in garment line production changes and even more they anticipated them to be qualified to supervise these changes (Joint Exhibit 5). Arbitrator negates, given the depth of the Supervisor’s job description, any contention made that the Agency filled overtime based on a particular skill set or exposure qualification under their “qualified employee” rights as stated in the Agreement. Arbitrator finds that a “qualified employee” skill set or exposure qualification could only be specifically proven applicable only to the one (1) Supervisor, Jeffrey Pentz, who was sent to film the ACU production in Talladega, Alabama for Inmate training purposes (Transcript, Pentz, page 157). The evidence and testimony showed that besides Jeffrey Pentz no valid

distinction existed that would justify offering overtime to any of the Fabric Worker Supervisor's (Fabric Worker Foreman) who worked at either the FCI or USP factories. Further, Arbitrator recognizes that Joint Exhibit 9, "Program Statement" confirmed that the Parties anticipated from time to time the future need to provide training to covered Employees. Specifically, Joint Exhibit 9 states the following:

"1. PURPOSE AND SCOPE. To establish comprehensive training procedures, specify training management responsibilities, and provide employees with access to the training process.

2. PROGRAM OBJECTIVES. The expected results of this program are: a. Employees will receive the training needed for their current positions, as well as for professional growth and advancement."

Furthermore, the Agreement, Article 21, titled "Training" elaborates on specifics of training which indicates again that the Parties anticipated from time to time the future need to provide training to the covered Employees. Evidence and testimony illustrated that training for Inmates on the ACU was initiated (Transcript, Pentz page 157) and that starting up the ACU operation was a long process (Transcript, Tigner, pages 123-124, 133). Arbitrator concludes that given the facts the Agency possessed the ability and time to invoke training for the Fabric Worker Supervisor (Fabric Worker Foreman) as provided for in the Agreement, Article 21 – Training (Joint Exhibit 1) and the Program Statement (Joint Exhibit 9) prior to the execution of filling overtime. Lastly, Arbitrator would like to acknowledge specific admissions of error stated in testimony. Michelle Cottingham, Human Resource Manager testified that with reference to Article 18, Section p (2) of the Agreement, which established overtime records that there existed no sign up lists as stated (Transcript, Cottingham, pages 23-24). The testimony of Jeffrey Pentz also confirmed that for an undetermined time period the use of sign-up sheets was not practiced as stated in the Agreement, Article 18, Section p (2)(Transcript, Pentz, pages 140-141). Jeffrey Pentz further stated that after he received specific training on the Master Agreement he began to utilize sign-up lists in conformity with the Agreement, Article 18, Section p (2). In conclusion with regards to the issue of overtime, which is the subject matter of this grievance, the Arbitrator finds the Agency did not distribute overtime beginning around December 3, 2012 and/or December 5, 2012 in accordance with the Agreement, Article 18, Section p (1) and (2).

Arbitrator will now address the issue of how long the overtime assignment was applied in error and what Employees were affected by the error. The Union asked in the grievance filing (Joint Exhibit 2) for the issue to encompass "From December 5, 2012, as well as before and ongoing thru the present". Further in the Union's Post Hearing Brief they asked for Arbitrator to address "UNICOR overtime being improperly hired from December of 2010 thru to the recent past." Arbitrator notes Article 31, Grievance Procedure, Section d of the Agreement states as follows:

"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 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 statues provide for a longer filing period, then the statutory period would control." (Joint Exhibit 1).

Further Article 31, Grievance Procedure, Section e of the Agreement states as follows:

"If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue." (Joint Exhibit 1)

Arbitrator will disallow consideration on the issue of overtime prior to the week of December 2, 2012 applying with the requirements stated in the Agreement, Article 31, Sections d and e. Furthermore, during the Arbitration process generalized statements were made with regards to misapplication of overtime distribution prior to December 2, 2012 but this time period was not addressed specifically through testimony and evidence. Arbitrator therefore determined that overtime prior to December 3, 2012 was not the subject matter of this Arbitration. In conclusion, Arbitrator will address only the incorrectly distributed overtime beginning around December 3, 2012 and/or December 5, 2012 ongoing to the present.

Arbitrator will now address the appropriate remedy for the misapplication of Article 18, Hours of Work, Section p (1) and (2) specifically overtime starting around December 3, 2012 and/or December 5, 2012. The Union has requested in their prayer for relief

for the Arbitrator to apply The Back Pay Act, 5 USC § 5596 if a violation of overtime is determined. The Back Pay Act, 5 USC § 5596 specifically states:

“(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 employees through other employment during that period”.

Arbitrator will not apply The Back Pay Act, 5 USC § 5596 in the issuance of the remedy because the Arbitrator is unable to determine from the testimony and evidence what Employees were affected due to the conflicting and inaccurate records. Specifically, the Agency’s official overtime records (Joint Exhibit 6) would normally be considered the official record in making a determination when considering which Employees were affected by the overtime application error. But Agency’s Exhibits 1, 2 and 3, which are timesheets signed by Employees and Supervisors, conflict with the Agency’s official overtime records (Joint Exhibit 6). The timesheets (Agency Exhibits 1, 2, 3) provide the employee’s names, date and times they worked for a 4 (four) day span. Arbitrator determined when examining the 4 (four) day span; comparing it to the Agency’s official overtime records (Joint Exhibit 6), the names, dates and times are different. Furthermore, the Union’s audit of overtime records that covered occurrences from December 3, 2012 to June 11, 2014 (Joint Exhibit 7) when compared to the Agency’s official overtime records that covered occurrences from April 26, 2009 to May 30, 2014 (Joint Exhibit 6) illustrates further discrepancies for a span greater than 4 (four) days. Article 18, Hours of Work, Section p. of the Agreement states “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." (Joint Exhibit 1). Arbitrator concludes that the Agency and the Union both shared the burden and responsibility for monitoring the overtime assignment system. The admission of Joint Exhibits 6, 7 and Agency Exhibits 1, 2, 3 are illustrations that both parties failed in exercising their obligations stated in the Agreement, Article 18, Section p (2). Furthermore, Arbitrator is unable to determine conclusively if the error in overtime began on December 3, 2012 or December 5, 2012. The Union in their grievance filing makes reference specifically to the beginning date as "From December 5, 2012, as well as before and ongoing thru the present" (Joint Exhibit 2). The Agency states the following "This case is about the overtime assigned the week starting December 2, 2012. More specifically it is about the overtime assignments for December 4, 5, and 6, 2012." (Agency's Post-Hearing Brief). Further the Agency states "When using seniority as the basis for assigning overtime to those who were working at the FCI, Joint 6 page 5 shows Mr. Burge refused his opportunity on December 3, 2012 and..." (Agency's Post-Hearing Brief). Arbitrator has already concluded that the Agency's overtime records were shown to be unreliable determined by both parties introduction of evidence and testimony. Arbitrator acknowledges "Strict compliance with the specific provisions of the Back Pay Act has been required." (Elkouri & Elkouri, How Arbitration Works, 5th Ed., page 98). Furthermore, "The FLRA has revised or modified arbitrator's awards involving application of the Back Pay Act where the arbitrator: 2. Awarded overtime back pay to an employee without a finding that but for the violation, the employee would have received the overtime."³³⁹ (Elkouri & Elkouri, How Arbitration Works, 5th Ed., page 98). The evidence and testimony from both Parties failed to provide the Arbitrator with accurate overtime records that would be vital in determining a back pay award in accordance with the strict rules of compliance required by The Back Pay Act, 5 USC § 5596. Considering the error by both Parties as stated above with regards to the inability to provide accurate overtime records, the Arbitrator will structure the award as a make-up overtime remedy. The testimony and evidence indicated that T and A records did exist which would after examination give a reasonable indication of which Employees were affected by the

error in overtime distribution. Arbitrator recognizes the following testimony of Michael Tigner with regards to Agency's overtime records (Joint Exhibit 6):

"Q. Disregard Joint Exhibit 7 for right now. Can you go back to Joint Exhibit 6? During the timeframe that you were here, were you the person that kept up with this – these records? A. Yes. Q. Were you the only one that maintained these records, Joint Exhibit 6? A. The majority of the time I did. The time I would not have is if I was on vacation not there then somebody else would fill it in. Q. And who would normally fill it in when your weren't there? A. Depending on who was acting Factory Manager. Q. Okay. So, it'd be in acting capacity, okay. To the best of your knowledge is this information accurate in during your timeframe that you were here? A. To the best of my knowledge. Q. Okay. A. I mean, I have electronic – or had electronic records that I would keep. Q. And what did you do with those electronic records when you retired, did you submit them to the oncoming Factory Manager? A. No. Q. So, y'all kept a hard copy of this anywhere, in other words, what I'm saying, when you left your position.. A. Uh-huh. Q. Okay. If there a shared folder that y'all used. A. No. "

(Transcript, Tigner, pages 104, 105).

Specifically, the following testimony of Michael Tigner indicates the existence of T and A records as follows:

"Q: All right. So, - all right. Going back to this document here, do you have any way of verifying if this information is accurate other than the T and A sheets? Did you have some sort of – something that you can compare it to for its accuracy? A. T and A sheets. Q. T and A sheets. A. Or if anything is left archived." (Transcript, Tigner, pages 117, 118).

Further the testimony of Jannette Odom stated as follows:

"Q. Can you go back to Joint Exhibit 6 on page 5 and did you work any overtime on December 13th, 2012? A. No. Q. Not according to this document? A. According to that, no. Q. So, this rotation that they're using to decide – determine who's next on overtime does not appear to be accurate at all, does it? A. No. Q. On these two separate lists, who created these two separate lists, is this something the Agency created? A. No, no, I'm not sure if Ryland – Mr. Ryland created that list or if Mr. Tigner did. Q. Mr. Ryland is he bargaining unit, he's not a manager right? A. No. Q. Why

would he have any input on the overtime at all, other than using it? A. Because sometimes he does the work in the computer. Q. So, he was keeping up with this? A. I think Mr. Tigner was keeping up with how everybody worked and Mr. Ryland, I think, was printing the sheets or what have you, putting names and keeping all that straight. Q. Printing what sheets? A. Printing these sheets. Q. Joint Exhibit 6, so Mr. Ryland was keeping up with the rotation? A. Yes, he – I think that he was – he does the T and A's so I think he had some part to do with this but mainly Mr. Tigner had it on his computer also. But if Mr. Tigner wasn't there and he was out, I guess, Ryland had it so we could refer back to it. Q. Okay. On these overtimes that you were bypassed, if you had been called for them would you have worked them? A. I'm sure I would have. Q. Do you know of any reason that you would not have worked them? A. No, I don't. Q. Do you work overtime? A. Yes. Q. Do you work it often or rarely or? A. No, I work it often." (Transcript, Odom, pages 78, 79).

Arbitrator concludes from the above stated testimonies that the parties utilized the T and A records in order to create Agency's overtime records (Joint Exhibit 6) transferring the information from one to the other. The Arbitrator also concluded from the testimonies above that the Agency's overtime records (Joint Exhibit 6) at times were maintained and accessible by the affected Employee's. Arbitrator has concerns that the affected bargaining unit Employee's access to the Agency's overtime records could have compromised the accuracy of the records further than the evidence and testimony already indicated. It is not within the Arbitrator's ability to determine, especially given the inaccurate and limited overtime records introduced through evidence and testimony (Joint Exhibit 6, 7 and Agency Exhibit 1, 2, 3), where the errors occurred in the overtime records system. Arbitrator rules in accordance with the Agreement; specifically the Preamble and Article 18, Section p (2), which states the Union and the Agency both are responsible for overtime records. Specifically; in accordance with the Agreement, the Union and Agency are both responsible for assuring "the effectiveness of the overtime assignment system" and to create safeguards to "ensure equitable distribution of overtime assignments to members of the unit." (Joint Exhibit 1).

AWARD

Arbitrator concludes that the Agency misapplied the application of the Agreement; specifically Article 18, Section p (1) and (2), on or around December 2, 2012 when filling overtime assignments. Further, Arbitrator concludes that the Union and Agency both failed to fulfill their obligations with regards to overtime records system as stated in the Agreement, Article 18, Section p (2). The Parties will audit the Agency's overtime records using the T and A's as well as any other records in existence which can be determined together to be accurate. The audit is to be performed by the Parties within regular work hours as allowed by the Agreement. The purpose of the audit is: (1) determine when beginning sometime on or around the first week of December 2, 2012 to present the misapplication of overtime occurred (2) determine how the errors in the Agency's overtime records occurred and (3) determine which Employee's were affected by misapplication of overtime identifying specific hours. Once the audit is completed the Parties will apply the remedy of make-up overtime, offering the identified affected Employee's make-up overtime for the hours determined by the audit. Upon determining how the errors in the Agency's overtime records occurred, the Parties are to take immediate corrective action assuring the effectiveness of the overtime assignment system and records as well as create safeguards to ensure equitable distribution of overtime assignments in accordance with Agreement, Article 18, Section p (1) and (2). The Arbitration cost is to be split by the Parties, as stated in the Agreement, Article 32 - Arbitration, Section d.

Respectfully submitted this 21st day of October 2014.



Charles G. Griffin, FMCS Arbitrator