UNITED STATES OF AMERICA

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE ARBITRATION BETWEEN

American Federation of Government Employees }

Council of Prison Locals (AFL-CIO) } FMCS Case No. 14-59314

Local 1034 }

and } Robert H. Monnaville
Arbitrator

U.S. Department of Justice }

Federal Bureau of Prisons }

Federal Correctional Complex }

Pollock, Louisiana }

Representing the Union:

John-Ed L. Bishop
Attorney-at-Law
Whitehead Law Firm
11909 Brickstone Avenue, Suite W-3
Baton Rouge, Louisiana 70816

Also present: Mr. Jason Shannon and Mr. Richard Logan

Representing the Employer:

John W. Weeks
Labor Relations Specialist
U.S. Department of Justice
Federal Bureau of Prisons
Grand Prairie, Texas 75051

Also present: Michael LaCaze

Opinion

Introduction

The American Federation of Government Employees, Council of Prison Locals (AFL-CIO), Local 1034 ("Union") serves as the exclusive bargaining representative for the bargaining units of employees who work at the Bureau of Prisons Correctional Complex located at Pollock, Louisiana ("Employer/Agency"). The Union and the Employer ("Parties") submitted this dispute under the Bureau of Prisons Master Agreement ("Master Agreement"), a copy of which they introduced at the hearing as joint exhibit one. (J-1). The parties selected me to arbitrate this dispute by mutual agreement under the provisions and terms of the Federal Mediation and Conciliation Service of the United States Government.

The Grievance in this case arose from a disagreement between the parties as to how bargaining unit employees are selected to fill voluntary overtime slots in Tower 8 at the penitentiary at FCC, Pollock, Louisiana. (J-2, 3, 4, 5 & 6).

The hearing took place at the Federal Corrections Complex at Pollock, Louisiana. At the beginning of the hearing, the parties agreed that the Grievance was properly before me for a final and binding decision on the merits. The parties agreed that I would retain jurisdiction to aid in the implementation of the remedy should I rule for the union. The parties agreed that either party may invoke my jurisdiction to address remedy issues for sixty days after I issue my award; and, I will then retain jurisdiction until the dispute is resolved either by agreement of the parties or my ruling.

The hearing was conducted over two days and proceeded in an orderly manner. The advocates did an excellent job of presenting their respective cases. A court reporter transcribed the hearing and made copies of the transcript available to the parties and to me. Each party had a full opportunity to call witnesses, to make arguments and to introduce documents into the record. Witnesses were sworn under oath and subject to cross-examination by the opposing party.

The parties submitted thirteen joint exhibits (J-1-13), and nine union exhibits (U-1-9) with the exception of (U-4). A total of eleven witnesses testified at the hearing. At the close of the testimony, the parties agreed to set mutual agreeable deadlines to submit post hearing briefs by simultaneous submission to me and to each other post-marked by

that deadline. On motions of the parties, the deadline for filing post-hearing briefs was extended to February 8, 2016. I received the briefs by the agreed deadline and closed the record February 12, 2016.

Issue to be Decided

Did the Agency violate the Master Agreement, laws, custom and practice, or regulations on how staff were assigned and/qualified to work Tower 8 on or before May 12, 2014 to the present date? If not, deny the Grievance. If so, what shall the remedy be?

Witnesses Who Testified at the Hearing

Jason Shannon – Union Representative/Senior Officer Specialist – DOH 3/25/01

James Byrd- BUE – DOH 5/7/2000

Jason Tucker-Hill – Complex Captain – Pollock 10/13 to 12/14 – DOH 1997

Shaqita Khabeer – Unit Secretary

Roseva Cosenza – Correctional Counselor in Unit Team – DOH – 2006

Christopher Myles – Guard - DOH 5/08

Christopher Lewellyn – Lieutenant – DOH 11/02

Michael Pierce – Lieutenant- DOH – 2008

John Bermingham – Deputy Captain – 14 years seniority

John Bartlett- Complex Captain – 14.5 years seniority (approximately)

Christopher Wright – Security Officer – 17 years seniority

Facts

This Arbitration concerns the employer's change in how management selected bargaining unit employees to work voluntary overtime shifts in Tower 8 at the maximum security prison located in the complex.

Tower 8 is the only manned tower at the complex, except for the back gate. It is an armed post. The tower gives correction officers an elevated 180 degree panoramic vista of the prison, the yard, several walkways and buildings inside the prison walls. Also, from the tower, a corrections officer can view the barbed wire fence, front lawn and parking lot outside the prison walls.

To be qualified to work Tower 8 either as a regular assignment or voluntary overtime, a correction officer must:

1) complete the basic police officer's course at Glenco, Georgia;
2) have passed his annual requalification with the 9 mm, M-16 and shotgun within the last 365 days; and
3) fire two Aerial Blast Dispersion Concussion rounds and two Long Range Fin Stabilized Rubber projectiles from the shotgun.

The need for number three of the qualifications written above arose as the result of the Bureau of Prisons publishing PS 5500.11, Chapter 2, Page 29, Section 11 on October 3, 2003. In the relevant section applicable to this arbitration, the policy states;

> "Staff who are assigned to towers are required to discharge a minimum of two rounds of the Aerial Blasts Dispersion Concussion rounds and the Long Range Fin Stabilized Rubber projectiles annually"

Although the policy went into effect in October, 2003, FCC Pollock never implemented the policy. Instead, if any custodial or non-custodial bargaining unit employee wished to volunteer for overtime (Tower 8 included) he/she placed his/her name on the volunteer overtime list. When his/her name reached the top of the list, he/she was contacted and offered the overtime. If the selected candidate accepted or rejected the overtime, his/her name went to the bottom of the overtime list. If he/she could not be reached or was passed over for selection to work the overtime because he/she was deemed unqualified to work overtime in Tower 8, his/her name remained at the top of the list ready to be selected the next time overtime was required. It was not until early in 2014, the Agency implemented the criteria for eligibility to work overtime in Tower 8 by selecting only those bargaining unit employees who met the qualification of having fired the four non-lethal rounds mandated by PS 5500.11, Chapter 2, Page 29, Section 11.

The Agency never notified the Union of this change in policy and procedure. Furthermore, the Agency never offered to train any volunteer who wished to obtain the qualifications now necessary for selection for overtime in Tower 8. The Agency did offer Tower 8 weapons qualification training quarterly, but only to those bargaining unit employees who had been assigned to Tower 8 as their regular post for the next calendar quarter. (It was also offered to certain sick and annual employees exclusively chosen by the Agency).

The Union was not aware of the change in policy and procedure until a bargaining unit employee realized that he had been passed by for an overtime shift in Tower 8. The Union questioned why the bargaining unit employee had not been selected to work the overtime in Tower 8. The Union was advised by Agency supervisory personnel that the employee was not selected because he/she did not possess the necessary qualifications of having fired the four non-lethal rounds from the shotgun pursuant PS 5500.11.

The Union filed a Grievance on April 14, 2014. On May 15, 2014 the Union filed an informal resolution memorandum with the warden of the complex. On June 4, 2014 the Union submitted a modified Grievance on the same issue. On July 3, 2014 the warden denied the Grievance for lack of specificity. Only July 10, 2014 the Union had invoked the Arbitration clause (Article 32) of the Master Agreement. The Union stated "that the Agency has never engaged in any meaningful attempts at an informal resolution as the contract requires. Should the Agency request to meet and discuss this issue and examine documentation, this Local will be more than welcome to engage in the informal resolution process of this Grievance" (Joint 7, Page 1).

Union's Position

The Union argues that the Agency violated the Master Agreement in the five following ways:

1) How bargaining unit employees are selected to work overtime in Tower 8 had not changed in the ten plus years since the Bureau of Prisons had published PS 5500.11, Chapter 2, Page 29. This longstanding custom and practice of selecting bargaining unit employees to work overtime in Tower 8 is entitled to the status of a local rule and to violate this standing procedure becomes a violation of the Master Agreement.

2) The Agency violated the Master Agreement because management made the change in selecting bargaining unit employees to work Tower 8 overtime

without notice to the union and without conducting effects bargaining with the Union over the changes in violation of Article 3 and Article 4 of the Master Agreement.

3) The Agency violated the Master Agreement in that it unilaterally bypassed bargaining unit employees without the non-lethal four round qualification from eligibility to work overtime in Tower 8. The Agency did not treat all similarly situated employees equitably and fairly in all aspects of personnel management pursuant to Article 6 Section b (2) of the Master Agreement.

4) The union argues that the Agency's unilateral refusal to consider previously qualified employees for overtime in Tower 8 makes those bargaining unit employees eligible for a back pay award due to the Agency's unjustified and unwarranted personnel action.

5) The Union proposes that if the Arbitrator awards back pay pursuant to the Federal Back Pay Statute the Union is entitled to an Award of attorney's fees pursuant to 5 USC Section 5596 (b).

Agency's Position

The Agency forcefully argues that Federal Law (5 USC Section 7106) grants the Agency the authority to manage the facility and "to determine the mission, budget, organization, number of employees, and internal security practices of the Agency". Further, the Master Agreement in Article 5, Section a states that the Agency, in accordance with applicable laws, has the right:

a) To hire, assign, direct, lay-off, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take over disciplinary action against such employees; and,

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 appointment from;

1) among properly ranked and certified candidates for promotion; or

2) any other appropriate source; and

d) To take whatever action may be necessary to carry out the Agency's mission.

The Agency contends that the above enumerated managerial rights clearly provide the prison with the authority to assign the necessary qualified personnel to work volunteer over-time in Tower 8 as the need arises.

Thus, in order to work a Tower 8 post, as regular duty or in an overtime capacity, certain specific qualifications are needed. Pursuant to Chapter 2 of PS 5500.11, Section 11, Page 29; "staff who are assigned to the towers are required to discharge a minimum of two rounds of the Aerial Blasts Dispersion Concussion rounds and the Long Range Fin Stabilized Rubber projectiles annually". This Agency policy has been in effect since October 3, 2003. The Agency claims to have not changed the procedure for selecting staff to serve overtime in Tower 8. All personnel who meet the qualifications mandated by PS 5500.11 have been treated equitably and fairly. All those similarly situated have been treated equally. This is true after as well as before the prison implemented the change in the qualifications that a bargaining unit employee must have to pre-qualify for selection to work overtime in Tower 8. The Agency maintains that it treated all bargaining employees equitably and fairly in the selection process. No one so qualified was passed over for overtime; and, no one who did not possess the prerequisite qualifications was penalized as to their position on the overtime list. No bargaining unit employee was harmed by any personnel action.

The Agency contends that there was no evidence presented at the two day hearing that qualified bargaining unit members were incorrectly bypassed for a Tower 8 volunteer overtime assignment. There was no evidence presented at the hearing that overtime assignments to Tower 8 were not assigned fairly and equitably among qualified bargaining unit members on the overtime list. Accordingly, no back pay or attorney's fees are warranted in this matter. Further, the cost of the Arbitration should be split equally between the parties pursuant to Article 32 Section (d) of the Master Agreement.

Decision

To the Agency's credit, when it became apparent that the FCC was not in compliance with the provisions of PS 5500.11, management changed the criteria for selection to work Tower 8 both in a regular and overtime capacity. The Agency argues

forcibly that Title 5, USC, Section 7106 and Article 5, Section a of the Master Agreement empowers management with the authority to do so. Further, management argues that the procedure for selection to work overtime in Tower 8 remained the same after the change in the criteria for selection to work overtime in Tower 8 as it had been before except the addition of having to be able to show that the overtime bidder had fired the four non-lethal rounds. The Agency argues that all bargaining unit employees similarly situated were treated the same way. The Arbitrator agrees.

Further the Arbitrator rules the procedure used prior to 2014 had not become a "local rule" because of it's long use (eleven years) in the overtime selection process as argued by the Union. In order for a procedure or policy to become a local rule the provisions of Article 9 and Section (d) specifically must be adhered to. See also Appendix A of the Master Agreement. Among other shortfalls, the policy/procedure was not memorialized in a written agreement between the parties.

The Arbitrator disagrees with the Union's demand for complex wide training to qualify all bargaining unit personnel to serve overtime in Tower 8 is not realistic, practical, cost-efficient or necessary. By analogy the Arbitrator argues that providing each bargaining unit employee with a college education just in case the employee might be eligible to apply for a job in the system that requires a college degree is an over broad reading of the Master Agreement in general and Article 21 in particular.

In response to the Union's claim that the Agency changed the overtime selection policy/procedure in 2014 without notice to the Union violates Article 3 and Article 4 of the Master Agreement, this Arbitrator agrees and so rules.

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 obligations imposed by five USC 7106, 7114, and 7117. The employer further recognizes it's responsibility for informing the Union of changes in working conditions at the local level.

Section b. On matters on 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 3. Governing Regulations

Section c. The Union and the 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, were required by 5 USC 7106, 7114, and 7117 and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

Section d. All proposed national policy issuance including policy manuals and program statements, will be provided to the Union. If the provisions contained in the proposed policy manual and/or program statement change or affect any personnel policies, practices, or conditions of employment, such policy issuances will be subject to negotiation with the Union prior to issuance and implementation.

This Arbitrator agrees with the Union argument that the Agency had an affirmative duty to notify the Union of the changes to be implemented in the working conditions at Pollock Correctional Complex. Such changes should have been negotiated in accordance with Article 3, and 4 of the Master Agreement. In the Agency's failure to give notice to the Union and to conduct effects bargaining with the Local, the Agency did not treat the employees fairly and equitably and by doing so the employees have been damaged by an unjustified and unwarranted personnel decision. See also Article 6, Section b (2) of the Master Agreement.

I find that the Agency's inaction in failing to negotiate the policy and procedure changes in work conditions was an unjustified and unwarranted personnel action that affected the bargaining unit employees at FCC Pollock and violated the terms of the Master Agreement between the parties. See U.S. SEC & EXCH. COMM'S n 62 FLRA 432, 438, 2008 (ULP); USDOJ, U.P.S. Marshals Scrv., 66 FLRA 531, 535 (2012) (Collective Bargaining-Agreement Violation). I also find that the Agency's unjustified and unwarranted personnel action resulted in a reduction of pay to those bargaining unit employees who were bypassed for overtime in Tower 8 from January 28, 2014 until October 30, 2015 plus interest. See Union Exhibit 1. See BPA 5 USC, Section 5996 (b) (1); U.S. DOJ Fed BOP, U.S. Penitentary, Marion, Illinois 60 FLRA 728, 730 (2005).

The Back Pay Act provides that;

"An employee of an Agency who… is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement to be affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee … is entitled, on correction of the personnel action, to receive for a period for which the personnel action was in affect … an amount equal to all or any part of the pay, allowances, or differentials … which the employee normally would have earned or received during the period if the personnel action had not occurred … (and) reasonable attorney's fees related to the personnel action."

I also award the Union reasonable attorney's fees in this matter. I find the Union meets all the conditions precedent for such an award. In reaching my conclusion that attorney's fees are warranted in this case, I rely on the provisions of the Back Pay Act, 55 USC Section 5596 and 5 USC Section 7701 (g). The Union is the prevailing party. It is in the interest of justice to award the Union attorney's fees, because the Agency's action was arbitrary, unilateral, unjustifiable and was a prohibited personnel practice, contra to the provisions of the parties' collective bargaining agreement. See Allen vs. United States Postal Service to MSPR 420 (1980). This Arbitrator plans to retain jurisdiction of this Arbitration until such time as the parties reach agreement that the Attorney's fees requested are reasonable or that I after taking evidence on the issue warrant them to be so.

Conclusion

Based on the entire record submitted by the parties, I find that the Agency violated Article 3 and Article 4 of the Master Agreement. In doing so the Agency committed an unjustified and unwarranted personnel action. The Agency changed the work conditions at FCC Pollock. The qualifications needed to work overtime in Tower 8 were modified without notice to the Union and without commencing negotiations with the Union as to the effects of such action of the bargaining unit members.

I find that the appropriate remedy is to:

1) award back pay with interest to all Union members who were bypassed for Tower 8 overtime from January 28, 2014 to October 30, 2015 as

reflected in Union Exhibit 1.

2) award reasonable Attorney's fees to the Union.

3) order the Agency and the Union to commence negotiations within thirty days from April 15, 2016 to negotiate the effects of the Agency modifying the qualifications required to work overtime in Tower 8.

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FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE ARBITRATION BETWEEN

American Federation of Government Employees }	
Council of Prison Locals (AFL-CIO) }	FMCS Case No. 14-59314
Local 1034 }	
and }	Arbitrator's Award
U.S. Department of Justice }	
Federal Bureau of Prisons }	Robert H. Monnaville Arbitrator
Federal Correctional Complex }	
Pollock, Louisiana }	

For the reasons set forth in the opinion that accompanies this Award, the Grievance must be and it is hereby sustained. The employer shall:

1) award back pay with interest to all Union members who were bypassed for Tower 8 overtime from January 28, 2014 to October 30, 2015 as reflected in Union Exhibit 1.

2) award reasonable Attorney's fees to the Union.

3) order the Agency and the Union to commence negotiations within thirty days from April 15, 2016 to negotiate the effects of the Agency modifying the qualifications required to work overtime in Tower 8.

I will retain jurisdiction for sixty (60) days from the date of this Award for the sole purpose of aiding the parties in the implementation of the remedy. During that sixty (60) day period, either party may invoke my jurisdiction in writing with notice to the other party. Once jurisdiction is invoked, I will continue to retain jurisdiction until this dispute over the remedy is resolved either through agreement of the parties or by a ruling by me, even if that process takes longer than sixty (60) days.

Dated this 25th of March ,2016

Robert H. Monnaville

Robert H. Monnaville
Arbitrator