FEDERAL MEDIATION & CONCILIATION SERVICE
FMCS CASE NO. 14-56538-A

FEDERAL BUREAU OF PRISONS	)	OPINION
	)	
And	)	and
	)	
COUNCIL OF PRISON LOCALS AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 3955 AFGE	))))	AWARD

FOR: Federal Bureau of Prisons
U. S. Department Of Justice
Michael A. Markiewicz
Labor Management Relations Specialist
230 N. First Avenue, Suite 201
Phoenix, AZ 85003

FOR: Council of Prison Locals
AFGE Local 3955
Tom Muther, Attorney
Minahan & Muther, P.C.
Denver, CO 80212

GRIEVANT: All Bargaining Unit Employees of Local 3955

BEFORE: Richard D. Sambuco, Arbitrator

DATE OF HEARING: January 22, 2015

RECEIPT OF TRANSCRIPT: February 14, 2015

RECEIPT OF POST-HEARING BRIEFS: April 6, 2015

DATE OF DECISION: June 19, 2015

PRELIMINARY STATEMENT

On January 22, 2015, an arbitration hearing was held at the Federal Bureau of Prisons (BOP) at 8901 and 9300 Wilmot Road, Tucson, Arizona 85756, hereinafter referred to as the "FCC" or the "BOP" or the "Agency" and the American Federation of Government Employees, hereinafter referred to as the "AFGE", "Council of Prisons" (Local #3955) or the "Union".

Richard D. Sambuco was mutually selected by the parties through the Administrative Services of the Federal Mediation and Conciliation Services to serve as Impartial Arbitrator.

Michael A. Markiewicz, Labor Relations Specialist for the Department of Justice, presented the case for the Bureau of Prisons. Also present was Jason Ludwick, Human Resources Manager, Felecia Ponce, Associate Warden and Amanda Miranda, Human Resource Specialist.

Thomas Murther, Attorney, presented the case for the Union. Also present was Gary England, Union President, and the following witnesses: Tom Ketchmark, Trish Shannan, Teresa Bloomfield, Jordan Borunda, Robert Flynn and Edward Fulgham.

There were no objections with regard to this matter coming before this Arbitrator either on substantive or procedural grounds. Equal opportunity was provided the parties for the presentation of evidence, examination of witnesses and argument in the form of post-hearing briefs.

The record is now closed and the matter in dispute is ready for final decision.

EVIDENTIARY BACKGROUND

The present dispute arises in the context of an arbitration provision in the parties' Collective Bargaining Agreement (CBA) (Joint Exhibit No. 1) which the parties have agreed to execute.

Pursuant to Article 32 – Arbitration, of the CBA (Joint Exhibit No. 1), this matter comes before the Arbitrator the result of a grievance (Joint Exhibit No. 2) which reads as follows:

<table>
<tr><td>U.S. DEPARTMENT OF LABOR</td><td>FEDERAL BUREAU OF PRISON</td></tr>
<tr><td>1. Grievant(s)
All bargaining Unit Employees of Local 3955</td><td>2. Duty Station
FCC Tucson
8901 & 9300 S. Wilmot Road
Tucson, AZ 85756</td></tr>
<tr><td>3. Representative of Grievant(s)
American Federation of Government Employees, Council of Prison Locals #33, Local 3955</td><td>4. Informal resolution attempted with (name person)
A/W F. Ponce</td></tr>
<tr><td colspan="2">5. Federal Prison System Directive, Executive Order, or Statute Violated:
Article 6(b-2)(Q-1), Fair Labor Standards Act, 29 CFR 778.106 Time of Payment; and FLRA Case No. 66 FLRA 100 (2012)</td></tr>
<tr><td colspan="2">6. In what way were each of the above violated? Be specific.
The Agency has failed to properly pay bargaining unit employees at FCC Tucson for overtime worked in a timely manner. This is a violation of the Fair Labor Standards Act, its implementing regulations, and FLRA case law.</td></tr>
<tr><td colspan="2">7. Date(s) of violation(s):
From an unknown date until present.</td></tr>
<tr><td colspan="2">8. Request remedy (i.e., what you want done):
The Union is seeking liquidating damages for all late paid overtime as well as any cost incurred by the Union (including reasonable attorney fees) in event this matter is not resolved through the grievance process and must go to arbitration and any other remedy the arbitrator deems appropriate.</td></tr>
<tr><td>9. Person with whom filed
Louis Winn Jr.</td><td>10. Title
Warden</td></tr>
<tr><td>11. Signature of Recipient</td><td>12. Date signed</td></tr>
<tr><td colspan="2">I hereby certify that efforts at informal resolution have been unsuccessful.</td></tr>
<tr><td>13. Signature of Grievant(s)
All Bargaining Unit Employees of Local 3955</td><td>14. Signature of Representative
/s/Executive Vice President</td></tr>
</table>

The Warden's response to this grievance is as follows:

"Gary England May 29, 2014
Vice President, Local 3955
Federal Correctional Complex
Tucson, Arizona 85756

Dear Mr. England:

This is in response to your grievance filed on May 23, 2014, wherein you allege Management violated Article 6, Sections b (2) and q (11), of the Master Agreement; Fair Labor Standards Act, 29 CFR 778.106, Time of Payment; and FLRA Case No. 66 FLRA 100 (2012).

Block 6 of your grievance is for you to specify in what way the Federal Prison System Directive, Executive Order, or Statute, cited in block 5 of your grievance was violated. The description header for block 6 on the Formal Grievance Form also includes the words "Be specific."

It is your responsibility, as the grieving party, to point out clearly and precisely what is being claimed and to actually specify the staff member(s) you are alleging were not paid in a timely manner. It is not possible or even reasonable to assume Management can follow-up on or even attempt to correct vague and ambiguous allegations of untimely payment of overtime.

Article 6, Section q. (2), of the Master Agreement states, "should an employee realize he/she has received an overpayment/underpayment, the employee will notify their first line supervisor in writing;" There were no attachments or supporting documentation included with your grievance which would indicated that any employee has notified their first line supervisor in writing advising them of an overpayment/underpayment.

Block 7 of your grievance is to identify date(s) of violation(s). You have cited, "From an unknown date until present." Article 31, Section d of the Master Agreement states in part that, "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."

Therefore, your grievance is denied because it is not filed timely and lacks specificity.

If you have further questions, please contact Jason A. Ludwick, Human Resource Manager, at 520-663-5056.

Sincerely,

/s/Louis W. Winn, Jr.
Complex Warden"

The Union's response to the Warden's letter dated May 29, 2014 is as follows:

"May 31, 2014

MEMORANDUM TO: Luis W. Winn, Jr., Complex Warden FCC Tucson

FROM: Gary England, Executive Vice President
AFGE Local 3955

SUBJECT: Notice of Intent to arbitrate.

In accordance with the Master Agreement, Article 32 Section (a), American Federation of Government Employees (CPL-33 Local 3955 hereby invokes arbitration of the Agency Grievance Response dated May 29, 2014.

The Issues Involved are:
From an unknown date to present the Agency has failed to properly pay bargaining unit employees at FCC Tucson for overtime worked in a timely manner. This is a violation of the Fair Labor Standards Act, its implementing regulations, and FLRA case law.

Violations:
Article 6(b-2) (Q-1), Fair Labor Standards Act, 29 CFR 778.106 Time of Payment; and FLRA Case No. 66 FLRA 100 (2012)

Requested Remedy:
The union is seeking liquidating damages for all late paid overtime as well as any cost incurred by the Union (including reasonable attorney fees) in event this manner is not resolved through the grievance process and must go to arbitration and any other remedy the arbitrator deems appropriate."

BACKGROUND OF THE CASE

The Federal Correctional Complex in Tucson, Arizona (The Agency) for purposes of payroll reporting utilizes a computer-based system referred to as the "Roster Program".

The Roster Program is a computer program intended to keep track of "custody" work assignments such as shift work (day, afternoon and night shifts) and overtime work assignments to custody officers. (See Master Agreement, Article 18, and Section d) (Joint Exhibit No. 6).

A roster is simply several sheets of paper compiled on a quarterly basis that list the daily work assignments by date and shift for each custody officer[1] including overtime work.

First-line lieutenants (supervisor) are responsible for monitoring the "roster" sheets in terms of making any necessary changes and any unplanned overtime assignments. Only the first-line supervisor has access to the roster sheets in terms of making any changes. Employees can only observe the"Roster."

For example, Union Exhibit No. 10, Page 4 of T. Bloomfield for the pay period 3/9/2014 through 3/22/2014 contains fourteen work assignments, five of which are overtime assignments for a total of 39 overtime hours. (Four eight-hour overtime shifts and one seven-hour overtime assignment.)

On Page 72 of the employee's (T. Bloomfield) Statement of Earnings and Leave, in the lower right-hand corner the following figures appear in Pay Period Five (5) (emphasis added):

$303.60 GRO ADJ-PP 1404-1404
$264.89 NET ADJ-PP1404-1404

But the figures in Pay Period Five (5) represent a pay adjustment from Pay Period Four (4). Explanation: 14 represent the year and 04 represent the pay period.

The witness: (T. Bloomsfield) testifies is as follows:

[1] Arbitrator's Note: The term "custody" is a locally utilized terminology with reference to correctional officer.

"Q. Is it your understanding that you were being paid for overtime that was worked during an earlier time period?

A. Yes." (See Tr. At Page 161)

When an employee (custody officer) works overtime in a particular pay period, he or she is not paid for the overtime they worked in the pay period that the work was performed but in a later pay period. In some cases several pay periods subsequent to when the overtime was performed depending on the situation. An employee has to wait two or three pay periods beyond the pay period in which the overtime is worked.

The unplanned overtime procedure calls for a front line supervisor (a lieutenant) to assign the overtime work to a particular employee. That employee and the Lieutenant agree on the assignment and the employee signs a slip that he is going to work the overtime. The lieutenant enters the amount of overtime to be worked on a roster sheet. That information is forwarded to "time and attendance" (TA) clerks who then "key" (data entry) the information into a computer system that is forwarded on to the National Finance Center (NFC), an organization that compiles the payroll for each employee and for the entire Federal Bureau of Prisons.

But before the payroll information (both regular pay and overtime pay) can be sent to the NFC, the payroll (regular time and overtime) must be reviewed with regard to its accuracy by a second lieutenant (supervisor) and then forwarded to a captain for certification and then on to the Warden for final approval.

On or around 2011, the Human Resources Department assumed the responsibility of processing the payroll and in an attempt to streamline the procedure, eliminated the approval authority positions of captain and administrative lieutenant.

This procedural change, according to employee testimony, has mitigated to a certain extent, the problem of late payment of overtime. However, from testimony adduced at the hearing, there still appear, depending on the situation, some employees who are still receiving late overtime payments two or three pay periods beyond the pay period in which the overtime was worked.

The U. S. Department of Justice publishes a payroll calendar for Agency use for a particular year. Contained within this calendar are symbols designating "H" for Federal Holiday, "P" for Official Payday and "TA" for Time and Attendance.[2]

With reference to Union Exhibit No. 9 and the month of March 2010, we find Thursday, March 6, 2014 containing the letter "P" designated an Official Payday, and March 20, 2014 containing a second "P" designating a second Official Payday. I conclude this to be a two-week pay period.

Contained within this fourteen day period (March 6 through March 20) is a designation of "TA" on March 11, 2014. This "TA" designation indicates that Time and Attendance clerks (TA) (three clerks) must enter data (employees' regular work time and any overtime some employees may have worked) during the payroll period ending March 20, 2014.

Testimony at the hearing reveals that the "TA" clerks have until Wednesday (March 24) at Noon to make adjustments and corrections to all employees pay prior to forwarding the information on to the National Finance Center. Wednesday, March 12 at Noon is the absolute deadline for submission of payroll data to the NFC for payroll processing for the pay period March 11 through March 25, 2014. (See Union Exhibit No. 9.) Because of this NFC processing deadline, any overtime worked on the afternoon of March 11, 2014 must be "keyed" into the next payroll period beginning March 21, 2014. One can see the difficulty of getting the necessary chain-of-command approvals in time for submission to NFC.

The Department of Justice's publication of the payroll calendar in advance of the year that it becomes effective does facilitate the data entry procedure for regular time and planned overtime. But unplanned overtime worked in the closing days of a pay period does present a problem.

Thomas Ketchmark, a Senior Offices Specialist who at one time was an alternate Time and Attendance clerk, explained the process. (Tr. P. 83-85) While the roster program does contain certain planned overtime assignments (See Article 18, Section d of Joint Exhibit No. 1) once the Agency becomes aware of certain unplanned overtime work to be performed, the Operations Lieutenant (front line

[2] Arbitrator's Note: The original chain of command included the first-line supervisor (Operations Lieutenant), Administrative Lieutenant, Captain and Warden, all requiring approval before forwarding the information on to the National Finance Center for processing.

management supervisor) will determine who is eligible to work overtime and seek volunteers (preference requests) to work the overtime assignment. (See Article 18, Section (a) (L) (C) (d) of Joint Exhibit No. 1). (Tr. P. 97)

Agreement between the Operations Lieutenant and the eligible and selected employee would result in his name being entered into the roster program in advance of the unplanned overtime.

The Operations Lieutenant authorizes and orders both orally and in writing an identified amount of overtime worked by a specific bargaining unit employee. (Tr. P. 98) Upon agreement with the Supervisor, the assigned employee is obligated to work the assignment. (Tr. P. 99).

Once the assigned employee and Operations Lieutenant agree and sign the necessary documents calling for the overtime, the Agency begins the process of obtaining the required management signatures to approve the overtime. This would include the Captain, Associate Warden and/or the Warden. (Tr. P. 110-111)

Tricia Shannon, an eleven-year employee who worked a variety of positions in the Agency while working as Unit Secretary and as the Captain's secretary, had the responsibility to process time and attendance sheets in the period 2007 to 2009. (Tr. P. 142-145)

Ms. Shannon testified under direct examination as follows:

"A. When I would process their time sheets, I would print on the back of the time sheet for each officer or custody person, I would copy from the roster their time for that two-week period and then I would key that time.

So if there was overtime on there, I would key what was on the roster, but also I would take the time sheets and route them from the captain's office, through the captain to the AW to the warden's office and make sure those got routed also. But I'd always key from the roster.

Q. So you would key the overtime from the roster?

A. Yes.

Q. Not – how about the overtime forms, would you wait for those overtime forms to be signed before processing them?

A. No, I didn't.

Q. Okay. So the overtime forms were not a requirement for ensuring employees got paid overtime in 2007 to 2009?

A. No, it wasn't at that time.

Q. During that time period, was there ever any issue regarding delayed overtime payments?

A. No.

Q. Okay. During the time that you did that, was there ever any indication that overtime was fraudulently being worked or that the employees were making off with improper overtime payments as a result of doing it that way?

A. No, not that I'm aware of.

Q. Mr. Muther: Has something changed between 2007 to 2009?

A. As far as I know, after I became warden's secretary, I remember the officers, some of the officers coming into the office and explaining to me that some of the overtime was being delayed now that I wasn't doing the time sheets.

From then I don't know how it changed or who changed the process or if it was changed at all, but that's the way I processed it. That's the way I did it.

And I have had people ask me: How did you do it, you know, when you were captain's secretary? 'Cause it was different. But other than that, I don't know.

All I know is, since they changed over from just each individual department keying their pay for each individual department and it being in one area, I know it's slowed down. I know that time has not been – it doesn't seem as if it's as efficient as it was when it was one department doing their own pay.

Q. Okay. So when you say "one department", what department are you talking about?

A. As in – okay, now there's one to three girls or one to three people keying T and A's, when before when I was doing time and when – well, when I was keying time, it was your own department. So if you were in the Facilities Department, you keyed for

Facilities. If you were in Custody, you keyed for Custody. If you keyed – if you were Unit Management, there was a person in Unit Management that did it. So there were many people that keyed the overtime and keyed the time sheets for their own department.

So after it went to only three people for the whole institution, it kind of put a backlog, I guess you could say it kind of slowed things down, versus just each department taking care of their own.

Q. And how many departments were there?

A. Oh, let's see. You had Food Service, Facilities, Education, Recreation, Custody, Employee Services, Executive Staff; you would have Trust Fund and R and D. I'm trying to think who else? But every department would have their own person to do it." (Tr. P. 146-149)

Another example:

Officer Jordan R. Borunda's overtime work experience for Pay Period Two (2) 2014 and the DOJ Pay Period Two (2) appears as follows: Refer to DOJ 2014 Payroll Calendar.

Date	Time	**Quarterly Roster**	Assignment	Shift
1/27/2014	08:00 – 16:00	**FCC Dec 2013- Mar 2014**	USP Kind 234-2	OT 08:00 – 16:00 (Planned Overtime)
1/28/2014	16:00 – 00:00			
1/29/2014	16:00 – 00:00			
2/1/2014	00:00 – 08:00			
2/4/2014	00:00 – 08:00			
2/5/2014	16:00 – 19:30			
2/6/2014	14:30 – 16:00			
2/6/2014	16:00 – 00:00			

I included this partial example to demonstrate that some of the overtime worked is planned overtime compiled by the joint committee in accordance with Article 18, Section (d) of the Master Agreement. Another way of saying it is some of this overtime is pre-approved well in advance of when it is worked. Which serves to simplify the T&A recording from the Roster?

A total of 53 overtime hours worked in Pay Period Two (1/26/2014 to 2/8/2014) (See CPD Roster Page 5 of Union Exhibit No. 11). (Emphasis added)

The Statement of Earnings Sheet for Pay Period Four of Employee Borunda (Page 90) shows an adjustment as follows: $405.76 GRO ADJ – PP. 1402-1403.There was no gross adjustment indicated in

pay period Three (2/9/2014 to 2/22/2014), which is the subsequent pay period to Pay Period Two. The gross adjustment is shown in Pay Period Four, which is four weeks beyond Pay Period Two.[3]

Robert Flynn, a Senior Officer in the Custody Department with eight-plus years with the Bureau of Prisons, testified as follows:

"Q. (By Mr. Muther) let me ask you, prior to May of 2014, roughly, did you ever have any issues regarding late payments of overtime?

A. Many times.

Q. (By Mr. Muther) All right. I'm going to show you some documents that are right now in front of you that have been marked as Union Exhibit 12. There are actually two sets of documents.

The first set that's grouped together by a staple, do you recognize this?

A. It's my daily assignments.

Q. Okay. And in looking at that, is there – do you have any reason to doubt the accuracy or the validity of that document?

A. No, sir.

Q. Okay.

Q. (By Mr. Muther) All right. And what does the daily assignment reflect or this roster

A. Reflect?

A. Where we worked for that day.

Q. Okay. Does it include both overtime and –

A. Yes it does.

Q. - Regular?

[3] Arbitrator's Note: It was explained at the hearing that each page of the Union Exhibits included an Earnings and Leave Statement documenting where overtime was not paid in the same pay period that the overtime was worked. This information is at the bottom right hand corner of the Statement of Earnings and Leave as a coded entry, i.e., $405.76 GRO ADJ- PP 1402 – 1403.

Q. Okay. So, all right, the next set of documents, if you can turn under the orange piece of paper, do you recognize what these documents are?

A. Yes.

Q. What are these?

A. Leave and Earnings Statement.

Q. Okay. And when you provided them, were they true and accurate to the best of your knowledge?

A. Yes.

Q. Okay. And these pay records reflect late payments of overtime as well as non late payments of overtime; do they not?

A. Yes, they do.

Q. Okay. I'll draw your attention to page 76 of this document.

A. Okay.

Q. Okay, 76. From looking at this, can you indicate whether or not you were paid for a – received a delayed overtime payment for overtime worked in a previous pay period?

A. That's in the Remarks (Indicating), correct?

Q. Okay. So you're pointing to the section there. How much does it look like you got paid?

A. For the correction?

Q. Yes.

A. $495.99.

Q. Oh, okay. So you're adding the 302.96 and the 193.13?

A. Yes.

Q. Okay. Do you know the difference between gross adjusted income and net adjusted income?

A. No, I do not.

Q. Okay, fair enough.

Q. All right. So, but you believe the figure here represents what you were paid late in overtime?

A. Yes

Q. Okay. And do you know when you would have worked this overtime, from looking at this?

A. I do not. I would assume maybe the pay period before or the one before that.

Q. Okay. So you can't tell from looking at this document – or this code there what that means?

A. That's correct.

Q. Nobody's ever explained to you what that means?

A. No.

Q. Okay. All right. Well, let me ask you, let's look again at the first set of documents I referred you to, the roster. You can keep that – whoa. That's all right. Turn back to 75. You're too quick, that's your problem. There's nothing wrong with that.

Page 76, okay.

Q. And now simultaneously get out the roster sheet and turn to page three. And if you look at the period of time between April 6, 2014 and April 19th, 2014, how much overtime did you work.

A. Two.

Q. Two hours?

Two shifts?

A. No, two shifts. 16 hours.

Q. Okay, 16 hours.

So look back at your Leave and Earnings Statements. And you might have to turn to page 75, the page immediately before.

Were you in fact paid for 16 hours of overtime on that pay period?

A. No, sir.

Q. How much – were you paid any overtime?

A. Eight hours.

Q. Eight hours, okay.

Could you show the Arbitrator where that's indicated there on that exhibit?

A. Eight hours (Indicating).

ARBITRATOR SAMBUCO: Wait till I get something. Highlighter (handing to witness).

THE WITNESS: All right. Overtime, eight hours.

MR. MUTHER: Okay.

ARBITRATOR SAMBUCO: He just called my attention to it.

MR. MUTHER: That's fine.

Q. (By Mr. Muther) so of the sixteen hours, eight hours was paid timely.

So if you then turn to page 76, do you know roughly $302.96, does that reflect what you would make for an eight-hour shift of overtime, do you know?

A. I'm not sure, actually.

Q. That's fine.

Okay. So looking at page 76, were you paid for any overtime on that day?

A. Yes.

Q. How many hours of overtime?

A. 32

Q. Okay. Returning back to the roster, looking at the period of time between 4/20 and 5/3, did you work any overtime during that pay period?

A. Yes.

Q. Okay. How many hours of overtime did you work during that pay period?

A. 24.

Q. But you were paid for 32 hours?

A. Correct.

Q. Is it safe to say that the eight hours that you didn't get paid for in the pay period before, added to the 24, equals the 32 hours that you actually got paid for?

A. That's correct.

Q. Okay. And that would be consistent with the information at the bottom, which shows that there was a gross adjustment made of $302.96?

A. Yes.

Q. And just so we can confirm, it looks like, at least, since you worked 24 hours in pay period eight, you got an additional eight hours of pay, making 32 hours; would you agree with me just looking at pay period eight that you would have been caught up at that point in time? The Agency wouldn't owe you any more overtime at that point, correct?

A. Correct.

Q. So let's look at page 77 just to verify if that's the case.

On page 77, does it look like there's any adjustment being made to your paycheck?

A. No.

Q. Okay. So that would confirm then, again, that it looks like at least that at that point in time, the Agency had caught up with its late payments of overtime?

A. Correct.

Q. All right. After working overtime, you would receive a form, would you not, from your lieutenant –?

A. Yes.

Q. - to sign?

Would you ever delay in signing that form?

A. No.

CROSS-EXAMINATION

BY MR. MARKIEWICZ:

Q. Just one for you, Mr. Flynn.

On the one eight hours of overtime that you felt was late paid to you, did you provide anything in writing to your supervisor that you felt your overtime had been paid late?

A. Honestly, I've been paid late so much I don't remember. If I'm paid late or if I don't get the overtime slip on time, I'll e-mail my supervisor, the lieutenant admin, to get another one, and I'll resubmit it.

Q. Just resubmit it?

A. Yes.

MR. MARKIEWICZ: Okay. All right. That's all I have for you. Thank you. (Tr. P. 201 – 209)

At this point in the hearing, the Union had six witnesses prepared to testify. Mr. Fulghrum, Ms. Holiman, Mr. Kensington, Mr. Johnson, Mr. Taylor and Mr. Vera.

Discussion between the parties revealed that these remaining witnesses would be testifying along the same lines as the three previous witnesses. As a result, the parties were in agreement to forego any additional testimony from the remaining witnesses.

Let the record show that since the remaining witnesses (six) were going to provide similar type testimony that has already been introduced into the record, the Agency stipulates that it is not necessary to hear any additional testimony from the Union. (See Tr. P. 210-211)

THE ISSUE

The parties in this matter could not agree on a joint submission of the issue and have deferred to this Arbitrator, upon hearing the merits of the case, to define the issue.

Union's Proposed Statement of the Issue

Did the employer violate the FLSA, impending regulations, and the FLRA case law in the processing and payment of overtime? If so, what would be the appropriate remedy?

Agency's Proposed Statement of the Issue

Did management fail to process overtime payments in accordance with the Collective Bargaining Agreement, Article 18? If so, what is an appropriate remedy?

ARBITRATOR'S STATEMENT OF THE ISSUE

Did the Agency violate Article 18 of the Collective Bargaining Agreement, FLRA case law and any applicable laws, rules and regulations? If the answer is yes, what is the remedy?

MASTER AGREEMENT

"Article 5 – Rights of the Employer

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

1. To determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and
2. In accordance with applicable laws:

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

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

   c. With respect to filling positions, to make selections for appointment from:

Article 6 – Rights of the Employee

Section a Each employee shall have the right to form, join, or assist a labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided by 5 USC, such right includes the right:

Section q The Employer and its employees bear a mutual responsibility to review documents related to pay and allowances in order to detect any overpayments/underpayments as soon as possible.

Article 18 – Hours of Work

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 (30) minute non-paid, duty-free lunch breaks. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break.

Employees on shifts which have a non-paid, duty-free lunch break will ordinarily be scheduled to take their break no earlier than three (3) hours and no later than five (5) hours after the start of the shift. It is the responsibility of the Employer to schedule the employee's break, taking into consideration any request of the employee. The Employer will notify the affected employee of the specific anticipated time that the employee will be relieved for his/her lunch break. Any employee entitled to a non-paid, duty-free lunch break that is either required to perform work or is not relieved during this period will be compensated in accordance with applicable laws, rules and regulations. The Employer will take the affected employee's preference into consideration in determining the manner of compensation (i.e., overtime versus compensatory time or early departure), except in cases where compensation is at the election of the employee. Management will not, without good reason, fail to relieve employees for a duty-free lunch break.

Section d Quarterly rosters for Correctional Services employees will be prepared in accordance with the below-listed procedures.

1. A roster committee will be formed which will consist of representative(s) of Management and the Union. The Union will be entitled to two (2) representatives. The Union doesn't care how many managers are attending;

2. Seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally, there will be no changes to the blank roster after it is posted;

   Section p 2 Overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and the Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be retained by the Employer for two (2) years from the date of said record.

Section q The Employer retains the right to order a qualified bargaining unit employee to work overtime after making a reasonable effort to obtain a volunteer, in accordance with Section p above.

Article 31 – Grievance Procedure

Section a The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

Section b The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

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

1. After the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representatives of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect not to participate.

2. If an employee files a grievance without the assistance of the Union, the Union will be given a copy of the grievance within two (2) working days after it is filed. After the Employer gives a written response to the employee, the Employer will provide a copy to the Union within two (2) working days. All responses to grievances will be in writing.

3. The Union has the right to be notified and given an opportunity to be present during any settlement or adjustment of any grievance; and

4. The Union has the right to file a grievance on behalf of any employee or group of employees.

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 a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statues provide 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 decide timeliness if raised as a threshold issue.

Section f Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

1 When filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over.

Section g After a formal grievance is filed; the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. If the final response is not satisfactory to the grieving party and the party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and

2. A grievance may only be pursued to arbitration by the Employer or the Union.

DISCUSSION ON THE MERITS

Interpretation of Contract Language – Intent of the Parties

The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. The concept that the disputed portions "must be read in light of the entire agreement" has received widespread acceptance. Sections or portions cannot be isolated from the rest of the agreement and given construction independently of the purpose and agreement of the parties as evidenced by the entire document. The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole. (See Elkouri and Elkouri, *How Arbitration Works, 6th Edition*; Alan Miles Ruben, Editor-in-Chief, BNA, Washington, DC, Page 462-463.)

The problem of interpretation arises from the fact that the words in a given document are written at a particular time by persons with special problems and purposes in mind, and then at a later time must be given meaning by other persons in the context of entirely different situations and problems not foreseen or even contemplated by the drafters. Recognizing that the agreement should be interpreted so as to effectuate the intention of the parties, the difficulty is that the parties might not have had a specific intent on how the language they agreed to would be applied. If the parties had a specific intent, and it was ascertainable, the grievance quite possibly would have been resolved prior to being presented to an arbitrator. The best that can be done is to try to determine the general intention of the parties and apply that to the specific problem.

Thus, the question, "If the parties have foreseen this particular problem, what would their intention have been? (See Zinny, Dolson & Barreca, *Labor Arbitration, a Practical Guide for Advocates*, BNA, Washington, DC, Page 222-224.)

Let the record show that this dispute involves the late payment of overtime worked. It does not involve the distribution of overtime or an incorrect calculation of overtime pay.

In fact, the record will show that the employee does get paid for the overtime that he or she worked but at a pay period subsequent to the pay period, and sometimes longer according to the Union, in which the overtime was worked. (Tr.P. 210.)

As relevant in this matter, the Union filed a grievance claiming that the Agency violated the Fair Labor Standards Act (FLSA) when it paid overtime to employees in pay periods subsequent to the pay periods in which the overtime hours were actually worked. (See FLRA No. 100, Decision March 1, 2012.)

In its post-hearing brief, the Agency points out that the Union failed to list a violation date as required by the formal grievance form. On May 29, 2014, management denied the grievance for being untimely filed and failing to provide specificity.

At the beginning of every one of my arbitration hearings, I review with the parties a prepared list of ground rules, the intent of which is to place the parties on notice of how I conduct hearings and what is to be expected from my perspective.

There are several ground rules that I review with the parties. One of the more important caveats is the question: "**Is the grievance properly before this Arbitrator on both substantive grounds and/or procedural grounds?**" (Tr. P. 12-13)

It is with this question that I give either party the opportunity of raising the issue of arbitrability prior to going forward and hearing the case on its merits. Neither party raised the issue of arbitrability prior to going forward on the merits.

In “substantive arbitrability”, the question is whether the subject matter of the grievance or the issue it raises is appropriate for an arbitrator to decide under a particular contract.

In “procedural arbitrability”, the question is whether there is some technical or procedural flaw, such as late filing of a grievance, which would cause the arbitrator to decline to hear the merits of the case.

Given the fact that neither party raised objection to arbitrability, the parties and the Arbitrator moved forward with hearing the case on its merits.

The accepted procedure, if an arbitrability question is raised, is to hear arguments from the parties as to why the grievance is arbitrable or is not arbitrable before hearing arguments on the merits of the case.

A decision by the arbitrator that the matter in dispute is not arbitrable would end the matter and there would be no hearing and decision on the merits of the case.

Of course, participation in the hearing on the merits will not constitute a waiver of objection with regard to arbitrability if the objection is raised as a threshold issue.

Which brings us to Article 31 – Grievance Procedure, Section ©, which reads as follows:

> “If a grievance is filed after the applicable deadline, the Arbitrator will decide timeliness if raised as a threshold issue.”

The record will show both in the Agency’s opening statement and in the presentation of its case, the question of arbitrability either on procedural or substantive grounds was never presented to this Arbitrator. To entertain arguments of procedural deficiency, presented in the Agency’s post-hearing brief, would be a disservice to the Union’s ability to respond.

The issues of timeliness, specificity and lack of a date on the grievance form (Joint Exhibit No. 2) are more than adequately addressed by Arbitrator Richard Fincher’s Award (See FMCS 06-50931); and Arbitrator Joseph A. Alutto’s Award (See FMCS 13-53960).

For me to revisit issues that these gentlemen have so cogently and copiously addressed would be redundant.

The Agency argues that 29 CFR, Section 778.106 pertains to private sector employees and Section 778.106 is part of an official interpretative bulletin of the Department of Labor (DOL). The Agency further argues that provision is not a regulation and does not have the effect of law. The Agency points out that 5 CFR Part 551.101 (c) applies to federal government employees such as those employed at FCC Tucson.

When Congress amended the FLSA in 1974 to extend its coverage to certain federal employees, it indicated that the Office of Personnel Management's (OPM) authority must be exercised "in a manner that is consistent with (DOL's) implementation of the FLSA," and so as to ensure that "any employee entitled to overtime compensation under the FLSA receives it under the civil service rules." *AFGE v. OPM, 821 F.2d 761, 770* (D.C. Cir. 1987). Construing OPM's regulation as precluding the application of a timeframe within which employees must be paid for their overtime hours worked, as the Agency argues, would be inconsistent with DOL's implementation of the FLSA and therefore contrary to congressional intent and §551.101 (c). And, interpreting its own regulations, OPM's view is that, where it has not established regulations regarding the administration of the FLSA, it is "to interpret the FLSA consistent with the DOL's regulations." See OPM Decision F-1801-09-03 at 8 (where OPM has not established regulatory definitions, OPM applies DOL's regulations). As OPM's decision is consistent with the FLSA, it carries persuasive weight. (See *AFGE, Local 2006,* 65 FLRA 465, 469 (2011) (Authority defers to OPM guidance, such as "opinion letters," to the extent that they have the power to persuade).

OPM's regulation is silent as to the timeframe within which the government is required to make overtime payments to its employees for overtime hours worked. 5 C.F.R. § 551.501. However, the regulation does provide that OPM's administration of the FLSA must be consistent with DOL's, where practicable. Specifically, § 551.101 (c) provides, in pertinent part:

OPM's administration of the FSLA must comply with the terms of the FLSA but the law does not require OPM's regulations to mirror DOL's FLSA regulations. OPM's administration of the FLSA must be consistent with DOL's administration of the FLSA only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the FLSA.

The Department of Labor's (DOL) regulation requires that overtime compensation earned in a particular pay period must generally be paid on that pay period's regular payday. (See FLSA, 29 C.F.R., Section 778.106.) Section 778.106, Time of payment, provides in pertinent part as follows:

There is no requirement in the FLSA that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.

When the correct amount of overtime compensation cannot be determined until sometime after the regular pay period, however, the requirements of the FLSA will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in **no event may payment be delayed beyond the next payday after such computation can be made.** (Emphasis Added)

Affected employees cannot read one (the top) section of the above language that appears to lean in their favor and completely ignore the rest of the language. It is the intent of the language that prevails. And the intent of the above language is to get the employees paid within a reasonable amount of time. If not in the same pay period then in the next pay period. Any employer (Agency) that cannot comply with the above requirement is in violation of the FLSA.

(See my explanation of "Interpretation of Contract Language – Intent of the Parties" in this decision.)

The Agency states that a review of the Master Agreement shows that there is no language pertaining to the time period in which overtime monies must be paid.

This is another example of cherry picking language, this time by the Agency, to support its point of view. The dispute (issue) is a violation of the FLSA, 29 CFR Section 778.106 and not the absence of language in the Master Agreement.

One of the key factors in analyzing this problem is the U. S. Department of Justice payroll calendar. This payroll calendar has three color-coded designations that are critical to understanding the problem. The Green code is used to designate the official pay day and the beginning and ending of a pay period.

The Yellow code box (TA) designates the deadline for time and attendance clerks to "key" in the data to be sent to the National Finance Center. This data is taken from the CDL Roster Program which illustrates the employee work assignment, dates and assigned work and hours of work performed. These daily assignment sheets are jointly prepared in accordance with Article 18 – Hours of Work, Section d in the Master Agreement (Joint Exhibit No. 1).

Except for unplanned overtime, these Daily Assignment sheets reflect employee work assignments for both regular hours worked and planned overtime hours worked. Keep in mind that these Roster Sheets are compiled by a committee of representatives of Management and the Union. (See Article 18, Section d of the Master Agreement.)

For all intents and purposes, the <u>planned</u> overtime hours appearing on these Roster Sheets along with the regular hours have been <u>pre-approved by the Roster Committee</u>. (Emphasis Added)

It is the unplanned overtime that must be assigned by the front line supervisor (Lieutenant) upon approval between the Lieutenant and the employee.

The quarterly (Daily Assignment Sheets) Rosters are posted for each employee to observe only. Employee's may want to see what their daily assignments (including regular hours and any planned overtime hours) are for the entire quarter.

It is the unplanned overtime hours worked that the front-line supervisor has the responsibility of assigning, monitoring and posting to the Daily Assignment Sheets. It is the unplanned overtime that must have the chain of command's (Administrative Lieutenant, Captain and Warden) approval before the employee can be paid. This causes the delay that can result in an employee getting paid several pay periods beyond the pay periods subsequent to when he/she performed the work.

Note that I did not include the First Lieutenant in the chain of command of authoritative approval because he makes the assignment. By making the assignment, going through the necessary sign-off with the employee, it is obvious that he approves of the overtime assignment.

My observation at this point is that if Management makes the unplanned overtime assignment, and the employee works the overtime assignment, he should be paid as soon as practicable.

One caveat – Take one example: If the Yellow block (TA) falls on February 11, 2014 (See DOJ 2014 Payroll Calendar) of the third pay period and the employee works the unplanned overtime prior to February 11, 2014, then he should be included in the TA reporting period before the third pay period along with any regular hours or planned overtime hours worked.

Since we know that the TA reporting deadline must be met or no one gets paid, (i.e.,) regular hours or overtime hours worked.

If the employee works the unplanned overtime in the third pay period after the TA reporting deadline he will not be included in the February 11, TA reporting deadline. His/her unplanned overtime worked will of necessity or logically be reported (included) in the February 25, 2014 fourth pay period. Which is the next pay period (fourth pay period) subsequent to the pay period (third) in which the employee worked the overtime? This scenario would be in keeping with the language of FLSA, 29 C.F.R., and Section 778-106.

Federal case law clearly supports the concept that overtime compensation is due, and thus legal claims accrue, at the end of each pay period. See *Beebe v. United States, 640 F.2d 1283 (Ct. Claims, 1981); Cook v. United States, 855 F.2d 848 (Fed. Cir. 1988); and Biggs v. Wilson, 1 F.3d 1537 (9th Cir., 1993).* These cases hold that basically there is no distinction between minimum wages and overtime compensation under the law when it comes to deciding when those wages are due to employees.

CONCLUSIONS ON THE MERITS

The evidence in this case showed that “The Roster” program contains the most accurate and up-to-date information available concerning what overtime hours were assigned by management and worked by employees. Thus, paying employees using the data contained in “The Roster” only makes sense. Paying on that basis may occasionally result in an error being made, but any such errors are not the fault of the employees. They are the fault of the supervisors. And the chance of such errors happening is far less than the chance that an error would occur if payments were made strictly from fully completed Overtime Authorization Forms. These forms can get lost, misplaced, delayed, or simply never signed by all necessary parties. Even if the forms are fully completed, if overtime pay is delayed until they are completed, then the T&A Clerks must then enter a correction to the time and attendance record

for the payroll period when the work was actually performed. And if they do not do that correctly, then the employee will not be correctly paid. And finally, the fact that an Overtime Authorization Form has not been fully completed does not mean that the hours were not authorized or worked. It just means that management has failed in its duty to see that the forms are properly completed after the work has already been performed.

It is the Agency (front-line supervisor) that orders the unplanned overtime to be worked. The Agency doesn't need formal authorization to require the unplanned (emergency) overtime or to pay for the overtime when it is worked. The chain of command overtime authorization is just a method of keeping track of the overtime over a period of time.

LIQUIDATED DAMAGES

The Fair Labor Standards Act provides for an award of liquidated damages in an amount equal to the overtime pay that was either not paid, or improperly delayed. See 29 U.S.C. § 216. The fact that the overtime pay was paid before an action is brought to recover the liquidated damages is irrelevant to determining whether liquidated damages are due in cases where the overtime compensation was paid late. See *Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945), Martin v. Selker Bros., Inc., 949 F2d 1286 (3rd Cir., 1991), and Biggs v. Wilson, 1 F.3d 1537 (9th Cir., 1993).* In the *Brooklyn Savings Bank* case, the employee had accepted a delayed payment of wages from his employer and waived the right to receive liquidated damages. The Supreme Court held that liquidated damages could not be waived and the employer was liable for liquidated damages in an amount equal to the wages that were "overdue" whether or not the employer had paid those wages before the suit was brought. In the *Martin* case, the Third Circuit held that "liquidated damages … compensate employees for the losses they may have suffered by reason of not receiving their proper wages at the time they were due." And in the *Biggs* case,

the State of California paid its highway workers approximately two weeks after the end of the pay period because, at the time they normally would have paid the employees, the state had not yet passed its budget for the fiscal year and state law prohibited the release of paychecks until the budget was approved. The 9th Circuit in that case was quite aware of the reason for the delayed payment in *Biggs*, yet it still held that the late payment violated the Fair Labor Standards Act and that the employees were therefore entitled to liquidated damages. See also *Birbalas v. Cuneo Printing Industries, Inc., 140 F.2d 826 (7th Cir., 1944) and Atlantic Co. v. Broughton, 146 F.2d 480 (5th Cir., 1944), cert. denied, 324 U.S. 883 (1945).*

29 U.S.C. § 260 also deals with the matter of liquidated damages. This section was added to the FLSA in 1947 to provide for a limited exception to the otherwise automatic entitlement to liquidated damages in cases where the FLSA is found to have been violated. In order to qualify for this exception, the employer must show that the act giving rise to the violation was in good faith and that they had reasonable grounds for believing that their action was not a violation of the Act. The limited nature of this exception is shown by the *Martin* and *Biggs* cases cited above, where the courts still found that liquidated damages were appropriate. An employer who has violated the Act bears "a substantial burden of proving that he acted in good faith and on a reasonable belief that he was in compliance" and thus "double damages are the norm, single damages are the exception." *Kinney vs. District of Columbia, 994 F.2d 6, at 12 (D.C. Cir., 1993)* quoting *Walton v. United Consumers Club., Inc., 786 F.2d 303, 310 (7th Cir., 1986).* See also *Mirleles v. Frio Foods, Inc., 899 F.2d 1407, 1414 (5th Cir., 1990)* (liquidated damages under the FLSA are "ministerial, not discretionary"); *Brock v. Wilamowsky, 833 F.2d 11, 20 (2nd Cir., 1987)* ("The Act does not authorize the court to decline to award liquidated damages . . . . Unless the employer has established its good-faith, reasonable-basis defense.")

Furthermore, in applying Section 260, "good faith" requires "a showing that the employer subjectively acted with an honest intention to ascertain what the Fair Labor Standards Act requires and to act in accordance with it." *Kinney, supra. At 12.* See also, *Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 464 (D.C. Cir., 1976)*. To meet this burden, "an employer must affirmatively establish that he acted in good faith by attempting to ascertain the Act's requirements." *Martin v. Cooper Electric Supply Co., 940 F.2d 896, 907 (3rd Cir., 1991)* (citing *Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3rd Cir., 1984)*. The "reasonableness" requirement "imposes an objective standard by which to judge the employer's conduct". Ignorance alone will not exonerate the employer under the objective reasonableness test." *Martin, supra.,* and *Williams, supra.*

An investigation made by the Agency concerning compliance with the FLSA can be relevant to determining whether the Agency acted "reasonably" and "in good faith".

Testimony by Human Resource Manager Jason Ludwick revealed that he looked into 29 C.F.R. Section 778.106 and concluded that the Agency was in compliance. His additional testimony included several comments about why the Agency could not eliminate the problem of late overtime payments. Testimony such as Roster errors, not being allowed to use the Roster program, insuring accuracy, absence of coding requirements to assign to a particular job and overtime authorization forms. (Tr. 217-257.) Since Management personnel are the only people who have access to the Roster Program once it is posted, this testimony carries very little weight.

The Agency denied the grievance in this case, at least in part, because it did not specify what section of the statute or regulations the Union was claiming it violated. But there is no evidence that anyone at the Agency even asked the Union to specify those sections at any time before the arbitration hearing in this case. The Agency knew that the Union thought the Agency

was violating the FLSA, but the evidence does not show that they ever did anything to check to see whether that was true or not.

In *Renfro v. City of Emporia, Kansas, 948 F.2d 1529, 1541 (10th Cir., 1991)*, the court ruled that the employer did not meet its burden of proof under Section 260 of the Act because the only inquiry it made was a phone call to an individual at the Department of Labor whose position was unknown. The court also found it significant that the employer never requested a written opinion from the Department of Labor. Even where opinion letters have been sought, reliance on those letters does not satisfy the good faith and reasonableness standard unless there is a showing that the employer received advice on the specific compliance issue in question, not just that he sought advice about the statute." *Kinney, supra. At 12.*

In *Martin, supra. At 910*, that court held that where there was no affirmative attempt by the employer to determine the legality of its wage payment practices, even "the employer's adherence to customary and widespread practices that violate the Act's overtime pay provisions is not evidence of an objectively reasonable good faith violation."

And finally, the Federal Labor Relations Authority has also weighed in on the issue of whether an employer has met the test under Section 260 for escaping an award of liquidated damages. In *NTEU, 53 F.L.R.A. 1469, 1481-84 (1998),* the Authority cited all of the above referenced court authorities when it found an arbitrator's award which denied liquidated damages to the contrary to 29 U.S.C. § 260 and modified the award to include the payment of such damages. Accepting the FLRA's instruction and direction on this issue, the Arbitrator finds that the Agency has not shown that it qualifies for any reduction in the liquidated damages generally required in these cases. The award will therefore provide for liquidated damages in an amount

equal to the total of overtime compensation payments that were made late to employees in violation of the FLSA.

DECISION ON THE MERITS

THE ISSUE

Did the Agency violate Article 18 of the Collective Bargaining Agreement, the FLRA, case law and any applicable laws, rules and regulations? The answer is yes. The Grievance is sustained.

THE REMEDY

Cease and desist from requiring Overtime Authorization Forms to be completed before employees can be paid the overtime pay that they have earned. Planned overtime hours appearing on the "Roster" have been pre-approved by the Roster Committee. It is the responsibility of the front-line supervisor to ensure accurate posting of unplanned overtime. The Roster Program is the most expeditious vehicle for reporting regular hours, planned and unplanned overtime hours worked.

Pay liquidated damages to all bargaining unit employees whose overtime pay was paid late from May 29, 2014, (Warden's letter), the date the Agency officially recognized the filing of the grievance. The definition of "Paid Late" is overtime that has been paid beyond the subsequent pay period that the overtime was worked.

Pay reasonable attorney's fees and costs in this case to counsel for the Union. Counsel for the Union is directed to submit an itemized bill to the Agency for these fees and costs. If the Agency does not believe that the fees and costs shown on the itemized bill are reasonable, it

should notify counsel for the Union of any objectionable items shown on the bill and then engage in good faith discussions about what would be a reasonable amount.

The Agency is directed to pay one-half of the Arbitrator's fees and expenses pursuant to Article 32, Section d of the Master Agreement. The other one-half payment shall be paid by the Union.

Any relief requested by the Union that is not specifically ordered above is hereby denied.

Decision made in Belmont County, Ohio, on the 19th day of June, 2015.

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Richard D. Sambuco, Arbitrator