

Kelly J. Hansen, Arbitrator

IN THE MATTER OF ARBITRATION BETWEEN

Department of Justice
Federal Bureau of Prisons
Federal Correctional Institution
Phoenix, AZ

And

American Federation of Government Employees
Council of Prison Locals #33
Local Union #3954

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Arbitrator's Opinion
and Award

FMCS Case # 11-57665-A

Award Issued:
November 16, 2012

Subject: Sick and Annual Leave Relief Shift

Contract Provisions Involved: Article 4 - Relationship of this Agreement to Bureau Policies, Regulations, and Practices

Article 9 – Negotiations at the Local Level

Article 18 – Hours of Work - Section e. Section g.2

Statement of the Award: The Grievance is Sustained

Appearances: On Behalf of the Agency:
Ruby Navarro

On Behalf of the Union:
Michael Meserve

PROCEDURAL HISTORY

This grievance was submitted to Arbitrator Kelly J. Hansen pursuant to the terms set forth in Article 32 of the Collective Bargaining Agreement (CBA(joint exhibit 1)) between the Federal Bureau of Prisons / Federal Correctional Institution Phoenix, Arizona (Agency) and the American Federation of Government Employees Local 3954 (Union). The Arbitrator was jointly selected by the parties using the services of the Federal Mediation and Conciliation Service.

The Union initiated a grievance (joint exhibit 3) on May 25, 2011 in response to the Agency's decision to not allow the sick and annual relief shift to count as a break in the requirement that no employee may exceed one (1) continuous year on a particular shift. The Agency responded and denied the grievance (joint exhibit 4) on June 20, 2011. The Union notified the Agency of the Intent to Arbitrate (joint exhibit 5) on June 29, 2011.

The arbitration hearings were held on January 19, and August 2, 2012 at the Federal Correctional Institution Phoenix, Arizona. During the course of the hearing both parties were afforded a full and fair opportunity for the presentation of evidence and testimony, examination and cross examination of witnesses, and oral argument in support of their respective positions. All witnesses testified under oath as administered by the Arbitrator. Witnesses were sequestered except for Adam Sisco who was present throughout the hearing due to his position of Chief Steward and the primary grievant. Witnesses Joseph Heap and Christopher Nolan, who are also Union Officers, were allowed to remain in the hearing after they testified.

A stenotype record and transcript of the hearing were prepared by and under the direction of Tammy Gillett, Certified Reporter, of Squaw Peak Reporters, Inc., Phoenix Arizona. The parties elected to file post-hearing briefs. The Arbitrator received the briefs by e-mail on September 24, 2012. The record was closed upon the receipt of the briefs.

The parties did not agree on the issue to be decided by the Arbitrator, but agreed to allow the Arbitrator to frame the issue to be decided after hearing the case. This is consistent with the CBA. The parties stipulated to the fact that the case was properly before the Arbitrator and the Arbitrator would retain jurisdiction over remedy disputes. The parties also agreed to the following facts:

The fact that FCI Phoenix from the period of time from at least September 29, 2002 through June 18, 2011, sick and annual relief shift provided a 'break' from the "(1) continuous year on a particular shift" as defined in Article 18, Section e. of the Master Agreement.

The fact that at FCI Phoenix the 'three (3) primary shifts' as represented in Article 18, section e. of the Master Agreement are morning shift, day shift, and evening shift.

PERTINENT PROVISIONS OF THE AGREEMENT

Article 4 – Relationship of this Agreement to the 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 USC 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 understanding 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 9 – Negotiations at the Local Level

The Employer and the Union agree that this Agreement will constitute the Master Collective Bargaining Agreement between the parties and will be applicable to all Bureau of Prisons managed facilities and employees included in the bargaining unit as defined in Article 1 – Recognition. This Master Agreement may be supplemented in local agreements in accordance with this article. In no case may local supplemental agreements conflict with, be inconsistent with, amend, modify, alter, paraphrase, detract from, or duplicate this Master Agreement except as expressly authorized herein.

Article 18 – Hours of Work

Section e. Nothing in this article is intended to limit an employee from requesting and remaining on a preferred shift for up to one (1) year. In this regard, no employee may exceed one (1) continuous year on a particular shift, and all officers are expected to rotate through all three (3) primary shifts during a three

(3) year period. This means, for example, that it is possible for an employee to work (1) year on the day shift, followed by one (1) quarter on the morning shift, then a second year on the day shift, then two (2) quarters on the evening shift, and then a final quarter on the day shift, or any combination thereof.

Section g. Sick and annual relief procedures will be handled in accordance with the following:

2. sick and annual relief shift is a quarterly assignment that will not impact upon the rotation through the three (3) primary shifts;

BACKGROUND

The employees covered by this grievance are required to work the three primary shifts, morning shift, day shift, and evening shift. There is also a sick and annual leave relief shift. This shift is to fill vacancies created by employees being sick or on annual leave. An employee is scheduled to work a shift on a quarterly basis. Employees working the sick and annual relief shift could be scheduled for any of the primary shifts and possibly work all three primary shifts in a quarter. Prior to the beginning of the quarter the Agency posts a blank roster notifying the employees of the available shifts. The employees may submit a preference request for the shift they would like to work for the upcoming quarter. A joint union management roster committee considers the preference requests by seniority to complete the schedule. An employee may request and remain on a preferred shift for up to one year but may not exceed one continuous year on a particular shift. An employee must rotate through all three primary shifts in a three year period. The sick and annual leave relief shift is also filled from employee preference requests. If vacancies remain after preference requests are considered the roster committee will assign employees to the shift sequentially, based upon the last quarter the employee worked the shift. This process is consistent with Article 18 of the CBA.

From at least September 29, 2002 through June 18, 2011, if an employee worked a quarter of the sick and annual leave relief shift, it provided the break required from one continuous year on a particular shift. The employee could return to the same shift for up to a year as long as the employee worked all three primary shifts in three years. Beginning in the third quarter of 2011 the Agency changed the practice and no longer allowed the sick and annual leave relief shift to be used as a break. If an employee had worked one continuous year on a preferred shift, then

worked a quarter of sick and annual relief, the employee would now be required to work at least one quarter on a different shift. The employee could then return to the preferred shift and work up to one continuous year as long as all three primary shifts were worked in a three year period.

CONTENTIONS OF THE PARTIES

The Union's Contentions

The Union contends the Agency violated Article 4 Sections a., b., and c. of the CBA (see page 3 for language within article) by not informing the Union of the change, and not negotiating the change, and in not allowing the sick and annual relief shift to count as a break in the one continuous year requirement. Section a. requires the Employer to inform the Union of changes in working conditions. Section b. states that negotiable items will not be changed unless agreed to in writing by the parties. Section c. again requires notification and negotiation.

The Union contends the Agency violated Article 18 Section e. of the CBA (see pages 3 & 4 for language within section) emphasizing the first sentence "Nothing in this article is intended to limit an employee from requesting and remaining on a preferred shift for up to one year".

The Union contends allowing the sick and annual relief shift to count as a break in the one continuous year requirement was a consistent, long term practice understood by the parties and therefore should be a binding past practice.

The Union contends that working a quarter of sick and annual leave relief to break the count for one continuous year on a particular shift is a benefit to the employee. It allows the employee more control over their work schedule and helps in planning their home life.

The Agency's Contentions

The Agency contends the language is clear and Article 18 Section g.2. (see pages 3 & 4 language within section) prohibits the sick and annual relief shift from impacting the rotation through the three primary shifts and the rotation requirement is linked to the one continuous year

requirement. Therefore working the sick and annual relief shift does not meet the rotation requirement or break the one continuous year rule.

The Agency contends the practice of allowing the sick and annual relief shift to count as a break in the one continuous year requirement was in conflict with the CBA. The Agency had the right to bring the practice into compliance with the CBA. The procedure had already been negotiated and did not require notification to the Union or additional negotiations.

The Agency contends that Article 9 (see page 3 for language within article) prohibits local agreements that are in conflict with the master agreement (CBA). Negotiating an agreement that would allow the sick and annual relief shift to count as a break in the one continuous year requirement would be in conflict with the master agreement (CBA) and violate Article 9. Recognizing the practice as a binding past practice and allowing it to continue would establish a local agreement and not be allowed by Article 9.

FINDINGS

The parties did not agree on the issue to be decided by the Arbitrator, but agreed to allow the Arbitrator to frame the issue to be decided after hearing the case. After hearing the case the Arbitrator has determined the issue to be decided is “Did the Agency violate the CBA when it no longer allowed the sick and annual leave relief shift to count as a break in the requirement that no employee may exceed one continuous year on a particular shift. If so, what is the appropriate remedy?”

After reviewing the testimony and evidence, this dispute is a difference in interpretation of the CBA. Article 18 – Hours of Work – Section e. has two provisions. Both requirements are separate and independent of each other, but both must be met. The first provision identifies the requirement that work on a particular shift may not exceed one continuous year. The section states: “an employee may request and remain on a preferred shift for up to one year,” and “no employee may exceed one continuous year on a particular shift”. This first provision does not mention the three primary shifts. It limits an employee from exceeding one continuous year on a particular shift. Since the different types of shifts are not specifically identified in this provision, the particular shift could be any one of the primary shifts or even the sick and annual leave relief

shift if the employee had requested it. As long as an employee bids to a different shift after one continuous year the condition is met. There is nothing in this section that restricts the sick and annual relief shift from being used as a break in the one continuous year requirement.

The second provision identifies the requirement to rotate among shifts. The section states: "all officers are expected to rotate through all three primary shifts during a three year period." This provision only indicates that the employee must rotate among shifts. In addition Article 18 Section g. defines the procedure for handling the sick and annual relief shift. Section g.2. states: "sick and annual relief shift is a quarterly assignment that will not impact upon rotation through the three primary shifts;" this subsection only addresses the rotation requirement, not the one continuous year requirement. For example, when assigned to the sick and annual relief shift an employee could work the morning shift, the day shift, and the evening shift in one quarter. In this example, Section g.2. would prohibit the employee from meeting the rotation requirement in Section e. Therefore, the sick and annual relief shift does not meet the requirement to rotate among the three primary shifts.

AWARD

The grievance is sustained. The Agency violated the CBA by not allowing the sick and annual relief shift to count as a break in the requirement that no employee may exceed one continuous year on a particular shift. The Agency is directed to return to the prior practice of allowing the sick and annual leave relief shift to count as a break.



Kelly J. Hansen, Arbitrator

November, 16, 2012