
In the Matter of the Arbitration between

United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Oakdale, Louisiana

and

American Federation of Government Employees, Locals 33, 1007

FMCS 06-54703-3

James Ponthieux
Overtime Grievance

Opinion and Award

The hearing in this case was held on February 8, 2007, in the EOIR Building, Federal Correctional Complex, Oakdale, Louisiana, before Donald J. Petersen, serving as sole arbitrator. The arbitrator was mutually selected by the parties and appointed by the Federal Mediation and Conciliation Service [FMCS]. Presentation for the Union was made by Sam T. Heuer, attorney, Coplin and Heuer. The Agency's presentation was made by Betty Gannon, Labor Relations Specialist, Federal Bureau of Prisons.

At the hearing the parties were permitted to present such evidence and argument as they desired including examination and cross-examination of witnesses. Witnesses were:

Union:

Kevin Deville
Bryan Pollard
Kenneth Humphries
James Ponthieux

Agency:

Joseph Young
Scarlett Lusk
Dee Bamburg

A full transcript of the hearing was taken and both parties elected to file a post hearing brief.

The Issues:

"Was the grievance timely and arbitration properly invoked?" "If so, did the Agency violate the parties' collective agreement when the grievant was reassigned on September 30, 2005, and lost ten overtime opportunities?" "If so, what should be the remedy?" Does the Agency owe attorney fees and expenses?"

Relevant Contract Provisions:

Article 6, Section b. "The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the rights:

1. To bring any matters of personal concern to the attention of any Management official, any other officials of the executive branch of government, the Congress, and any other authorities. The parties endorse the concept that matters of personal concern should be addressed at the lowest possible level; however, this does not preclude the employee from exercising the above-stated rights;"

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, handicapping condition, Union membership, or Union activity."

Article 6, Section f. "Unit employees, including probationary employees, have the right to a Union representative during any examination by, or prior to submission of any written report to, a representative of the Employer in connection with an investigation if:

1. The employee reasonably believes that the examination may result in disciplinary action against the employee."

Article 18, Section a. "The basic workweek will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minutes non-paid, duty-free lunch break. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break."

Article 18, Section m. "Employees may request to exchange work assignments, days off, and/or shift hours with one another. Supervisory decisions on such requests will take into account such factors as security and staffing requirements and will ensure that no overtime cost will be incurred."

Article 18, 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 signup 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.

Article 18, 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 30, Section g. "The Employer retains the right to respond to an alleged offense by an employee which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution. The Employer may elect to reassign the employee to another job within the institution or remove the employee from the institution or remove the employee from the institution pending investigation and resolution of the matter, in accordance with applicable laws, rules, and regulations."

Article 31, 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."

Article 32, Section a. "In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement."

Background:

The Federal Detention Center located in Oakdale, Louisiana ["Agency" hereinafter] is part of the Federal Bureau of Prisons system with facilities located throughout the

United States. Bargaining unit employees are represented by the American Federation of Government Employees, Prison Locals 33 and 1007 ["Union" hereinafter]. The prison complex located in Oakdale is divided into three major parts: The Federal Detention Center [FDC] houses inmates with immigration violations (Tr. 33); the Federal Correctional Institution [FCI] houses regular inmates in a low security facility; and the Camp. In the latter, inmates are dressed in green and perform maintenance for the entire complex which includes yard work, garbage pickup, etc. Anyone at the FDC or FCI can easily come into contact with camp inmates as they may be found all over the grounds and buildings.[1]

The grievant in this case, Prison Guard Officer, James Ponthieux, has a seniority date of February 5, 1995 (Tr. 134). Prior to the incidents involved in this case, Ponthieux has worked at the FDC, and had never before been disciplined.[2]

The Oakdale Complex has several different shifts. Ponthieux worked the 11:50 p.m. to 7:50 a.m. one (Tr. 34).

On September 29, 2005, Lt. Hernandez called Ponthieux and told him to report to the FCI hospital after work (Tr. 135). Ponthieux inquired what it was about but Hernandez claimed that he did not know. The grievant was part of a car pool arrangement and he requested that they wait for him. He also called the hospital to determine why he was to report there, but they also did not know (Tr. 135). The grievant left a message for Kevin Deville, the local Union president, to call him. When Deville returned the call, Ponthieux stated that he was required to go to the FCI hospital and no one knew what it was about. Deville stated that he would meet him at the front entrance to the FCI building (Union Ex. 20). When Deville saw Ms. Lusk, the hospital administrator, she stated that she wanted Ponthieux to provide a urine sample (UA) for a random drug test. Lusk said that Ponthieux was off work at 8:00 a.m.[3] Deville told her that Ponthieux had not been relieved for duty yet, and that his shift ended at 7:50 a.m. By

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[1]There are some jobs at the Oakdale prison, which have limited contact with regular inmates such as a perimeter person, control center officer or a control number 2 who monitors inmates' telephone calls (Tr. 39-40).

[2]Since at least April of 2002, Ponthieux has received excellent performance appraisals [see Union Exs. 12 to 15]. He was also commended by the South Central Regional office of the Federal Bureau of Prisons on October 26, 2005, for contributions in connection with efforts following Hurricane Katrina (Union Ex. 11).

[3]Lusk claimed that she called both Ponthieux and his supervisor "toward the end of his shift" (Tr. 207).

the time Ponthieux arrived, it was after his shift had ended.[4] The grievant had recently relieved himself in anticipation of his hour- and -one-half hour ride home (Tr. 138). Lusk inquired when Ponthieux would be willing to provide a UA. He stated that he would be willing to provide a specimen, but that he had "just used the bathroom" (Tr. 138). Lusk responded that it would not take long to provide a UA (Tr. 138). She insisted that he produce a specimen "now" (Tr. 138).[5]

Deville then asked Lusk if she would pay Ponthieux overtime because it was after his shift (Tr. 46). He [Deville] also stated that: "We're not going to stay here as this man is off duty" (Tr. 47).[6]

At that point, Lusk tried to get Ponthieux to sign a form stating that he refused to provide a specimen. Ponthieux would not sign it (Tr. 49). Ponthieux never told Lusk that he would not take a UA (Tr. 48).[7]

Then Lusk allegedly told Ponthieux that he better provide a specimen tomorrow (Tr. 139, 49).[8] The grievant said "I can do it in the morning" and Lusk replied: "I'll see you in the morning." She then released him.[9]

Thereafter, Ponthieux made arrangements to take the UA the following morning. First, he did an "okey-dokey",[10] by swapping shifts with another employee, Pearlie Gotreaux (Union Ex. 24, Tr. 144). Ponthieux reported to the FCI Hospital in the morning on

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[4]Section 6 of the Collector's Procedure Manual (Union Ex. 6) mandates that for random testing, employees are to be tested "consistent with work schedules." Collectors are to arrange their schedule to accommodate employees.

[5]Section 11 g. of the Collector's Procedure Manual (Union Ex. 6), which was negotiated by the parties, states in part that some individuals may not be able to urinate immediately. "Be sensitive to these individuals."

[6]Overtime must be approved prior to working extra time (Tr. 47).

[7]Scarlett Lusk also agreed that Ponthieux never said that he was unable to provide a UA (Tr. 212).

[8]Lusk denied that she offered to allow Ponthieux to do a UA the next day (Tr. 205).

[9]Lusk called Warden Young on September 29th (Tr. 209) because Ponthieux refused to take a UA (Tr. 209). She never informed Ponthieux or Deville that she was going to tell Warden Young.

[10]Pursuant to Article 18, Section m, employees may exchange work assignments. This is referred to an "okey-dokey" arrangement.

September 30, 2005, but Lusk was not there (Tr. 147). Indeed, Lusk was not at work that day (Tr. 50, 53).

Ponthieux also learned on September 30, 2005, that he was being reassigned from the FDC facility to the FCI facility while he was under investigation (Union Ex. 9). Capt. Million also noted that: "You will not have contact with inmates" (Union Ex. 9).[11] He [Million] told Ponthieux that he was not going to discuss the reassignment, but that Ponthieux was under investigation for refusing the UA (Tr. 54).[12]

Deville filed a grievance on October 4, 2005, which claimed that Ponthieux was fearful of mistreatment and or retaliation by management (Union Ex. 25).[13] The previous day, Kenneth Humphries, the local Union vice president, and Ponthieux talked to the human resources manager at Oakdale, Carmen Hamer (Tr. 125, 150). They attempted to discuss the fact that the no-inmate-contact restriction placed on the grievant was nearly impossible for Ponthieux to observe (Tr. 125). Humphries suggested that Ponthieux be placed on home duty, but that suggestion was rejected (Tr. 125). Hamer stated that she did not wish to hear about any of it (Tr. 126).

Ponthieux decided to take a private drug test to demonstrate that he was drug free. This action was taken on October 6, 2005 (Tr. 151). The test proved negative for all drugs (Union Ex. 16).

During the time period in question, Ponthieux had experienced financial problems as his wife was not working (Tr. 162). Therefore, to help alleviate the problem, overtime was worked when available. After his reassignment to the FCI facility, the grievant could not sign for overtime at that facility because he was on the FDC signup program, and lacked computer access to sign up for overtime at FCI (Tr. 66-67).[14]

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[11]Deville was also under investigation for allegedly advising Ponthieux to violate Agency policy (Tr. 68). He [Deville] was cleared, but never received copies of the investigation nor the results (Tr. 69).

[12]However, the initial investigation was for refusing to follow an order, not for refusing a UA (Tr. 68).

[13]Ponthieux actually believed that he was being "setup" by management because there is no way that one can avoid contact with camp inmates (Tr. 75-76). Warden Young explained at the arbitration hearing that he meant that Ponthieux should avoid only those inmates that an officer supervises. This point was not made clear to Ponthieux at the time, however.

[14]An employee can sign up for overtime only in his or her assigned facility (Tr. 65, see also Section 13-c of Union Ex. 10).

Thereafter, Ponthieux missed ten occasions for overtime, consisting of eight hour shifts (Tr. 114, 116). After the first of such opportunities occurred, on October 29, 2005, a grievance was filed (Union Ex. 21, Tr. 116) on December 5, 2005 (Tr. 78-79). This grievances was denied by the Agency on January 3, 2006 (Union Ex. 22). Nothing in the grievance response indicated that the grievance was not timely (Union Ex. 22).

The grievance (Union Ex. 21) was dropped by the Union (Tr. 83). It opted to wait until the completion of the investigation to file another grievance (Tr. 84).[15]

Subsequently, on January 24, 2006, Lt. Sibley called Ponthieux and told him to report to FDC (Tr., 159). A written statement, on that same date, read that the allegation of failure to follow a supervisor's instructions had been investigated and completed, and "was not sustained."

Thereafter, Ponthieux was subjected to a drug test on February 2, 2006 (Union Ex. 17) and March14, 2006 (Union Ex. 18). Both of these tests were found to be negative for drugs.

Ponthieux still sought 80 hours of pay at the overtime rate. His grievance dated February 8, 2006 (Joint Ex. 4) was found to have been untimely filed by Warden Young (Joint Ex,. 5). The Union sent an e-mail indicating that: "Local 1007 invokes arbitration regarding the grievance response."[16]

No resolution of this dispute proved possible and it was, accordingly, appealed to the instant arbitration.

Position of the Union:

1. The Union argues that the Agency has, in its threshold issues, engaged in hyper technical and legalistic arguments. It maintains that arbitrators have repeatedly refused to dismiss a grievance for a procedural defect if the employer has not raised the objection until the date of the arbitration. Time limits have been considered waived by a party when a clear and timely objection has not been made.

According to the Union, Article 31, Section e, states that an arbitrator "will decide timeliness if raised as a threshold issue." It claims no other issue is stated that can be

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[15]Article 31, Section d of the parties' collective agreement mandates that grievances must be filed within 40 calendar days of the date of the alleged grievable occurrence.

[16]Article 31, Section a, reads in part that a party seeking arbitration must notify the other party. Such notification "...must include a statement of the issues involved, the alleged violations, and the requested remedy."

taken as a threshold issue in arbitration.

2. The Union contends that the Agency has ignored the last sentence of Article 31, Section d, which states that "[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 language will control." It was urged by the Union that the Fair Labor Standards Act [FLSA] in cases of unpaid minimum wage, unpaid overtime compensation, or liquidated damages, may be commenced within two years after the cause of the action occurred.

Moreover, the Union cites several arbitration decisions which hold that when the violations are continuing ones, each violation gives a new opportunity for the Union to file a grievance.

3. As to the grievance's specificity, the Union maintains that Warden Young stated that he was aware of what the grievance concerned. It cites an arbitration award which held that if there is sufficient information for the employer to respond, it is sufficiently specific.

4. The Union further avers that the Back Pay Act is triggered when an arbitrator finds that an employee was affected by an unjustified or unwarranted personnel action and the personnel action has resulted in a reduction of a grievant's pay. It insists that the purpose of the Back Pay Act was to place an employee in the same position as he would have been in, had the unwarranted personnel action not occurred. A violation of the collective agreement constitutes an unjust or unwarranted personnel action.

5. According to the Union, there have been many violations of the parties' collective agreement in this case. It asserts that the grievant did not violate any order or refuse to take a UA. The Agency produced no documents or testimony to support Lusk's testimony that the grievant violated her order. Even the OIA investigation found her allegation to be untrue. No one relieved the grievant, but he went to Lusk's office after his duty hours. Actually, Ms. Lusk was supposed to adjust her schedule to coincide with the grievant's schedule for a UA.

The Union asserts that the grievant paid for a private UA and submitted it to the Agency to demonstrate that he was not using drugs. His drug test was negative.

6. It was further urged by the Union that the grievant was punished for exercising his rights under the collective bargaining agreement, when the Agency refused to allow him to work overtime. He was not granted access to the FCI overtime sign up program, and therefore, for four months, was bypassed for overtime opportunities. In all, he missed ten 8-hour overtime shifts that he would have worked.

Under Article 30, Section g, the Agency may reassign an employee, but there was no legitimate reason why the Warden restricted the grievant from being around inmates. If

the Warden believed that Ponthieux was a drug threat, he allowed him to work the next shift, and never required the grievant to take another UA until February 2, 2006.

His performance evaluations were rated outstanding during the time period in question and he was a 12 year veteran of the Agency who was well respected.

Both the Warden and Ms. Lusk were evasive and untruthful. The OIA investigation lasted four months even though the Warden never doubted the integrity of the grievant.

6. Finally, the Union petitioned for an award of attorneys fees and expenses.

Position of the Agency:

1. The Agency points out that Article 31, Section d., states in part that "...grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence." While the Union claimed that the date of the alleged violation was October 2, 2005, the grievance was filed on February 8, 2006, well beyond the 40 calendar day limit specified for filing a grievance. According to the Agency, however, the actual date of the reassignment was September 30, 2005, which even exacerbated the truant grievance filing. In its response to the grievance, the Agency informed the Union that the grievance was rejected because it was untimely filed.

In addition, the Agency avers that the Union has attempted to argue that the grievance was a continuing one. The Agency maintains that arbitrators have ruled on timeliness issues without reaching the merits of the case.

2. Moreover, the Union invoked arbitration via a one-line e-mail. The Agency points out that Article 32 of the parties' agreement clearly requires that the notification must include a statement of the issues involved, the alleged violations and the requested remedy. According to the Agency, the grievance process is intended to be simple. The Union failed to adhere to the requirements of the collective bargaining agreement when arbitration is demanded. Arbitrators are not allowed by the agreement to add to, subtract from, disregard, alter, or modify any of the terms of the agreement.

3. The Agency maintains that if the arbitrator reaches the merits of the case, the grievant was ordered to provide a urine sample on September 29, 2005, but failed to do so. Because of his refusal, an investigation was conducted. The investigation ended in January of 2006, and the grievant was returned to his regular job duties.

4. It further contended that the Union mentioned ten or eleven overtime opportunities which the grievant allegedly missed. The grievant claimed that he had worked only one overtime shift prior to his reassignment. The grievant never stated that he would be ready, willing and able to work the ten or eleven overtime opportunities. According to the Agency, there is not evidence that the grievant would have worked these overtime opportunities anyway.

Moreover, the Union failed to prove that the Agency's reassignment of the grievant was an unwarranted personnel action which would be a requisite for any type of back pay. The Agency requests that the grievance be dismissed as not arbitrable, but if it is not dismissed on that basis, the grievance should be denied as it is lacking in merit.

Opinion:

Two threshold issues were raised in the instant case. The first issue alleged that the grievance which triggered this arbitration, was not timely filed. Ponthieux was reassigned on September 30, 2005, but his grievance was not filed until February 8, 2006. Thus the grievance was submitted well beyond the 40 calendar days specified in the parties' agreement.

Article 31, Section d, covers the time periods in which grievances must be filed. The language reads 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 after its occurrence, the grievance must be filed with 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 d, as noted above, provides that if there is a statute that governs time limits, that statute prevails over the terms of the parties' agreement. In portal-to-portal cases [Fair Labor Standards Act, 29 U.S.C. § 255 (a)], at (a) states:

> "...if the cause of action accrues on or after May 14, 1947–may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued..."

Thus, the grievance in this case, dealing with overtime, was not truant, based on the language of the parties' collective agreement, and the applicable statute which allows two years for a cause of action to commence.

Moreover, arbitrators usually do not invoke time limits if the violation is a continuing one. Such was the case here. After Ponthieux was reassigned on September 30, 2005, there were ten separate occasions when he could have qualified for overtime. Each of these occasions was triggered by a single cause–the Agency's reassignment of Ponthieux to the FCI facility without computer access to the overtime opportunities.

Thus, each occasion can be considered a separate violation which could trigger a separate grievance.

Therefore, the Agency's threshold issue of timeliness was not persuasive.

Article 31, Section e, of the parties' agreement states that: "If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue." Thus, the only negotiated threshold issue can be the timeliness one.

Nevertheless, the Agency also contended that the invocation of arbitration by the Union was fatally flawed. Article 32 of the parties' agreement requires that the notice to invoke arbitration must include a statement of the issues involved, the alleged violation, and the requested remedy. That the Union understood these requirements is not in doubt as it has properly invoked arbitration in the past (see Management Ex. 1). Nevertheless, the Agency's objection is overly technical. It was well aware of the Union's position and requested remedies from prior grievances and discussions in this case. The Warden also acknowledged that he was aware of the issues involved in this grievance. In addition, there was no mention of the flawed arbitration demand in the Agency's grievance answers. The matter was first raised at the arbitration hearing.

Thus, the case is considered on its merits.

The crux of the Agency's case is that Ponthieux refused to obey an order. There was absolutely no proof that insubordination occurred. Indeed, the Agency could not produce a form that Ponthieux refused to take a drug test.[17] Scarlett Lusk, the person who made the complaint of the alleged refusal to the Warden, testified that the grievant never stated that he was not able to give a UA (Tr. 212).[18] Of course, Ponthieux and Deville, who were both present during the September 29th meeting with Lusk, corroborated the fact that the grievant never refused to take the test (Tr. 138-39, 48).

While Lusk claimed that she never suggested that Ponthieux could take the UA the following morning (Tr. 205), both Deville and Ponthieux stated that she did suggest it (Tr. 49, 139). While it could be argued that Deville and Ponthieux may have had a motive to lie, Lusk obviously would have denied that she gave the grievant another UA opportunity, because she had just informed the Warden that Ponthieux had refused to take a drug test. I did not find Lusk to be a credible witness.

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[17]The Warden claimed to have received a written document stating that Ponthieux refused a UA, but he stated that "he did not bring it with him to the hearing" (Tr. 187).

[18]Nor did Lusk ever tell Ponthieux that she was going to notify the Warden if he refused to take he test (Tr. 141).

Be that as it may, the grievant's behavior demonstrates that he was given another opportunity to take a UA on September 30th. First, it was uncontested that Ponthieux swapped shifts with office Pearlie Gotreaux (Tr. 143-144, Union Ex. 24). This swap permitted Ponthieux to be available at an early morning hour on September 30th (Tr. 147). Why would the grievant swap shifts if there was not a drug test scheduled? However, Lusk did not come to work on September 30th (Tr. 53, 92). It must also be remembered that Lusk never warned Ponthieux that she would inform the Warden if the grievant did not take the test. Thus, the grievant would have had no motive to attempt to build an alibi for himself because he was unaware of Lusk's accusation at that time.

Moreover, Ms. Lusk demonstrated not only a lack of knowledge of the drug testing procedures, but a distinct lack of sensitivity toward employees. First, she scheduled Ponthieux's UA after hours. The Collector's Procedure Manual (Section 6 at 3) states that collections should be conducted consistent with employees' work schedules. It mandates that collectors must arrange their schedules to accommodate those of the employees, not *visa versa*. Moreover, Ponthieux relieved himself directly prior to the UA in preparation for an hour-and-a-half automobile trip home. The Collector's Procedure Manual states that a collector must be "sensitive" to a bashful bladder problem (Union Ex. 6 at 11.c). Instead, Lusk ordered the grievance to produce a specimen "now". Lusk acknowledged that she did not follow the manual (Tr. 46). Officers at the facility are on a strict portal-to-portal requirement and when Lusk scheduled Ponthieux for a UA after his hours, she was actually obliged to pay him overtime.

The grievant in this case was also deprived of his due process rights. I have no idea why it took almost four months for the Agency to investigate this matter. Lusk informed the Warden on September 29th that she believed that Ponthieux had refused an order to take a UA. There were only three parties to the conversation on that date: Lusk, Ponthieux, and Deville. How long would it take to interview these three people and make a determination if Lusk or Ponthieux was telling the truth? Instead, the Warden decided to not only reassign Ponthieux, but also place him in a situation when he had no contact with prisoners. While the Employer had the right to reassign the grievant, that right was not unlimited. Article 30, Section g of the parties' collective agreement permits the Agency to "respond to an alleged offense which may adversely affect the Employer's confidence in the employee or the security or orderly operation of the institution." The Warden admitted on cross-examination that there was no evidence that Ponthieux was using drugs on September 29th or 30th (Tr. 188), or that he was a danger to national security (Tr. 191). He [Warden Young] thought that he might be a danger to "public safety" (Tr. 191). However, if he truly believed that Ponthieux was a danger to the prison or its inmates, why not assign him home duty instead of keeping him working at the prison? A better question is if Warden Young believed that Ponthieux represented a threat to inmates, why did he wait until February of 2006 [after the investigation had been completed], to schedule another drug test? Leaving Ponthieux on the job and not requiring an immediate drug test, suggests that the Warden was punishing Ponthieux without any reason to do so.

This conclusion is further buttressed by the fact that the Agency prevented Ponthieux from working overtime while he was reassigned. An employee can only sign up for overtime in his or her assigned location (Tr. 65, Union Ex. 10, 13-c). Thus, Ponthieux could only sign up for overtime at the FCI facility, but was not allowed computer access to the FCI overtime roster (Tr. 66-67). Ponthieux did sign for overtime in both the FCI and FDC facilities between September 30, 2005 [the date that he was reassigned] and January 24, 2006 [the date that the investigation was completed] (Tr. 67). There was sufficient evidence that Ponthieux, while under investigation, missed ten eight-hour shift overtime opportunities (Tr. 114, 116, Union Exs. 4 and 5). He is entitled to be reimbursed for those overtime opportunities missed.

Finally, there is the matter of the Union's request for attorneys fees and expenses. Attorney fees are not available in claims against the United States unless there is an express waiver of sovereign immunity. Such a waiver exists here in the form of the Back Pay Act [5 U.S.C. 5596 (b)(1)(A)(ii)]. It allows a prevailing employee to recover reasonable attorneys fees upon the correction of an unjustified personnel action. Section 7701 of Title 5 of the United States Code governs the appellate procedures of the Merit Systems Protection Board ("the Board"). Section 7701 (g)(1) states:

> "Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of *reasonable attorney fees* incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge or other employee (as the case may be) determines that payment to the agency is warranted in *the interest of justice*, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit" [emphasis supplied].

In sum, an employee is entitled to reasonable attorney fees when an arbitrator grants back pay, which an employees previously lost due to an agency's unjustified personnel action, and an award of attorney fees is in the interest of justice [see e.g., *U.S. Department of the Navy, Naval Undersea Warfare Ctr. and NAGE, Federal Union of Scientists and Engineers*, 56 F.L.R.A. 477, 478 (2000); *U.S. Department of Defense Education Activity and Federal Education Association*, 57 F.L.R.A. 23 (2001)].

In the instant case, the Agency violated the parties' collective agreement at Article 6, Section b, which states 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..." It also violated the overtime provisions of the collective agreement. The Agency investigated the president of the local [Deville] simply because he represented a Union member, and advised him not to sign the drug refusal form and because he correctly wanted overtime for Ponthieux for taking a drug test after hours in direct contravention of the negotiated Drug Policy and the parties' collective agreement. Ponthieux, as previously noted, was subject to almost a four

month investigation and reassignment when the Agency never believed that he was using drugs. Moreover, he was deprived of any opportunities for overtime when assigned to the FCI facility.

In *Stanley Sterner v. Department of the Army*, 711 F.2d 1563 (Fed. Cir. 1983), the court noted that the question of who is the prevailing party is only the threshold test for eligibility for the award of attorney fees. There is no question that the Union and Ponthieux are the prevailing parties in this case. A more difficult question is reserved for a second prerequisite, i.e., "warranted in the interest of justice." This second standard operates to limit the first, broader, entitlement standard. According to the court, there are a number of criteria which would entitle an employee to attorney fees [assuming that he or she was the prevailing party] under the "interest of justice" standard:

1. Where the agency engaged in a prohibited personnel practice;

2. Where the agency's action was "clearly without merit" or "wholly unfounded" or the employee is substantially innocent of the charge brought by the agency'

3. Where the agency initiated the action against the employee in "bad faith"including:

a) where the agency's action was brought to harass the employee;

b) where the agency's action was brought to exert improper pressure on the employee to act in certain ways.

4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee and/or

5. Where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding.

Virtually every one of the above standards could apply to the instant case. There were numerous violations of the collective agreement and other policies. In my view, the Agency harassed the local president and the grievant. Moreover, the Agency cleared the grievant of all charges, yet brought the arbitration to hearing.

Award:

The grievance is sustained. Ponthieux shall be paid ten eight-hours' of pay at the overtime rate and all reference to the investigation and/or discipline should be expunged from his record. The Union's attorney shall be reimbursed $29,558.90 for attorney fees and expenses.

Placitas, New Mexico

Donald J. Petersen
Arbitrator