BEFORE
SEAN J. ROGERS
ARBITRATOR

In the Matter of Arbitration between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local 1034,

Union

and

FEDERAL BUREAU OF PRISONS, FCC POLLOCK, POLLOCK, LOUISIANA,

Employer.

(Grievants: Durrell Cottongin, Bryan Brunson & Kevin Bird, Overtime Assignment Process)

FMCS Nos. 17-51526 & 16-57934

OPINION AND AWARD

APPEARANCES:

On behalf of the American Federation of Government Employees, Local 1034:

John Ed Bishop, Esq. and Parker A. DeAgano, Esq., Whitehead Law Firm

On behalf of the Federal Bureau of Prisons FCC Pollock, Louisiana:

Isaac Thomas, Labor Relations Specialist and Michael LaCaze, Human Resources Specialist, Federal Bureau of Prisons

PROCEDURAL BACKGROUND OF THE ARBITRATION

This arbitration arises out of four disputes between the American Federation of Government Employees, Local 1034 (AFGE or Union) and Federal Bureau of Prisons, Federal Correctional Complex (FCC), Pollock, Louisiana (BOP or FCC or Employer) (collectively the Parties).

The arbitration takes place pursuant to the *Master Agreement, Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees* (CBA), effective July, 21, 2014 through July 20, 2017.[1] Pursuant to Article 31, *Grievance Procedure*, AFGE grieved BOP's denial of: two overtime assignments to Durrell Cottongin; one overtime assignment to Bryan Brunson; and one overtime assignment to Kevin Bird, all FCC Correctional Officers (CO). The Parties agreed to consolidate the grievances for hearing.

AFGE's grievances assert BOP violated Articles 6 and 18 of the Parties' Bargaining Agreement (CBA) and provisions of the Parties' Memorandums of Understanding (MOU) on mandatory and voluntary overtime assignments. As a procedural defense, BOP asserts that the first of Durrell Cottongin's grievances is untimely filed. The BOP defense is addressed below as a threshold issue in this Award.

The Parties were unable to resolve the four disputes through the CBA grievance procedure and AFGE demanded arbitration. From a panel of arbitrators provided by the Federal Mediation and Conciliation Service, I was selected by the Parties to resolve the disputes.

A hearing was held on December 20, 2017 at the FCC Pollock, 100 Airbase Road, Pollock, Louisiana. AFGE was represented by John Ed Bishop, Esq. and Parker A, DeAgano, Esq., Whitehead Law Firm. BOP was represented by Isaac Thomas, Labor Relations Specialist and Michael LaCaze, Human Resources Specialist, Federal Bureau of Prisons. At the hearing, the Parties were each afforded a full opportunity: to present testimony, documents and other evidence; to examine and cross-examine witnesses; and to challenge documents and other evidence offered by the other Party.

AFGE's witnesses were: Adam Smith, FCC CO and AFGE, Local 1034 Secretary; Chad Luke, FCC Correctional Systems Officer (CSO) and AFGE, Local 1034 Union Steward; Durrell Cottongin, FCC CO and a Grievant; Bryan Brunson, FCC CO and a Grievant and Kevin Bird, FCC CO and a Grievant.

BOP's witnesses were: Thomas E. Bergami, FCC Associate Warden/LMR Chairperson; and Christopher Llewellyn, FCC Lieutenant.

[1] The CBA was in effect at all times relevant to this dispute.

The witnesses were sworn and sequestered, and a transcript (Tr) was taken. Joint Exhibits (Jx) 1-5, Union Exhibits (Ux) 1-16 and Employer Exhibits (Ex) 1-3 were offered and received into the record. The Parties' counsels elected to submit Post-hearing Briefs. On or about March 19, 2018, the Arbitrator received by e-mail attachment the counsels' Post-hearing Briefs and the record closed.

This Opinion and Award is based on the entire record. It considers the Parties' arguments, and interprets and applies the CBA, MOUs and work rules based on the facts established at hearing.

STATEMENT OF THE ISSUE

Whether the August 18, 2016 grievance of Durrell Cottongin was timely?

If ***NO***, then the Cottongin grievance is dismissed.

If ***YES***, then;

Whether BOP violated the CBA when it ***did not*** assign voluntary overtime to the Grievants? If so, then what shall be the remedy?[2]

RELEVANT CONTRACT LANGUAGE

From the *Master Agreement Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees*, effective July 21, 2014 through July 20, 2017 (Jx 1):

ARTICLE 5 – RIGHTS OF THE EMPLOYER[3]

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

1. to determine the mission, budget, organization, number

[2] This wording of the second part of the Issue varies from the transcript. (Tr 6). The undisputed facts establish that the Grievants were ***not*** assigned voluntary overtime to which AFGE asserts they were entitled. The wording change reflects a corrected statement of the Issue.

[3] The CBA Article 5 language is substantively identical to 5 USC § 7106 which by specific reference in Section a. is subsumed into the CBA.

of employees, and internal security practices of the Agency; and

2. in accordance with applicable laws:

   a. to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

   b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted;

   c. with respect to filling positions, to make selections for appointments from:

      (1) among properly ranked and certified candidates for promotion; or
      (2) any other appropriate source; and

   d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

Section b. Nothing in this section shall preclude any agency and any labor organization from negotiating:

1. at the election of the Agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

2. procedures which management officials of the agency will observe in exercising any authority under this section; or

3. appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

* * *

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 law, rule, and regulations, including the right:

* * *

2. to be treated fairly and equitably in all aspects of personnel management.

* * *

ARTICLE 18 - HOURS OF WORK

Section p. Specific procedures regarding overtime assignment 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 shall receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees; . . .

* * *

ARTICLE 31- GRIEVANCE PROCEDURE

* * *

Section c. Any employee has the right to file a formal grievance with or without the assistance of the Union. . . .

* * *

Section d. Grievances must be filed within forty (40) calendar days of the date the alleged grievable occurrence. If needed both parties will devote up to ten (1) 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. . . .

RELEVANT MEMORANDUM OF UNDERSTANDING LANGUAGE

From the Parties November 29, 2010 local memorandum of understanding (MOU) regarding FCC's voluntary overtime assignment procedures signed by the Complex Warden FCI Warden and Union Representative. (Ux 1):

Agreement on procedures for FCC Pollock, LA. when hiring overtime

1. When hiring overtime the Lieutenant will ensure the employee is not currently at work before attempting to call the employee at home. If the employee is at work the Lieutenant will make contact with the employee.

2, When contacting an employee who is signed up for overtime, the Lieutenant will make at least one attempt on each number the employee has listed for contact.

3. As the lieutenants are making entries on the overtime log after contact or attempted contact of the employee, they will annotate "what time the overtime became available" and also make the following notes as it pertains to each attempt:

A. No Contact (N/C), Not at work (N/W), No Voicemail (NVM)

B. No Contact (N/C), Not at work (N/W), Left message (L/M) on Date and Time.

C. Made contact, Employee refused or accepted the overtime.

Three months from the signing of this agreement it will be reviewed by both parties to address any concerns that either party may have about this agreement.

DISCUSSION

I. The Parties

The United States Department of Justice, Federal Bureau of Prisons (BOP), Federal Correctional Complex, Pollock, Louisiana (FCC) comprises a high security penitentiary, a medium security correctional institution (FCI) and an adjacent minimum security satellite camp.

The American Federation of Government Employees, Local 1034 is the recognized, sole and exclusive representative for all bargaining unit employees at FCC Pollock. (Jx 1).

The Grievants, Durrell Cottongin, Bryan Brunson and Kevin Bird, are FCC Pollock Correctional Officers (CO).

II. Statement of the Case and Undisputed Facts

The facts are not disputed. The discussion below describes the witness testimony, exhibits, the timeline of events and circumstances, and the relevant and material facts forming the basis of the BOP's denials of voluntary overtime assignments to the three Grievants, and the ensuing four grievances.

The record establishes that the Parties follow overtime assignment practices and procedures described in three documents: the CBA Article 18; the October 20, 2010 MOU entitled *Agreement on procedures for FCC Pollock, LA. when hiring overtime*; and the February 25, 2011 MOU entitled *Procedures for assigning Mandatory Overtime To Correctional Services Staff at FCC Pollock, LA*. (Jx 1; Ux 1 and 2). AFGE's grievances assert that BOP violated the procedures for assignment of voluntary overtime only.

Regarding voluntary overtime, testimony established that bargaining unit employees sign up for future overtime assignments through the Roster Program. A qualified employee who wants overtime work can sign up for any overtime shift, post or assignment. A list of names is created and the names ordered by seniority and last overtime date worked. (Tr 28-29). Typically, voluntary overtime assignments are made by Lieutenants. When an employee works a voluntary overtime assignment or refuses a voluntary overtime assignment the employee's name drops to the bottom of the list. (Tr 30).

Durrell Cottongin's Informal Resolution request

The record contains an AFGE June 23, 2016 Informal Resolution request challenging Lieutenant T. Robinson's cancellation, also known as a by-pass, of a June 20, 2016 voluntary overtime assignment to Durrell Cottongin on June 19, 2016.[4] Robinson's cancellation/by-pass remarks state,

> *OT Removed – Mgmt Cancelled . . . staff cannot work, would be 24 hours worked in 26 hour period*. (Ux 3).

Simply stated, AFGE's Informal Resolution request stated,

> There are numerous verifiable instances where Pollock employee(s) have voluntarily worked over twenty-four (24) hours at a time. Additionally, there is nothing in the Contract or Statutes that places a limitation on how many hours an employee can work in a specific length of time. (Jx 2).

On July 3, 2016, J. Bartlett, Complex Captain, resolved the dispute raised in AFGE's June 23, 2016 Informal Resolution request. The entirety of his response is relevant to the four grievances in this dispute:

> This is in response to your Informal Resolution received June 23, 2016, in which you allege that Mr. Durrell Cottongin was denied the opportunity to work overtime on June 20, 2016.
>
> After reviewing the overtime logs for the date and shift in question and speaking to the Lieutenant who was responsible for hiring the overtime in question, I find that Mr. Cottongin was eligible to work the overtime shift. To resolve this issue, I have instructed the Time and Attendance Clerks to correct Mr. Cottongin's Time and Attendance report to reflect 8 hours of overtime worked on June 20, 2016.
>
> Thank you for calling this matter to my attention. I am committed to our mutual goal of ensuring all staff are treated fairly and equitably in all aspects of personnel management, and I hope we can continue to work together in the spirit of partnership. (Ux 4).

[4] Pursuant to CBA Article 31, Section d., a grievance may be resolved by the Informal Resolution process which is prefatory step to a formal grievance.

Durrell Cottongin's First Grievance

Bartlett's settlement of Cottongin's June 20, 2016 overtime claim caused Cottongin to recall an earlier voluntary overtime cancellation by BOP based on the same overtime limitation. Cottongin could not recall the date of the earlier voluntary overtime cancellation. He asked Chadwick Luke, AFGE Shop Steward, to research the voluntary overtime roster data to identify the cancellation. (Tr 40).

On July 26, 2016, Luke's research established that Cottongin had a June 13, 2016 voluntary overtime assignment canceled with the reason being, "Staff cannot work more than 16 hours in 24 hour period." (Ux 6).

On August 3, 2016, based on Luke's research, AFGE filed another Informal Resolution request with J. Barnhart, Complex Warden, seeking an informal resolution of Cottongin's grievance asserting his June 13, 2016 voluntary overtime assignment was canceled on June 12, 2016 in violation of CBA Article 6. (Jx 2). AFGE once again asserted that,

> . . . there is nothing in the Contract or Statutes that places a limitation on how many hours an employee can work in a specific length of time. (Jx 2).

However, the Parties did not reach an informal resolution.

On August 18, 2016, AFGE filed a Formal Grievance Form on the matter with M. A. Stancil, Complex Warden. (Jx 2). This is the first Cottongin grievance to be resolved by me.

On September 12, 2016, Thomas E. Bergami, Associate Warden/LMR Chairperson, denied Cottongin's grievance stating in pertinent part,

> The Supervisory Lieutenant on shift made a sound correctional decision in removing Mr. Cottongin from working twenty-four (24) consecutive hours. . . .
>
> * * *
>
> Furthermore, your filing of this grievance is beyond the time line referenced in Article 11, Section(d). "Grievances must be filed within forty (40) calendar days of the alleged grievable occurrence.["] You allege the incident

occurred on June 12, 2016; however, the Grievance was filed on August 18, 2016. Approximately 68 days after the alleged violation. (Jx 2).

On September 14, 2016, AFGE invoked arbitration on this first Cottongin grievance. (Jx 2).

Durrell Cottongin's Second Grievance

The second Cottongin grievance arose as a result of BOP's cancellation of a September 12, 2016 voluntary overtime assignment from midnight-to-8:00 a.m. scheduled after he a completed a September 11, 2016 6:00 a.m.-to-10:00 p.m. 16-hour shift. Cottongin would have had a 2 hour unpaid break between his September 11, 2016 16-hour regular shift and his September 12, 2016 midnight-to-8:00 a.m. overtime shift. The reason for the by-pass recorded in BOP's records states, "conflict 24 out of 26 hrs." (Ux 11).

On September 12, 2016 AFGE filed an Informal Resolution request which, once again, AFGE asserted that,

> . . . there is nothing in the Contract or Statutes that places a limitation on how many hours an employee can work in a specific length of time. (Jx 3).

Once again, the Parties did not reach an informal resolution on this second Cottongin Informal Resolution request. On September 16, 2016, Bergami responded to the Informal Resolution request stating in pertinent part,

> . . . I have determined that allowing Mr, Cottongin tho work an additional 8 hours from 12:00 AM to 8:00 AM in addition to the 16 consecutive hours he had already worked would place the staff, inmates, the public and Mr. Cottongin at unnecessary risk. (Jx 3).

On September 16, 2016, AFGE filed a Formal Grievance on this second Cottongin overtime by-pass repeating the assertion that,

> There are numerous verifiable instances where Pollock employee(s) have voluntarily worked over twenty-four (24) hours at a time. Additionally, there is nothing in the Contract or Statutes that places a limitation on how many hours an employee can work in a specific length of time. (Jx 3).

On September 20, 2016, M. A. Stancil, Complex Warden, responded to the second Cottongin grievance stating in pertinent part,

> . . . I have determined that allowing Mr, Cottongin to work an additional 8 hours from 12:00 AM to 8:00 AM in addition to the 16 consecutive hours he had already worked would place the staff, inmates, the public and Mr. Cottongin at unnecessary risk. (Jx 3).

On or about September 26, 2016, AFGE invoked arbitration on this second Cottongin grievance.[5] (Jx 3).

Bryan Brunson's Grievance

Bryan Brunson's grievance arose as a result of BOP's cancellation of a June 19, 2016 voluntary overtime assignment from midnight-to-8:00 a.m. scheduled after he completed a June 18, 2017 6:00 a.m.-to-10:00 p.m. 16-hour shift. Brunson would have had a 2 hour unpaid break between his June 18, 2017 16-hour regular shift and his June 19, 2017 midnight-to-8:00 a.m. overtime shift. (Tr 74-78). The reason for the by-pass recorded in BOP's records states, "Officer already worked 16hrs (sic) this would put him at 24hrs (sic) working." (Ux 12).

On June 22, 2017, AFGE filed an Informal Resolution request with Stancil seeking an informal resolution of Brunson's grievance asserting his June 19, 2017 voluntary overtime assignment was canceled in violation of CBA Article 6. (Jx 5). AFGE asserted that,

> There is no law, rule or regulation that places a limitation on how many hours an employee can work in a specific length of time. Nor is this limited in either Master Agreement or in policy. (Jx 5).

The Parties did not reach an informal resolution. (Jx 5). BOP's response to the Informal Resolution request was the same as stated in the first and second Cottongin Informal Resolution requests. (Jx 5).

[5] The AFGE letter invoking arbitration is dated September 17, 2016 but states that Stancil's denial of the second Cottongin grievance was received by the Union on September 26, 2016.

On or about July 26, 2017, AFGE filed a Formal Grievance Form with Stancil. (Jx 5). AFGE's Formal Grievance states the same grounds as stated in the first and second Cottongin grievances. (Jx 5).

On July 28, 2017, Stancil denied Brunson's grievance for the same reasons as stated in the first and second Cottongin grievances (Jx 5).

BOP documents presented at hearing, including comprehensive and abbreviated Daily Assignment reports from September 21, 2011 to December 6, 2017, and testimony established that even after the filing of the grievances in this dispute, BOP assigned bargaining unit employees to voluntary overtime for more that 16-hours in 24-hours. (Ux 7, 13, 15 and 16).

On August 24, 2017, AFGE invoked arbitration on the Brunson grievance. (Jx 5).

Kevin Bird's Grievance

Kevin Bird's grievance arose as a result of BOP's cancellation of his previously assigned February 8, 2017 day watch (D/W) voluntary overtime. On February 7, 2017, Bird worked his regular 8-hour evening watch (E/W). Then, BOP mandatorily assigned him to an overtime assignment on February 8, 2017 morning watch (M/W). (Tr 87-94). As a result, BOP cancelled his February 8, 2017 D/W voluntary overtime assignment. The reason for the cancellation recorded in BOP's records states, "Officer was mandated for M/W and can not work 24 hours straight." (Ux 14).

On February 13, 2017, AFGE filed an Informal Resolution request with Stancil seeking an informal resolution of Bird's grievance asserting his February 8, 2017 D/W voluntary overtime assignment was canceled in violation of CBA Article 6. (Jx 4). AFGE asserted that,

> There is no law, rule or regulation that places a limitation on how many hours an employee can work in a specific length of time. Nor is this limited in either Master Agreement or in policy. (Jx 4).

The Parties did not reach an informal resolution. (Jx 4). BOP's response to the Informal Resolution request was the same as stated in the first and second Cottongin and Brunson Informal Resolution requests. (Jx 4).

On or about February 23, 2017, AFGE filed a Formal Grievance Form with Stancil. (Jx 4). AFGE asserted the same grounds for Bird's grievance as stated in the first and second Cottongin and Brunson grievances. (Jx 4).

On March 13, 2017, Stancil denied Bird's grievance for the same reasons stated in the first and second Cottongin and the Brunson grievances (Jx 4).

On March 24, 2017, AFGE invoked arbitration on the Brunson grievance. (Jx 4).

III. Contention of the Parties

A. AFGE contends as follows:

Timeliness of the first Cottongin Grievance

AFGE asserts that the first Cottongin grievance is timely filed because it was filed within 40 calendar days of when the Union became aware of the July 26, 2016 grievable occurrence. Therefore, AFGE argues, its August 18, 2016 grievance was timely filed.

AFGE argues that Cottongin did not know how to file a grievance and the Party filing his first grievance was the Union and the appropriate Party under the CBA.

In the alternative, AFGE asserts that, if Cottongin is the appropriate party, he was not aware of the grievable event until the July 5, 2016 informal settlement triggered his memory of BOP's June 20, 2016 by-pass of his previously assigned voluntary overtime assignment.

For these reasons, AFGE maintains the first Cottongin grievance is timely in accordance with the CBA.

The Cottongin, Brunson and Bird Grievances

Next, AFGE argues that BOP violated the CBA and the binding past practice of allowing bargaining unit employees to work voluntary overtime without limitation when BOP denied voluntary overtime assignments to the three Grievants. AFGE argues that CBA Article 18 is the controlling contractual authority and reflects the Parties' intent as regards voluntary overtime. AFGE argues Article 18 places no time restriction or any type of limit

on voluntary overtime that bargaining unit employees may choose to work.

AFGE argues that the only overtime limit in Article 18 is at Section d(8) which requires BOP "to make every reasonable effort . . . to ensure that no employee is required to work sixteen (16) consecutive hours against the employees will." AFGE says this language places no restriction on an employee's choice to work voluntary overtime for more than 16 hours and only protects employees from mandatory overtime assignments against their will after working 16 hours.

AFGE asserts that the number of overtime hours a bargaining unit employee can work is established by past practice. Based on the Grievants' and others' testimony, and overtime records, AFGE argues that the past practice since at least November 29, 2010, the date of the voluntary overtime local agreement (Ux 1) and, perhaps even earlier, is that bargaining unit employees have worked voluntary overtime in excess of 16 hours consecutively often. Citing arbitral precedent establishing a three-prong test regarding past practice as support, AFGE asserts this past practice has been established over a long duration; has been consistently applied; and has been acquiesced in by BOP.

Next, AFGE asserts that while Article 5 provides BOP has the right to assign work, Article 4 provides that BOP must provide AFGE "expeditious notification of changes . . . to working conditions at the local level" and changes "will be negotiated in accordance with the [CBA]." AFGE argues that the testimony of Bergami establishes that BOP unilaterally changed the past practice of no limitation on voluntary overtime without notice or bargaining.

Citing precedent, AFGE asserts that BOP's claim that management rights allow BOP to solely determine internal security practices is incorrect because BOP cannot neglect its obligation to provide notice and bargain a change to a binding past practice. AFGE argues that BOP's right to determine internal security practices does not disprove that a binding past practice existed. AFGE says that BOP offered no evidence to prove a binding past practice did not exist.

For these reasons, AFGE concludes BOP violated Article 4 when it unilaterally changed the past practice regarding voluntary overtime limits without providing AFGE with notice and opportunity to bargain.

Next, AFGE asserts that BOP violated the Article 18, Section p., requirement that "overtime assignments . . . will be distributed and rotated equitably" by improperly by-passing employees at the top of the voluntary overtime roster even after the employees accepted the overtime assignments. AFGE says that BOP then assigned employees lower on the roster thereby resulting in inequitable rotation and overtime distribution.

AFGE asserts that BOP violated Article 6 as well because this article requires that employees will be "treated fairly and equitably in all aspects of personnel management." AFGE argues that since BOP denied employees overtime because they would be working more that 16-hours in 24-hours or in 26-hours, then these denials were arbitrary and without valid basis. AFGE argues that this is particularly true because, after the filing of these grievances, documentary evidence at hearing showed that other employees continued to work voluntary overtime in excess of 16-hours in 24-hours. AFGE concludes this continuation of the past practice shows that BOP administration of voluntary overtime is not even-handed, fair and equitable, and so violates Article 6.

AFGE asserts that BOP committed unjustified and unwarranted personnel actions against the Grievants resulting in reduction of their pay for which BOP must remedy with back pay. AFGE argues that but for BOP's unjustified and unwarranted personnel actions, the Grievants would have worked and been paid for the missed overtime opportunities for which they were willing and able to work. For these reasons, AFGE concludes the Grievants are entitled to backpay and AFGE is entitled to reasonable attorney fees and expenses.

AFGE also presents a fulsome argument for the payment of attorney fees and expenses. In this regard, AFGE states, if the Union prevails on merits and the other statutory requirements for attorney fees and expenses are met, then counsel will submit a request for attorney fees and expenses with supporting documentation for a ruling.

As remedy AFGE requests that the Grievants be paid the overtime pay with interest that they would have otherwise received but for BOP's CBA violations. AFGE requests that the Arbitrator retain jurisdiction for 120-days to resolve possible disputes over the remedy and the claim for attorney fees and expenses.

B. BOP contends as follows:

BOP asserts the first Cottongin grievance is untimely filed and must be dismissed as not procedurally arbitrable.

Specifically, BOP argues that the alleged grievable event occurred on June 13, 2016 and the formal grievance was filed on August 18, 2016, 68 calendar days later.[6] BOP argues Article 31, Section d., requires Cottongin to file his grievance within 40 calendar days of becoming award of the grievable event. BOP argues that AFGE's argument, that this grievance time limitation does not begin until the Union became aware of the grievable event, is without merit. BOP argues that Article 31, Section c., gives the employee an independent right to file a grievance with or without AFGE. For these reasons, BOP requests that the first Cottongin grievance be dismissed.

Next, regarding the merits, BOP asserts that it has a non-negotiable statutory right to determine its own internal security practices. BOP says that it has determined it would not knowingly allow staff to work excessive hours which makes the employee not qualified for an assigned overtime post. When this happens, the employee remains in the employee's current roster position until the employee has received proper rest.

BOP says there is no limit on the number of hours that an employee may work, but it "has adopted the practice of not knowingly hiring employees for excessive hours barring an emergency." (BOP Brief p. 8-9). BOP says to safeguard employee well-being, it sought guidance from the Occupational Safety and Health Administration (OSHA). (Ex 1). BOP says that there is no OSHA standard on the employee health hazards of extended work hours, but argues that the OSHA guidance advises that management should recognize signs of employee fatigue arising from extended work shifts.

Next, BOP asserts that the Agency practice is to determine an employee to be not qualified for overtime if the assignment required the employee to work excessive hours. BOP admits that the roster program which tracks and assigns employee overtime has technological flaws which have resulted in improper and inadvertent hiring of employees for excessive overtime hours. However, BOP argues such hiring is not and has not been the acceptable practice.

---

[6] BOP's brief asserts 68 calendar days elapsed between the incident giving rise to the grievance and the filing of the formal grievance, but the correct count is 66 calendar days.

Next, BOP asserts that it has a past practice of hiring employees for voluntary overtime that is consistent with the OSHA recommendations, CBA and BOP policy. BOP argues that "it would be unreasonable to believe that allowing an employee to work twenty-four (24) consecutive hours in a correctional setting is not linked to security." (BOP Brief p. 10). BOP argues that Agency Program Statements, *Standards of Conduct* and *Escorted Trips* requires employees to be fully alert and attentive during duty hours. (Ex 1 and 2). For this reason, BOP maintains, that institutional internal security and safety, and the well-being of employees out weigh the Grievants' desire to work all the overtime that they want.

BOP argues its concerns are for employee well being and safety, and meeting the CBA Article 27 requirements to reduce correctional environment hazards. BOP argues further that while the Federal Service Labor-Management Relations Statute (Statute) and the CBA are silent on overtime hours that an employee may work, the Agency must lower the inherent institutional dangers to the lowest levels.

BOP asserts that the Agency has the right to determine if an employee is qualified to work and it has determined employees working more than 16-hours are not qualified to work. BOP argues that AFGE's grievances restrict the Agency's right to determine whether an employee is qualified to work. BOP argues, as well, that AFGE's grievances represent a danger to internal security; and clearly and excessively interfere with BOP's employer right to determine internal security practices pursuant to 5 USC § 7106.

BOP asserts that the continuing past practice has been not to assign employees excessive work hours. BOP argues that Bergami's testimony, based on 25 years of experience at 10 duty locations, established staff was never been assigned three consecutive shifts when management was aware. BOP argues that Bergami's testimony was supported by the testimony of Warden Moses Stancil and Lieutenant Christopher Llewellyn. BOP argues as well that, when AFGE negotiated the local overtime assignment procedures in MOUs at Ux 1 and 2, the Union knew of the practice yet did not challenge it and so acquiesced in the practice.

BOP asserts that employees may have signed up for voluntary overtime assignments up to 24 consecutive hours, but once discovered by management, the employees were removed from the assignments as unqualified. BOP says a very small number of employees have worked in excess of 16 hours, but this is not the standard practice.

BOP asserts AFGE's request for attorney fees is not warranted because BOP has provided warranted and justified reasons based on OSHA recommendations and CBA Articles 5 and 27 for removing employees from overtime assignments. BOP concludes that since the Grievants are not entitled to back pay, then AFGE's request for attorney fees and costs should be denied.

BOP concludes that the first Cottongin grievance was untimely and not procedurally arbitrable. BOP maintains that it has demonstrated justifiable reasons for removing the Grievants from the disputed overtime assignment and requests that the grievance be denied.

IV. Analysis and Award

Timeliness of the first Cottongin grievance

BOP bears the burden of proof the show that the first Cottongin grievance is untimely. For the reasons discussed below, I find that BOP met its burden of proof and AFGE's first Cottongin grievance is dismissed.

CBA Article 31, Grievance Procedure, provides that an "employee has the right to file a formal grievance with or without the assistance of the Union." Therefore, the party filing a grievance maybe the Union or the employee jointly or individually. The contract language permits an employee the benefit and freedom to engaged in self-help without Union representation when filing a grievance. The language also places a burden on an employee, who chooses self-help or not, to be aware of and to defend against employer CBA violations through the grievance process.

CBA Article 31, Section d., establishes that "[g]rievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence." But also Article 31, Section d., establishes a party a may file grievance within 40 calendar days from when the party reasonably became aware of the grievable occurrence which permits a grievance to be filed more than 40 calendar days after the alleged grievable occurrence.

Determining whether a grievance is timely filed is most often based on the facts and circumstances surrounding the date of the alleged grievable occurrence and when a party reasonably became aware of an alleged CBA violation.

In this dispute, the facts regarding the date of the incident and the filing of Cottongin's first grievance are not disputed.

On June 12, 2016, Cottongin was "removed" or "cancelled" from an overtime assignment by BOP for the stated reason that, "staff cannot work more than 16 hours in a 24 hour period." (Jx 2). On June 12, 2016, Cottongin was on notice that he was bypassed for voluntary overtime and the reason for the bypass. He did not file a grievance.

AFGE filed a formal grievance on his behalf on the alleged CBA violation on August 18, 2016. (Jx 2). From the date of the alleged grievable occurrence to the filing of the formal grievance 67 calendar days past.

AFGE argues that Cottongin did not know how to file a grievance and only became aware of the alleged CBA violation on July 5, 2016 when AFGE and BOP settled a similar dispute on his behalf. Then, AFGE argues, Cottongin recalled the June 12, 2016 incident when he was removed from a voluntary overtime assignment.

I find that Cottongin's refreshed recollection of the alleged grievable occurrence and admitted ignorance of the CBA grievance time limits are not creditable reasons to waive the Article 31, Section d., time limits. The Parties are entitled to the benefits and burdens which their agreement in Article 31, Section d., place on them as regards the timely processing of grievances.

Based on the record, I find that Cottongin knew or should have known that the June 12, 2016 cancellation of his June 13, 2016 voluntary overtime assignment was a possible CBA violation. For this reason, AFGE's arguments are unconvincing and without merit.

I find the first Cottongin grievance is untimely filed and must be dismissed.

Merits of the second Cottongin, Brunson and Bird Grievances

AFGE bears the burden of proof the show that BOP violated the CBA when it did not assign voluntary overtime to the Grievants. For the reasons discussed below, I find that AFGE met its burden of proof, the grievances are sustained and the Grievants must be made whole.

At the center of this dispute is the Parties' dueling past practice claims. AFGE claims that there is a past practice permitting employees to accept voluntary overtime assignments which exceed 16 hours within 24 hours. BOP claims its past practice is to bypass an employee as unqualified for a voluntary overtime assignment who has already worked 16 hours.

Past practices are conditions of employment which evolve and arise over time in the work place which are not covered by CBA language or are inconsistent with CBA language yet are followed by the Parties.

In this dispute, the record establishes that the Parties' CBA and voluntary overtime process MOU do not contain limitations on how many overtime hours an employee may work within 24 hours which is the basis of the past practice dispute. (Jx 1 and Ux 1).

Under these circumstances, the existence of a past practice as a condition of employment in the absence of agreed working conditions may be proven when the practice is: known and understood; consistently applied and exercised over an extended time; and accepted as the way of doing things. The knowledge and acceptance of a past practice may be proven by express or implied consent. Implied consent may be found when a Party knowingly acquiesces in the practice without objection.

AFGE's witnesses testified, without BOP challenge, to BOP's acceptance of numerous overtime assignments in excess of 16 hours within 24 hours for many years. In addition, BOP daily assignment roster reports for Shop Steward Chadwick Luke showed a consistent practice, from September 2011 through December 2017, of voluntary overtime assignments in excess of 16 hours within 24 hours. (Ux 7). Other employees testified, supported by BOP daily assignment rosters, that they had worked in excess of 16 hours within 24 hours for many years. (Brunson Ux 13; Bird Ux 15; Joseph Witte Ux 16).

In addition, the July 5, 2016 Cottongin grievance settlement proves BOP's knowledge and acquiescence in the past practice of assigning voluntary overtime to employees in excess of 16 hours within 24 hours.

Furthermore, the record shows that BOP has been making voluntary overtime assignments in excess of 16 hours within 24 hours even after AFGE filed the grievances which are the basis of this dispute. (Ux 16).

This testimony and documentary evidence establishes that there has been a consistent past practice of assigning overtime to employees in excess of 16 hours within 24 hours dating back at least to the signing of the voluntary overtime MOU in November 2010. The evidence proves the existence of the past practice over an extended time and BOP's knowledge of and acquiescence in the past practice.

The totality of the testimony, evidence, facts and circumstances establish that the Parties have a long standing, accepted past practice of assigning voluntary overtime in excess of 16 hours within 24 hours. The practice has been known and understood; consistently applied and exercised over an extended time; and accepted as the way of doing things by the Parties.

BOP provided no evidence to support its claim of a past practice to bypass an employee for a voluntary overtime assignment who has already worked 16 hours. BOP presented no testimony challenging AFGE's proof of the past practice. To the contrary, Bergami's testimony shows that the bypassing and cancellation of employee overtime in excess of 16 hours within 24 hours started with his assignment to FCC. (Tr 110-111).

In this regard, the record shows that Bergami unilaterally changed the voluntary overtime assignment past practice based on unilateral policy determinations and his interpretation of BOP's CBA Article 5, Section a.. regarding the employer right to determine FCC's internal security practices. (Tr 112-113). Bergami testified that his decision was based on his years of BOP experience at many institutions and OSHA recommendations against extended work hours and unusual shifts introduced as Ex 1. (Tr 110 and 115; Ex 1).

However, Bergami could not identify any agency-wide policy that limited employees from working more than 16 hours in 24 hours. (Tr 146). Regarding the OSHA recommendations, entered as Ex 1, Bergami testified, "I saw this document today." He testified as well that he did not look at the document when he made the decision that 16 hours was all that an employee should work within 24 hours. (Tr 140-141).

The center of gravity of BOP's argument, supported by Bergami's testimony, is a policy argument. Simply stated, Bergami testified insistently that an employee's work schedule which is more than 16 hours work within 24 hours is just too long to be working. BOP's argument is that a scheduling policy limiting employees to no more than 16 hours within 24 hours is the *best policy*.

Based on the issue before me, I do not have the jurisdiction or power to determine the best FCC voluntary overtime procedures policy. In addition, overtime assignment procedures concern not only internal security, but also procedures concerning hours of work, safety and assignment of work.

Moreover, CBA Article 18, Section p., states, "procedures regarding overtime assignments may be negotiated locally." (Jx 1). The record shows that the Parties negotiated two overtime procedure MOUs locally. (Ux 1 and 2). None of the Parties' agreements limits voluntary overtime to no more than 16 hours within 24 hours.

In addition to the *best policy* argument, BOP and Bergami advanced the argument that, based on CBA Article 5, Section a., BOP has an employer right to change the existing past practice on voluntary overtime procedures.

Article 5, Section a., is subject to Article 5, Section b.[7] As a process matter, this plain language of the CBA establishes that Section a. is limited by and subject to Section b.

CBA Article 5, Section b., ***requires*** that when BOP exercises an employer right under CBA Article 5, Section a., including decisions involving internal security processes and practices, then BOP must first negotiate the procedures it will observe in exercising its employer rights and the appropriate arrangements for employees adversely affected by the exercise of its employer rights.

This bargaining is also known more generally as *impact and implementation bargaining* (I&I bargaining). Longstanding Federal Labor Relations Authority precedent establishes that an employer ***must*** give a union notice and opportunity to bargain the I&I resulting from the exercise of a management right ***before*** making a change in working conditions.

This record establishes that BOP did not give AFGE notice and opportunity to bargain I&I before Bergami made the change to the past practice permitting employees to work more than 16 hours voluntary overtime within 24 hours.

[7] The basis of this CBA language is statutory and found at 5 USC § 7106. See also fn 3.

For these reasons, I find that BOP violated: the longstanding existing past practice on assigning voluntary overtime; the CBA Articles 5 and 18; and the *Agreement on procedures for FCC Pollock, LA. when hiring overtime* when it did not assign voluntary overtime to the Grievants.

AWARD

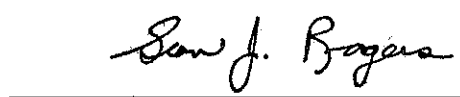
The first Cottongin grievance is dismissed.
The second Cottongin, Brunson and Bird grievances are sustained.

REMEDY

1. The Grievants shall be made whole with full back pay and benefits, including appropriate statutory interest, for the voluntary overtime hours which BOP denied then by cancellation or bypass.

2. Unless the Parties resolve the issue of attorney fees and expenses, the record will remain open for AFGE to submit a *Petition for Attorney Fees and Expenses* within 30 calendar days of receipt of this Award; BOP may reply with an *Opposition to Petition for Attorney Fees and Expenses* within 30 days of receipt of the AFGE *Petition*.

3. I will retain jurisdiction to resolve disputes over the remedy and attorney fees and expenses.



Sean J. Rogers, Esq.
Leonardtown, Maryland
April 20, 2018