FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION

Between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES/ Local 1034	§	
Union	§	
and	§	**FMCS# 14-54763-7**
FEDERAL BUREAU OF PRISONS FCC POLLOCK, LOUISIANA	§	

Hearing Called At:
TIME: 8:30 a.m. CST
DATE: July 15, 2015

APPEARANCES:

Arbitrator: **DON E. WILLIAMS**
1204 Creekwood Lane
Longview, TX 75602

For the Union: **JACK K. WHITEHEAD, JR.**
WHITEHEAD LAW FIRM
11909 Bricksome Ave. Suite W-3
Baton Rouge, LA 70816

For the Agency: **DANIEL W. JOHNSON**
Labor Relations Specialist
U. S. Department of Justice
Labor Relations Office-South
346 Marine Forces Drive
Grand Prairie, TX 75051

FACTUAL BACKGROUND

PRELIMINARY STATEMENT

This is a contractual arbitration pursuant to the MASTER AGREEMENT between Federal Bureau of Prisons and Council of Prison Locals American Federation of Government Employees, dated March 9, 1998 -March 8, 2001, which is a collective bargaining agreement, called "CBA." The AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES/1034, referred to as the "Union," and the Federal Bureau of Prisons, referred to as the "Agency," agreed to arbitrate this dispute at the facility in Pollock, Louisiana. On March 9, 2012, the Union had filed a grievance alleging the Agency violated 5 U.S.C. §§ 7116(a)(5) and 7116 (a)(8); CBA, Article 3, Section c; Article 4, Sections a, b, & c; Article 6, Section b (6); and Article 7, Section b.

STATEMENT OF FACTS

FACTS LEADING TO GRIEVANCE

The Arbitrator adopts and finds the following statements as true as to each and all of the matters as set forth below. The Arbitrator adopts the following statements as findings of fact and, where necessary as conclusions of law. Wherein conclusions are necessary to this award, findings shall be deemed to be conclusions, and where findings are necessary to the award, any conclusions shall be deemed to be findings.

In a threshold statement, the Agency claimed the Union had not timely performed the condition precedent of filing the grievance within forty (40) calendar days of the Union becoming aware of the condition or incident, with ten (10) days for informal resolution, as stated in Article 31(d) of the CBA. The Agency stated the evidence speaks for itself as to this issue. The Agency alleged the email complaining about the incident or condition was dated June 20, 2011,and was the incident complained of and the grievance was filed on March 9, 2012, with the date of the incident stated as "Continuous."

Brian Richmond, called "Richmond," was a Correctional Officer and the Union President. He testified, not necessarily from personal knowledge, but from information he received as President of the Union. He testified that non-custodial officers, who had a regular work schedule, served as guards for the inmates who had been taken to local hospitals for medical treatment or long term care. He testified the CBA stated the officers are to be treated fairly and equitably. He testified the Agency is to pay overtime pursuant to Article 17 of the CBA. He stated there were two (2) supervisors with eighteen (18) members of the Inmate Management System, called the "IMS," department working three shifts, morning watch from 12:00 a.m. to 8:00 a.m., day watch from 8:00 a.m. to 4:00 p.m., and evening watch from 4:00 p.m. to 12:00 a.m. He testified the Union may negotiate personal matters locally, which he claimed included the time worked

with a "roster adjustment" procedure that had been used in the non-custody staff departments, such as IMS department. He testified the inmates, when necessary, were taken to local hospitals or care units at Cabrini Hospital and Rapides General in Alexanderia, Huey P. Long Medical Center in Pineview, LSU Medical Center in Shreveport, and a nursing home in Oakdale. He testified these facilities were thirty (30) minutes to two (2) hours away. He testified these locations required an armed post, with protective vest and handgun, restrains on the inmate chained to the bed with two (2) officers at most.

Richmond testified if an officer worked the morning shift and was relieved on time, which was rare, and arrived at the complex at 8:30 a.m. he must work until 4:00 p.m., which would allow eight (8) hours of straight time and eight (8) hours of overtime for one (1) work day.

Richmond testified that at the Labor Management Relations, referred to as "LMR," Meeting" on June 30, 2011, there were minutes taken. He testified the minutes included comments about "Mandatory Overtime," which stated:

> Clarkson stated table this item until we get the Captain here. Byrd said Mr. Clarkson is not the chair; if the agreement is followed there is no problem. Richmond asked how you can keep saying we need those people here and then you schedule a Lt's meeting. Item Opened Clarkson asked to caucus. 940 am After returning from the caucus the Union asked to Caucus until 12:00 pm.
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> . . .
>
> 5. Overtime/Non Custody staff
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> Richmond stated, if you are at work you can not get charged annual leave. Rivera said what about giving a government vehicle to staff that work Hospital overtime. The main problem is staff who leave early and come back late. Byrd said that you have to look at each situation. Every one is different. Rivera said that they needed to look into more options for this to present for this. Clarkson asked to table until this could be done. Rivera stated that this will remain Status Quo until we can get a better idea.

Richmond testified that the parties had a past practice of allowing roster adjustment, which Lejean Moore, called "Moore," the Case Management Coordinator, "CMC" described in an email sent by Moore to the Correctional System on June 20, 2011. Richmond testified that on June 30, 2011, there was a LMR Meeting, in which the parties discussed the roster adjustment and the Labor Management chair stated the

issue was to remain at *status quo*, to which Richmond testified it meant they would continue what they were doing until the got back to it in another fashion. Richmond testified this was to continue the past practice of rooster adjustment, in which the employees would continue to get eight (8) hours of overtime pay instead of only seven (7) and one half (½) hours. Richmond testified the grievance form stated that on February 17, 2012, he understood they were continuing "as [they] were at the time of the LMR meeting."

On February 17, 2012, the chain of command was headed by Warden Martinez, called "Martinez," as the Complex Warden. Warden Rivera, called "Rivera," was Labor-Management Relations chairman; and Assistant Warden (AW) Julie Nicklin, called "Nicklin." Moore was supervisor of that IMS department and Scott Clarkson, Human Resource Manager, referred to as "Clarkson," was the Human Resources Manager, with supervisory correctional systems specialist, fancy name for supervisors. Richmond testified the officers were either the correctional officers or the non-custodial officers, who were involved in this grievance, and who work in the IMS unit, which also handles inmates' mail. He testified all the correctional officers have the same qualifications for custodial or non-custodial duties.

Richmond testified he understood the past practice was that the department was allowing them to roster adjust to get their full sixteen (16) hours, which meant they would give up their lunch break so they could get their complete eight (8) hours of overtime. He testified they worked with their supervisors at the complex, which was no problem, because Rivera said he needed to look into it and to table the issue of not allowing roster adjusting.

Richmond testified that on February 17, 2012, he thought the roster adjustment was continuing as it existed in the past and as stated in the June 30, 2011, LMR meeting. He testified that on February 24, 2012, Nicklin sent an email that stated this issue was placed on the next LMR meeting agenda.

Richmond testified that on March 1, 2012, Clarkson sent an email stating that after reviewing all the documentation the Agency would determine if Moore's email would be utilized for overtime procedures in the IMS department. He testified that was when the violation actually occurred because it was the final answer that the practice of allowing roster adjustment was not to be allowed. He testified the Moore email stated she was going to stop the roster adjusting , and in her educated opinion, she thought that it was best for the department not to follow through with what was stated in the LMR Meeting without negotiation. Richmond testified the Union did not know what the effect of not allowing the roster adjustment would be. Richmond testified to an email thread, in which the emails were not in chronological order.

Richmond testified that the last several direct supervisors have allowed roster adjustment from the normal schedule to 7:30 a.m. to 4:00 p.m., with a 30 minute duty-free lunch break, and work straight through eight (8) o'clock a. m. to four (4) o'clock p.m. shift to accommodate staff work custody overtime, with this practice being utilized for the benefit of management to accommodate incoming and outgoing movement. Richmond testified there was no contractual or procedural prohibition against working hospital overtime. He testified there was no policy that dictates staff hours of work.

Richmond testified Chadwich Luke, called "Luke," informed Nicklin that Richard T. Logan, called "Logan," Executive Vice President of Local 1034, suggested that he request the AW's opinion on the matter. Richmond testified that Andrew Howard was approved to roster adjust from his 7 a.m. to 5 p.m. schedule to 6 a.m. to 4 p.m., which allowed him to work custody overtime at the outside hospital. Richmond also attached a request for roster adjustment to Moore for the next day which was denied. Luke testified that U-9 was yellow marked with the dates he only received seven and half (7 ½) hours overtime but worked eight (8) hours as follows:

11/20/11	12/22/11	1/4/12	2/16/12	5/5/12	7/6/12
10/9/12	10/30/12	11/18/12	11/23/12	12/15/12	12/24/12
3/14/13	3/23/13	7/18/13	2/5/14	2/6/14	5/15/14
5/16/14	7/19/14	7/21/14	8/8/14	9/22/14	10/21/14
11/13/14	12/30/14	2/19/15	3/24/15	6/12/15	

Richmond testified that the Correctional Systems Specialist, Moore, was his direct supervisor for approximately seven (7) months. Moore sent out the email on June 20, 2011, and Richmond attached a copy from the LMR minutes from the June 30, 2011, Meeting, in which the issue was brought up and tabled. On December 12, 2012, Boteler sent an email, which stated, "Mr. Howard you did receive prior approval and young are not authorized to report to work late due to Correctional Services overtime," which was a mistake. Richmond testified that he attached a request for Moore to roster adjust for him the next day, which she refused.

Richmond testified that Moore required the Correctional Systems Department staff to turn in a leave slip for the time they were at the hospital and were not at their regular post. He testified, however, that they were still on duty performing correctional functions at the local hospitals. He testified the leave slip meant that the employee was not at work, was not on duty, was at home and, therefore, AWOL, which means the employee did not show up for work at all. Richmond testified that non-custody departments other than the

IMS department were allowed or permitted roster adjustment. He testified if they were put on leave it was using annual leave, or paid time off, "PTO." Richmond testified that Moore was a supervisor whose attitude was that she did not want them working hospital overtime because they were not at the institution at 7:30 a. m. when normal shift started and that is why she ordered the AWOL's came and told them to take annual leave.

Richmond testified that every department has the ability to work out issues with the department supervisor when those issues deal with their time, including the hospital overtime. Richmond testified Amenda Boteler, called "Boteler," a supervisor, allowed roster adjustment. He testified he was aware that the unit team comprised of counselors and case managers, was allowed to roster adjust. Richmond testified the hours set by a schedule that they work out with their supervisor and the hospital overtime are going to remain the same. He testified the employee does not have to get supervisor approval to work custody overtime that overlaps their normal shift. He testified their primary work assignments, with hours set as agreed in the schedule as to the normal days, where no changes have been made at the time when they had no supervisor. He testified at that time, the employees bid every quarter on their schedule. He testified an employee can only leave his post when relieved. He testified the employees were doing government work regardless of which post it is performed at, it is still government work, and it's well known that you are able to work custody overtime because that is where the overtime is and you have to be a qualified bargaining unit staff member to work those posts. He testified if that post ends at 8 o'clock you leave from wherever you're walking or driving and you to go to your other post in the department.

Richmond testified the supervisors must know where their staff is located by talking with this department particularly about how to communicate prior to going to the post, especially in the IMS department. He testified they came up with a system of sending email to the supervisor that included supervisors' personal phone numbers and informing the staff supervisors when working overtime.

Richmond said the IMS was currently on a compressed work schedule, which is, instead of working eight (8) hours per day, five (5) days per week, to get forty (40) hours, the employee could work ten (10) hours per day four (4) days per week to get forty (40) hours. Richmond testified supervisors have the discretion to approve staff arriving late or leaving early, as far as treating them as fair as the other staff, plus they have discretion to move staff around with eight (8) hours notice. He testified each staff member in IMS can work one of three (3) shifts mentioned above.

Luke testified he moved into the IMS department in December 2008, a non-custody department with three (3) separate areas: a mail room, a receiving and discharge area, and a records area. He testified the compressed work schedule began on June 19, 2011. Luke negotiated the compressed work schedule with Moore, who was one step above his immediate supervisor. He testified the overtime shift at the hospital was from 12 a.m. to 8:00 a.m., and that Ms. Gonzalez, Eva Guillory, and Clayton Lucas rotated with himself, Andrew Howard, called "Howard," and Greg Thomas, called "Thomas." Howard testified the overtime shift was entered into the hospital duty by a Lieutenant at the institution, by either the morning or evening watch. Luke testified he went to work overtime at the hospital until he was relieved; then he would drive to the facility to work his normal duty hours, which started at 7:30 a.m. He testified if he arrived at institution afer 7:30 a.m., he would work the eight hours shift commencing at 8:00 a.m. until 4:30 p.m. if he took the duty free lunch break or until 4:00 p.m if he did not take his duty free lunch period. This system of altering shift time was referred to as "roster adjustment." Luke testified the clock was "twisted" since "day one" and the institution was activated for IMS and the education, recreation, and unit management departments.

Luke testified that on June 19 or 20, 2011, there was a practice of allowing non-custody staff to use roster adjustment. He stated there were numerous supervisors, and for a period there was no supervisor, until June 2011,when Moore had been made supervisor. He testified she sent out an email, which stated as follows:

> I have not agreed to adjust schedules for staff to work overtime that conflicts with your regular work schedule. However, if you work overtime, you cannot be paid overtime for time that you are supposed to be at your regular post. This continues to be a problem in this department. Additionally, if you are not at your post for your regular shift I need to know where you are and as with all absences, I expect a leave slip for all time you are not at work.

Luke stated he considered the statement to be that he was expected to use annual leave for that time he was at the hospital. He testified he responded to the email by stating, "Could you please be specific as to what time a leave slip should begin? Apparently we will have to discuss the roster adjustments with the department also." He testified Moore responded in an email that she had not agreed to adjust schedules that conflicts with his regular work schedule. He testified he talked to Clarkson , Human Resources Manager at the time, who told him this would be an LMR issue to be discussed.

Luke testified that in November 2011, Boteler told him that she was sent to straighten the department out, and she became his immediate supervisor under Moore. He testified the unit had received high ratings in the past.

Luke testified he had filled out two (2) leave slips. He said Richmond had told him if an employee is at work the work time can not be charged as leave time, even if you are working an overtime shift. He was aware the LMR resulted in the issue being tabled and Associate Warden Rivera stated the issue would remain as status quo until it was resolved. Luke testified his understanding was the officers would go back to the custom and practice they had been doing before the email from Moore. He stated that on February 17, 2012, Moore said they would have to request annual leave for the overtime shift. He testified he told Moore he did not think he could get paid for annual leave and overtime shift pay, so she stopped requiring leave slips but she started reporting Luke AWOL, but not Thomas. He said the AWOL's were later removed. Luke testified Thomas was allow to roster adjust. He would let his supervisor know by oral communication, text message, or phone to her office. He testified that at one point, he was told he could not work overtime shifts, but after he took it to Richmond, it was reversed by the warden. He testified they were allowed to work overtime shifts but they were not permitted to roster adjust. He testified it was a common practice to get prior approval, but the past practice was to inform the supervisor because the supervisor had the right to approve or deny variations in work schedule.

Luke testified that in November 2011, there was an Officer of Inspector General, referred to as "OIG" investigation, which resulted in him being terminated for double pay, which was reversed by Cristina Griffin and later made into a thirty (30) days suspension after the Associate General Counsel consulted with Human Resources. After the Special Agent Sandra D. Barnes coordinated with U.S. Attorney Mark Mudrick, the prosecution was declined. There was an Exhibit of this case, which was an arbitration, and the thirty (30) days suspension was reduced in arbitration to a one (1) day suspension.

On May 31, 2012, the Human Resources department issued a Memorandum on overtime, which stated, "When/if there is a conflict between your primary work schedule and the overtime shift, prior approval from your supervisor is required before departing early or not showing up for your scheduled start time ." Luke testified he did not read the memorandum; however, Howard did read it. Luke testified that Warden Carvajal asked him if he was still doing this and Luke said that he was not and that Associate Warden Nicklin brought the issue up and Clarkson had sent the memorandum out. Luke said he was being prosecuted making logbook entries under false identity. Luke had answered Carvajal that his supervisor and Associate Wardens had adjusted his schedules when their schedules are changed to "bus" overtime and "medical" overtime. Luke stated he told Carvajal that he did not review his Time and Attendance, called "T and A," Report before turning then in and many of them had not been signed by his supervisor. Luke

testified he was not paid any overlap time because he worked through his duty free lunch break. Luke responded to Carvajal that he did not certify them and disagreed with the wording of the document. However, Luke provided only verbal corrections and not any written corrections. Luke testified when he was relieved from hospital duty he drove to the institution and arrived at 8:30 a.m. from the thirty-minute drive. Luke stated that on the compressed work schedule, there was no free duty lunch break. He testified if he was being roster adjusted he had to work later. Luke testified he needed permission every single time to work late and advise the supervisor they had been hired to work the overtime shift even thought the past practice had not required his getting anyone's permission. He testified there were shifts within his department that ended prior to 4:00 p.m. that he was qualified to bid.

Luke testified it not his knowledge that the OIG sustained the charges of T and A irregularities. He testified the one-day suspension was for falsification. He testified the name of the department was changed to Correctional System Department, refereed to as "CSD." Luke testified that Boteler said in February 2014 that Correctional Systems Officers are to report to regular work within thirty (30) minutes of being relieved from hospital, unless instructed differently but nothing was added on "status quo."

Kendall Francois, referred to as "Francois," was a counselor in D unit team, a non-custody department. He testified that he worked from June 2011,at the hospital overtime shift, in particular the morning watch from 12:00 a.m. to 8:00 a.m. working eight (8) hours but now working with general duty hours with roster adjustment starting at 7:30 a.m. and late night as 10:30 to 9:00 p.m. until at present on compressed schedule working from 6:00 to 4:30 and late night is 10:30 to 9:00. He was working the overtime shift in June 2011and roster adjusted to get 8 hours of overtime. He stated he took his duty free lunch break when he worked overtime and got off at 4:00 p.m. He said now with compressed schedule, he does not get overtime. He testified he did not get permission; he just told them he was working overtime. He testified he was hired to work overtime by a call from the lieutenants at the institution. He stated that most of the time, he told them that he had worked overtime by telling them when he got to work on regular work schedule.

Thomas testified he was part of the IMS team of eighteen (18) employees. He stated he worked from 12:00 p.m. to 8:00 a.m. at the hospital with a thirty (30) minute overlap with his duties at the institution. He stated, when relieved, he would come straight to the institution arriving at 8:30 a.m. at the latest to work his full eight (8) hours. He testified he did this practice after June 30, 2011. He testified he quit doing this practice for a while because he did not want to be in the firefight. He testified he saw people being treated

differently than other people in the unit, like Luke and Howard. He stated he was roster adjusted while those were not. He testified he was allowed to pick up the full eight (8) hours at the institution by working late at the end of his scheduled shift at the institution with a break in the time. He testified he would send an email from his cell phone and would receive permission. He stated he worked at the hospital until his relief showed up and then drove directly to the institution to work late but he did not have to ask for permission because it was understood, which continues to the present.

Howard testified he has worked in the Correctional System Department under either Boteler or Moore. He stated he would work at the hospital from midnight to 8:00 a.m. then convert over to straight time at the institution by skipping lunch or work until 4:30 p.m. after June 30, 2011, when a very turbulent time started. He stated during that time he was required to take annual leave time, once or twice, for the hours of overtime. Howard testified he was placed on AWOL but that practice stopped after he talked to a supervisor. Howard testified that after May 2012, his supervisor deemed his notice to work overtime to be a request for permission to work overtime, which was denied. He testified it took some time until the warden informed the supervisor they could work the overtime by notifying supervisor by cell phone but there were times she did not answer and did not have her voice mail set up so he sent an email. He testified all the overtime was "put out" by a Lieutenant at the facility, who has to fill those slots at the hospital. He testified he was required to take the overtime work when offered or he would be dropped to the bottom of the list. Howard testified he recognized the overtime he worked from September 20, 2011, until June 2015, in Exhibit U-15 as evidence for one-half (½) hour on the yellow high-lighted dates, as follows:

4/12/12	4/25/12	5/1/12	5/3/12	5/10/12	5/16/12
6/7/12	6/21/12	6/28/12	8/7/12	10/21/14	8/8/12
8/10/12	8/15/12	8/22/12	8/27/12	9/18/12	10/23/12
11/1/12	11/16/12	12/12/12	3/22/13	3/25/13	4/23/13
5/27/13	6/14/13	6/26/13	6/29/13	7/2/13	7/11/13
6/20/13	9/11/13	10/15/13	12/10/13	12/23/13	12/24/13
1/15/14	2/25/14	3/4/14	3/5/14	3/10/14	4/2/14
4/30/14	5/12/14				

However, at present he only works overtime on his days off due to health issues.

Howard testified he and Luke were investigated for "double-dipping" on overtime and regular pay, for which he was disciplined. He stated after a period of time without a supervisor, Boteler was appointed, for which she stated she was to get control of this unit, which he said had gotten good ratings. He stated

there was only one (1) "Unacceptable," which was changed to and "outstanding" in arbitration.

Howard testified that Thomas got an hour and half (1 ½) overtime while he got one-half (½) hour as requested. He testified Boteler refused his being roster adjusted but allowed Thomas to roster adjust. Howard testified that he presently has a compressed work schedule. He stated his supervisor has the authority to approve any deviations from his schedule but not the right to deny overtime. He testified he does not believe management has the right to deny overtime but has the authority to approve or disapprove an employee's request to change their normal work hours. Howard testified he notified Boteler the day before when he was going to work overtime at hospital. He testified he was shown that management does not have the right to deny evening watch overtime. He testified when he was working at the hospital, he was taking care of the mission of the Bureau, which he was also taking care of when working at the institution. He testified that in May 2012, the supervisor said he could not work overtime. He testied he told Richmond, who got the warden to inform supervisor that they could not refuse permission to work overtime. Howard testified that in an email from Boteler dated June 27, 2012 at 12:26 p.m., she had inadvertently failed to include "not" saying he received prior approval.

Nicklin was Associate Warden at Pollock from December 2011 until January 2013. She testified she was familiar with the officers working overtime for the evening shift at the hospital and for their regular 7:30 a.m. to 4:00 p.m. shift at the institution, but does not recall roster adjusting, was not aware that Francois was treated differently, has not studied the minutes of the June 30, 2011, meeting, was not aware what the practice was for working overtime, or familiar with the email of February 2012. She testified the employees were required to get approval for overtime from their supervisor. She testified she does not recall if the employees were directed to seek annual leave for time worked at hospital. She testified the overtime work at the hospital was security post. She testified she did not recall the issues involved in discipline of Luke and Howard. She does not recall creating a policy of roster adjusting. She testified she does not recall Warden Martinez telling management officials that they could not refuse officers permission to work overtime. She testified management has the right to alter work hours of employees but the employee does not. She stated the parties negotiated compressed work schedules that is negotiated for the general work hours, or whatever the post is, may be negotiated with the Union if it's contrary to 7:30 a. m. to 4:00 p.m. hours of work.

Michael Lacaze, referred to as "Lacaze," testified Boteler notified the institution she had a worker's comp doctor's appointment. Moore was overall department head and Boteler was under her, with both supervising all eighteen (18) employees in the IMS. Lacaze testified that Clarkson was working the day

stated in his T and A report. He testified the compressed work schedules are always fixed schedules. He testified that although agencies may change or stagger the time of arrival or departures, there are no provisions for employee flexibility in reporting starting or quitting time. He stated the OIG sustained the charges against Howard and Luke.

Moore was the Case Management Coordinator with supervisor authority over IMS and stated she was familiar with non-custody personnel sometimes working custody of inmates at area hospitals. She testified there were other supervisors under her including Mary Singleton, Shane Wilhite, Karen Weathers, Brad Duplechien and Boteler. She testified that before they became supervisors, there was a period of time without a supervisor. She testified that neither she nor orther supervisors ever adjusted the schedule of anyone, which is contrary to the testimony of Thomas and others. She recalled an AWOL being issued when she could not find an employee that was not on his shift. She testified the employees had to get permission from a supervisor before working the overtime shifts as doled out by a Lieutenant at the institution. She admitted to sending the email dated June 13, 2011, which denied adjusting schedules for staff to work overtime that conflicts with their regular work schedule. She testified the employees could not be paid overtime for time worked in the hospital during the time of the regular scheduled work hours. She testified she was not aware of shifts being changed. She was aware of employees working the midnight to 8:00 a.m. shift, but she did not pay attention to their arrival time, or to their working late on regular basis. She did not approve schedule changes but approved time and attendance reports by initialing the front page with number of hours worked, paying no attention to arrival times. She admitted she allowed some employees to arrive late and to be relieved early without their always providing a reason.

Brad Duplechien, called "Duplechien," was a bargaining unit member, as well as the acting supervisor in June 2011, but he was never aware of either Luke or Howard skipping lunch break or working late.

Tyler Mecker, called "Mecker," an HR specialist since April 2012, was aware that Luke asked to have those minutes disregarded as inaccurate analogies and misinformation.

STATED OR WRITTEN DOCUMENTS

The parties agreed the CBA stated the following:

ARTICLE 3-GOVERNING REGULATIONS

. . .

Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 U.S.C. 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

. . .

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

Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 U.S.C. 7106, 7114, and 7117. The employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

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

Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.

. . .

ARTICLE 6-RIGHTS OF THE EMPLOYEE

. . .

Section b. the parties agree that there will be no restraints, harassment, intimidation, reprisal, or any coercing against any employee in the exercise of any employee rights provided for in the Agreement and any other applicable laws, rules, and regulation, including the right:

. . .

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

. . .

ARTICLE 7-RIGHTS OF THE UNION. . .

Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statue and this Agreement. The includes, in accordance with applicable laws and this Agreement,

the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority n accordance with the Federal Labor Management Statute.

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ARTICLE 12 - USE OF OFFICIAL FACILITIES

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Section b. The Employer agrees to provide available meeting facilities upon request.. . .

. . .

ARTICLE 18-HOURS OF WORK

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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 (3) minute non-plaid, duty-free lunch break. However, there are shifts and pasts fro which the normal workday is eight (8) consecutive hours without a not-paid, duty-free lunch break.

. . .

There will be no restraint exercised against any employee who desires to depart the institution/facility while the employee is on a non-paid, duty-free lunch break. For the purposes of accountability, the employee leaving the institution/facility with leave word with his/her supervisor.

. . .

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 the bargaining unit employees; and

2. overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments system and ensure equitable distribution of over time assignments to members of the unit. . .

ARTICLE 31-GRIEVANCE PROCEDURE

. . .

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If at 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 of 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 provided for a longer filing period, then the statutory period would control.

1. if a matter is informally resolved and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

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

FEDERAL STATUTE

The grievance stated the Agency violated the following:

5 U.S.C. § 7116(a)(5),(8)

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

. . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

STATED GRIEVANCE

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

5 U.S.C..: 7116(a)(5): & 7116(a)(8)

Master Agreement: Article 3, Section c; Article 4, Sections a, b, c; Article 6. Section b (6); & Article 7, Section b.

. . .

6. In what way were each of above violated? Be specific. On June 30, 2011, during a Labor-Management Relations (LMR meeting, procedures for non-custody staff working custody overtime were discussed due to an email dated June 20, 2011 from Lejean Moore, CMC to Correctional Systems Staff, Scott Clarkson, Human Resource Manager asked to table this issue and Carlos Rivera, Associate Warden and LMR Chair state the *"this will remain Status Quo until we can get a better idea"*. Status Quo would consist of staff being roster adjusted, which was past practice prior to June 20, 2011, to accommodate non-custody staff wishing to work custody overtime. On February17, 2012, CMC Moore once again sent out an email to Correctional Systems staff, referring to the previous correspondence dated June 20, 2011. This was discussed with Julie Ann Nicklin, Associate Warden on February 22, 2012. On February 24, 2012 A. W Micklin stated in an email *"Good Morning. I will have this issue placed on the LMR Meeting Agenda for the next scheduled meeting and we will discuss at that time."* On March 1, 2012, Scott Clarkson, Human Resource Manager, sent an email stating *"After reviewing all the documentation, we have determined that CMC's Moore email,* Manager, dated 6/20/2011 will be utilized for overtime procedures in the IMS department. If you have any questions, please feel free to contact me." These actions not only contradict A. W. Micklin's attempt to informally resolve this issue, but it is being done regardless of what was agreed upon during LMR and with no attempts at negotiations.

PARTIES' POSITION

AGENCY'S POSITION

The Agency argued that on June 20, 2011, Moore sent the email to her staff in the CSD division that she had not agreed to roster adjust for the staff to work overtime in the CSD that conflicted with their regular work schedule and, as with all absences, she expected a leave slip for any time not at work. The Agency argued that on June 30, 2011, this issue was discussed during the monthly LMR meeting, at which time it was tabled and remained at status quo. The Agency argued that on February 17, 2012, Moore sent another email to the CSD staff referring to her June 20, 2011, email. The Agency stated on March 9, 2012, the Union filed a grievance, and on April 20, 2012, invoked arbitration.

The Agency quoted Article 31, of the CBA, which stated the grievance must be filed within forty (40) calendar days of the of the date of the alleged "grievance occurrence." The Agency stated the grievance was filed on March 9, 2012, alleging a past practice within the CSD was improperly changed on June 20, 2011, and indicates informal resolution was attempted during a LMR meeting on June 30, 2011; however there is no indication that this matter was resolved or closed at the LMR meeting. The Agency alleged the meeting minutes indicate Management requested to table the issue to investigate the matter more fully.

The Agency argued that to table an item means to postpone or suspend discussion until a later time and does not mean a matter is resolved or closed. The Agency quoted Richmond as saying "[Then-Human

Resource Manager Scott] Clarkson asked that we table the issue which means. . . we hold on to it, let's hold on and let's wait until the next meeting." The Agency stated the issue would *remain* status quo; however, despite the Union's contentions, there is no evidence that Management had existing procedures outlined by Moore that needed continued - just that more information needed to be gathered on the subject. The Agency argued the evidence indicated there may have been some disagreement on the interpretation of status quo, as Logan later attempted to clarify the Union's interpretation of status quo to Nicklin "to alleviate any misunderstanding." The Agency argued the term "status quo," refers to the situation as it currently exists, which at the time of the June 30, 2011, LMR Meeting would have been the procedures in Moore's June 20, 2011, email, as opposed to "status quo *ante.*"

The Agency argued Moore advised Luke they would know more after the LMR Meeting; however, Moore' s testimony indicates she was not familiar with the outcome of the June 30, 2011, Meeting and there is no evidence Moore was provided with any notice or direction to stop or otherwise change the procedures provided in her June 20, 2011, email after the LMR Meeting. And actually on February 17, 2012, Moore to the Correctional staff referred to her previous email dated June 20, 2011.

The Agency stated Richmond testified he did not file a grievance at the time of the June 30, 2011 LMR Meeting because the parties were "working through it" and waiting until they were back to the table on it. The Agency stated that while attempts at resolution, informal or otherwise, can be made, there is no provision in the CBA allowing the 40-day time frame to be extended, suspended, or postponed pending a resolution. The Agency argued the Union filed the grievance on March 9, 2012, approximately eight and one-half (8 ½) months after the grieving party can reasonably be expected to have become aware of the issue; therefore, the filing was untimely.

The Agency argued the Union failed to establish a past practice as stated in the allegation, in that on June 20, 2011, Management changed a past practice of the Correctional Staff being roster adjusted to accommodate the working voluntary overtime for the Correctional Services department. The Agency argued that Moore had supervisory authority over the CSD from 2005 until December 2013, and that none of the supervisors under her advised her of the roster adjusting. The Agency argued that Moore never roster adjusted and the June 20, 2011, email was consistent with the procedures by the supervisors in her chain of command for the time she was the supervisor. The Agency argues that she relied on the integrity of her staff to report on time, that she was not made aware of shifts being changed without her consent, and that she never knowingly approved the roster adjusting. The Agency argued Duplechien, Acting

Supervisory Correctional System Specialist from August 2010 through April 2011, provided a sworn statement that at no time did Howard or Luke inform him they were working overtime or ask him to change work schedules.

The Agency stated that legal authority has established that essential factors are necessary to find past practice, in that the practice must be known to management, responsible management must knowingly acquiesce, and the practice must continue for a significant period of time, citing *Department of Health, Education and Welfare and AFGE Local 3400,* 80 FLRR 1-1479, 4 FLRA 736 (FLRA 1980), which supports that the Union failed to meet their burden of proof that Moore or any other responsible Management official within the CSD knew of any past practice allowing Correctional Systems staff to work through lunch or stay late in order to make up time when their voluntary overtime overlapped their normal work hours, nor knowingly acquiesced to such.

The Agency argued the Union's allegation concerning disparate treatment and negotiation of local overtime procedures under Article 6(b)(2) and Article 18(p) were first introduced at the hearing. The Agency argued that according to the grievance, the Union's sole complaint alleges that the past practice within CSD was improperly changed with no attempt at negotiations. Logan electronically filed the grievance via email to Clarkson on March 9, 2012, and provided a brief summation of the issue entitled "Grievance on failure to negotiate changes," and alleged violation of Federal Prison System Directive, Executive Order, and Statute as 5 USC 7116(a)(5&8), and Article 3(c), Article 4, Sections a, b, c; Article 6; & Article 7, Section b of the Master Agreement.

UNION'S POSITION

The Union failed to file a brief before the deadline agreed between the parties; therefore, the Union' s position is based on the facts and issues found in the hearing.

ISSUES

The grievance statement filed at the initial step of the internal dispute resolution process defines the issue, especially if the statement is carefully worded. The grievance stated the past practice was established prior to June 20, 2011. The hearing developed issues which the Arbitrator may "restate the substance of issues or arguments to promote or verify understanding. CODE OF PROFESSIONAL RESPONSIBILITY, Section 5.A.1.b. The issue must be stated in a form which requires an affirmative answer

for the party with the burden of proof. The statement may not contain a statement of an assumed fact that is disputed by the parties. Elkouri & Elkouri, *How Arbitration Works,* (The Bureau of National Affairs, Inc.). Ed. Alan Miles Ruben, 2003. Sixth Edition. Page 296. The issue from the grievance is:

Did the Agency commit an unjustified personnel action in violation of CBA and a past practice within the Correctional Systems department?

What is the appropriate remedy?

DISCUSSION

SUBSTANTIVE ARBITRABILITY

The substantive arbitration depends on whether an issue is properly the subject of an arbitration agreement; that is, whether a party has agreed to be bound by an arbitration decision concerning the subject manner of this case. The function of the arbitrator is to decide whether or not an allegation of arbitrability is sound and could be compared to that of a trial judge who is asked to dismiss a complaint on a motion for directed verdict or for failure to state a cause of action. Elkouri & Elkouri, *How Arbitration Works,* (The Bureau of National Affairs, Inc.). Ed. Alan Miles Ruben, 2003. Sixth Edition. Page 285. This issue is properly brought to the courts. The parties did not raise an issue of substantive arbitrability.

PROCEDURAL ARBITRABILITY

Procedural arbitrability refers to whether the parties' contractual prerequisites for arbitration have been met, which is generally decided by the arbitrator. *John Wiley &Sons v. Livingston,* 376 U. S. 543 (1964). Such procedural issues often are inextricably enmeshed with the merits of a case, and the parties contract for an arbitrator's judgement of the merits of the case. The Agency raised the timeliness issue in the "threshold statement" as procedural arbitrability for lack of the Union timely filing this grievance, which is a condition precedent to arbitration of this dispute. Elkouri & Elkouri, *How Arbitration Works,* (The Bureau of National Affairs, Inc.). Ed. Alan Miles Ruben, 2003. Sixth Edition. Pages 218-219. The Union has the burden of proof that the grievance was timely filed. The grievance was "filed" on March 9, 2012, by an electronic transmission to Clarkson, which alleged the date of the incident was "continuing." Continuing violations of a grievable event, as opposed to a single isolated and completed transaction, gives

rise to a grievable event in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new "occurrence." The filing of such grievances may be at any time, although any back pay would ordinarily accrue only from the date of filing. Where the CBA provided for filing "within forty (40) calendar days of the date of the alleged grievable occurrence," it is held that the employees were denied overtime and yet they had worked each day as requested by the lieutenant at the facility as considered an occurrence and that a grievance filed within forty (40) days would be timely. The CBA stated both parties will devote up to ten (10) days of the forty (40) to the informal resolution process, which the Union at different times did by contacting the warden or union officials.

The parties met on June 30, 2011, and discussed the roster adjusting and Clarkson stated to table this issue until the department got a Captain. Rivera, as chair of the LMR Meeting, stated that this will remain *status quo* "until we get a better idea." *Status quo* is the existing state of things at any given date. BLACK'S LAW DICTIONARY (West Publishing Co., Revised 4th ed. 1968), page 1581. The evidence supports a finding that the *status quo* was that the non-custody employers were working overtime at the hospital but working a full eight (8) hours at the institution by either working through the lunch break or later to fully work their eight (8) hours as reported on the T and A card, which was not reviewed by a Moore when she was a supervisor.

On February 24, 2012, Nicklin stated in an email, ". . . this issue placed on the LMR Meeting Agenda for the next scheduled meeting and we can then discuss at that time." Rivera, as Associate Warden, chaired the meeting and stated, "this will remain Status Quo until we can get a better idea as reported in the minutes.

The email by Moore is not a grievable event but is instead the statement of her interpretation of the CBA. However, on November 12, 2011, December 22, 2011, January 4, 2012, and dates thereafter, Luke did not receive one-half hour of overtime on the dates outlined in yellow and that was a grievable event. On April, 12, 2012, and thereafter, Howard did not receive overtime for one-half hour with every lost period of overtime, which are grievable events. However, back pay should not be paid for grievable events more than forty (40) days before the grievance is filed. Luke should not be considered for back pay prior to January 29, 2012, but Howard should be considered for back

pay from April 12, 2012. Since the grievance alleged the grievable event as "continuing," it is only timely for the days after the grievance is filed.

PAST PRACTICE

A past practice is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action. Past practice may be used to create a separate, enforceable condition of employment or to modify or amend clear and unambiguous contract language. It is an established practice that is an enforceable condition of employment, wholly apart from any basis in the CBA, and cannot be unilaterally modified or terminated during the term of the CBA. Either party may repudiate the practice at the time a new agreement is reached, since its continuing existence depends on the parties' inferred intent to retain existing conditions, in absence of any objection. Mittenthal, Richard, *Past Practice and Administration of Collective Bargaining Agreements,* 14 NAA 30 (1961) and See Elkouri, *Supra,* at pages 605-615. It is nonsensical that a lieutenant at the institution, contrary to other command officers at the same institution, would schedule employees during a time they are "required" to be on the location. The facts support a finding that each time the warden reviewed the situation the employees could not be denied their overtime.

Moore and the Agency attempted to unilaterally change the practice of roster adjusting by prosecution, requiring leave usage, and discipline. Moore testified she had supervisory authority over IMS; however, she did not participate in the LMR Meeting, but was aware non-custody personnel were working the midnight to 8:00 a.m. shift at the hospital and then the 8:00 a.m to 4:00 or 4:30 p.m. shift at the institution amounting to eight (8) hours of work. The Agency argued that management must be knowledgeable of the past practice, which Duplechien, as acting supervisor from August 2010, through April 2011, stated he was unaware of Howard and Luke's arrival time at work and was never informed they were working an overtime shift, and yet they had performed the duty of guarding inmates at the hospital. Duplechien testified he was not aware of the officers skipping lunch or staying late to make-up time due to working an overtime shift, but this is not evidence that the officers were doing exactly this. However, the lieutenant, who requested them to work at the hospital, would have known the overtime schedule and regular work

schedule.

The difficulty in understanding the Agency's position during part of the time from June 2011 until February 2014, is that a lieutenant at the same institution as the non-custody employees was requesting that these same employees worked in the hospitals and long-term care facilities, which was part of the mission of the Agency. Further, these were periods of time when there wre no supervisors or when there were supervisors the not know of the roster adjustment. Moore testified that she did not roster adjust or consent to roster adjustment; however, she was not fully aware of the practice. On February 11, 2014, Boteler appears to have reached an acknowledged agreement by allowing the Correctional Systems Officers to report to regular work within thirty (30) minutes of being relieved from the Morning Watch at the Hospital Overtime.

The *status quo* that existed at the time of the LMR Meeting on June 30, 2011, was that several non-custody employees were working overtime at the local hospital and then working without a lunch break or until a later time to put in their eight (8) hours at the institution. The Agency either did not know of, yet acquiesced to, the practice until at least November 20, 2011. The problem was aggravated by the IMS department not having a supervisor or not having a practical way to contact the supervisor, when there was one, as the cell phone was disabled or not activated. Yet the lieutenant continued to use the non-custody employees from the facility to guard the inmates at the hospitals. At this hearing, Moore, without Boteler appearing, despite her being subpoenaed, testified the employees were doing Agency business at the hospital, but did not recall the specifics after Boteler arrived. She did understand that approval must be obtained, but does not recall more.

The fact that the overtime work was at a different location does not prevent the employee receiving overtime. On February 22, 2012, Luke sent an email to Nicklin setting out the roster adjusting that had been utilized as the past practice, to which Nicklin replied the issues would be on the LMR agenda. This indicates that the issue was unresolved and that the *status quo* was the employees not seeking permission, but giving notice of working the overtime at the hospital. Sandra Barnes sent a memo that stated "an employee can count the travel time from the hospital

to the UPS since management has allowed it in the past, it is of benefit to the government." This supports the finding that the time worked at the hospital also benefit the Agency mission and warrants overtime payment.

AWARD

1. The grievance is granted as to the back pay of Luke for the days not paid, as indicated by yellow marked dates on Exhibit Union 9, commencing February 15, 2012, and forward to June 12, 2015.

2. The grievance is granted as to back pay of Howard for the days not paid as indicated by the yellow marked dates on Exhibit 13, commencing April 12, 2012, and forward to May 12, 2014.

3. The Agency committed an unjustified personnel action by violating the CBA, Article 3, Section c, by failing to meet and negotiate the overtime and work hours and application of the past practice of employees roster adjusting.

4. But for the violation, these employees would have received overtime.

5. The payment is under the terms of the Back Pay Act.

DATED this 29th day of September 2015.

DON E. WILLIAMS *Arbitrator*