

Before
Rex H. Wiant
Arbitrator

*****)
In the matter of grievance arbitration between)
Federal Correctional Complex—Pollock)
Federal Bureau of Prisons)
United States Justice Department)
and)
American Federation of Government Employees)
Local 1034)

Overtime Bypass

FMCS #13127-51546-7
Union #1082-006

For the Employer:

Ruby Navarro, Chief Spokesman and Labor Relations Manager
Michael LaCaze, Human Resources Specialist

For the Union:

Jack Whitehead, Chief Spokesman and Attorney
John-Ed Long Bishop, Attorney
Brian Richmond, Local President

Jurisdiction:

The parties selected Rex H. Wiant to hear and decide the instant grievance. A hearing was held at the facility on September 11, 12 and 13, 2013 and June 4 and 5, 2014. A decision on arbitrability was issued on December 18, 2013 declaring that the issue was arbitrable. All witnesses were sworn and subject to cross examination. Dianne Stewart, CSR recorded the September dates of the hearing and Renee Billingsley, CCR recorded the June dates.

At the conclusion of the hearing the parties requested to brief the main issue. Both the Union and the Employer briefs were received on September 5, 2014 and the hearing was declared closed.

Issues:

Did the Employer violate the labor agreement or the November 29, 2010 Memorandum of Understanding that resulted in individuals being bypassed on the overtime list and resulting in the loss of pay?

Do the attorneys qualify for payment of attorney fees?

Statement of Facts:

The Federal government, through its Bureau of Prisons, operates a Federal Correctional Complex near Pollock, Louisiana (hereinafter the Employer). The facility is actually three prisons. There is a Minimum Security facility, Medium Security facility and Maximum Security facility that are on Government land surrounded by the Kisatchie National Forest. Each has its own Warden with a Complex Warden over the facility. It operates on a paramilitary structure with support staff that provides all the functions of a community.

The American Federation of Government Employees Local 1034 represents the correctional officers and other workers (hereinafter the "Union").

Grievances were filed concerning the selection of overtime at the facility. At the time of the hearing there were approximately 600 grievants filing approximately 1000 incidents. All were consolidated into one hearing.

Assignment of overtime has been a problem. Particularly the bypassing of qualified people to those lower on the list. The parties signed a Memorandum of

Understanding on November 29, 2010 to correct this problem. The key phrase is as follows:

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.

To sign up for and assign overtime the parties used what was called the "Roster Program" on the in house computer system. Managers would post overtime opportunities and employees would sign up for the jobs they were able and qualified to perform. The computer would rank employees based on seniority. Generally speaking employees signed up for jobs they liked and avoided jobs they did not like. Some like hospital shifts, others like transportation shifts and a few would sign up for any overtime. Some like weekends. Some avoided weekends. Some had child responsibilities and some had church activities that took up time. FCC—Pollock is large enough that there was a great deal of flexibility. The one thing that was consistent throughout the testimony was that employees signed up for jobs they were willing to take.

The MOU did not satisfy the Union concerns about employees being bypassed. Records indicate that the Lieutenants regularly made more than six phone calls in a minute and marked either "No Contact" or "Left message". Several employees complained and the local union officers investigated the claims. After discussions with the Warden a grievance was filed on April 6, 2011. The relevant language follows:

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.

The Union presented many witnesses and argument as part of their case in chief. The Employer presented no witnesses or case in chief. All argument was entered through cross examination of Union witnesses.

Positions and Major Arguments of the Parties:

Union:

- Employees signed up for the shifts they wanted. They were willing and able to accept the work. Asking them how they felt was not relevant.
- In each case the Lieutenant did not call them when they were at work.
- Corrections were made to the list when it was discovered that the employee could not have worked the overtime due to other shift commitments, did not have required certifications, or other reasons.

Employer:

- Not a continuing violation. Each action was unique and involved different facts.
- Willing and able to perform work. The Union failed to show that staff was willing and able to work the various dates.
- Staffs do not return phone calls in time.
- Employees sometimes refuse overtime and request to be marked down as “no contact” so they remain on the top of the list.
- Conflicting shifts. Conflicts occurred between schedules that prevented the employee from working overtime.
- Basic Prisoner Transportation Training. Employees could not work transportation overtime because they lacked the proper certification.
- Other situations prevented the employees from being contacted. Sometimes either the cell phones did not work or they did not have agency cell phones.

Discussion:

There is nothing about this case that is easy. The five days of hearing produced the most material in a hearing held by this Arbitrator. Before beginning to write the decision the Arbitrator reviewed all evidence .

Before turning to the overtime issue itself, the Arbitrator must look at the dates the grievance covered in this hearing. The Employer limits the date to the time period from February 24, 2011 until April 6, 2011. The Arbitrator has spent much time trying to figure out the basis for the eleven day period selected by the Employer and can find no support for those dates. April 6, 2011 is the filing of the grievance. At no point of the hearing was the date of February 24, 2011 raised. Further at no point did the Employer object to testimony from incidents outside of those dates

The Union presented a much longer period of time, November 29, 2010 until September 11, 2013. The Union dates have logic behind them. The dates range from the signing of the MOU to the first hearing date of this grievance hearing. The Arbitrator agrees with the Union. The dates to be considered in this case are from November 29, 2010 to September 11, 2013.

The Employer, in their brief, makes one more procedural argument that there is not a continuing violation. This is a new argument and conflicts with the above argument. You cannot say on one hand we should have a small group that occurred in an eleven day period and then say each one should be tried separately. Through out the hearing the Employer heard testimony that that the case was considering a group in incidents with the same key claims that the Employer bypassed the individual for overtime. The argument is rejected and the dates to be considered by the Arbitrator are from November 29, 2010 to September 11, 2013.

Turning now to the meat of this case. The key language involved is clear. The second sentence of the agreement the local parties signed on November 29, 2010 states, "If the employee is at work the Lieutenant **will make contact with the employee** (emphasis added)". There is no wiggle room in the phrase "will make contact". The facility has three main methods of communications land line, cell phone and radios. When the Lieutenant has overtime he goes to the roster program and starts at the top of the list. He must make contact with that person. Leaving a message is not good enough. He cannot pick and choose. He cannot say he is too

busy. There is no burden on employees to return calls. The Arbitrator realizes that his is a significant burden on Lieutenants but that this the language that was agreed to by the parties.

The Employer made two major arguments through cross examination: (1) that employees cannot prove they were willing and able to accept the overtime and (2) employees requested the Lieutenant to mark them down as: "no contact" so they would remain at the top of the list. Dealing with the second argument first is the easiest because no witness, either bargaining unit member or manager testified that it had ever happened. It is a claim that is totally unsupported by the evidence.

The accepting overtime argument ignores that the individual employee signed up for the shifts and jobs they wanted. Sometimes it was a matter of only a few hours before the overtime occurred. Most times it was within a day or two. When they signed up the employee understood what they were committing to do. There was no record introduced that any of these employees had a pattern of rejecting overtime. Most said that when situations changed and they could not work overtime they simply went to the roster program and removed their names from the list. To ask them if they could remember a particular day often more than a year ago is unreasonable. This argument is rejected.

Finally the matter concerning conflicting shifts, certification and other situations where an employee could not accept the overtime were withdrawn by the Union.

In a case like this it is natural for the parties and the Arbitrator to examine the tiny details. It is important to also step back and examine the whole case. The Union spent four days calling witnesses that told basically the same story. They signed up for overtime and were bypassed. The Employer did not call any witnesses nor did it make a case in chief.

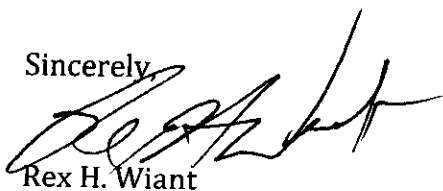
The grievance is SUSTAINED.

Because the grievance is sustained the Arbitrator now turns to the issue of attorney fees. In the federal sector, the Back Pay Act does allow for the awarding of attorney fees if aggrieved employees were affected by an unjustified personnel action and they lost pay. In this case both occurred, there was unjustified personnel actions and the grievants lost overtime that resulted in a loss of pay in their paychecks. Attorney fees are awarded.

Award:

1. The Union has up to forty-five (45) days to present a list of claims that individuals were bypassed for overtime.
2. The Employer has up to forty-five (45) days to review the list, calculate and make the payments. The Employer must notify the Union of entries that it believe are in error.
3. The parties are directed to meet and attempt to resolve disputes. The Arbitrator retain jurisdiction for one hundred-twenty (120) as to the implementation of this award.
4. The request of attorney fees is granted.

Sincerely,



Rex H. Wiant

Arbitrator

Dated on October 7, 2014 in Kansas City, Missouri.

Rex H. Wiant, Arbitrator

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Kansas City, Missouri 64112
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816.361.0144 Home
rwiant@naarb.org

October 7, 2014

Jack Whitehead, Jr.
Whitehead Law Firm
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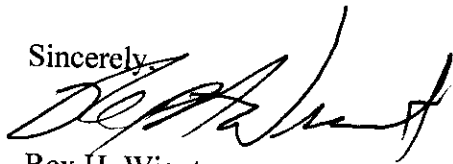
Ruby Navarro
Department of Corrections
US Justice Department
239 N. First Ave Suite 201
Phoenix, AZ 85003

RE: Grievance Arbitration between FCC—Pollock and AFGE, Overtime Bypass.

Dear Representatives Whitehead and Navarro:

Enclosed is my decision and statement in the above case. Thank you for the selection in this matter.

Sincerely,



Rex H. Wiant
Arbitrator

CC: Michael LaCaze, Employer
John-Ed Bishop, Attorney
Brian Richmond, Local Union

Rex H. Wiant, Arbitrator

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October 7, 2014

STATEMENT OF SERVICES

Grievance Arbitration between FCC—Pollock and AFGE, Overtime Bypass.
Hearing dates September 11, 12 and 13, 2013 and June 4 and 5, 2014.

0 travel + 2 days hearing + 8 days study and writings = 10 days

10 days X \$1200 per day = \$12,000.

Expenses

Air fare	No charge
Hotel	\$346.52
Rental car	\$345.80
KC parking	\$21.00
Food	\$30.00
Postage	\$6.50
Subtotal	\$764.20

\$12,000 + \$764.20 = \$12,764.20.

Half Payable by each side \$6,382.60.