

ARBITRATION DECISION AND AWARD

In the Matter of Arbitration	)	
Between:	)	
	)	FMCS Case # 12-56400
American Federation of Government Employees,	)	
Local 3969, Council of Prison Locals,	)	Motion to Dismiss
	)	
Union,	)	
	)	
and	)	
	)	
Federal Bureau of Prisons,	)	
FCC Victorville CA	)	
	)	
Employer.	)	
_____	)	

Arbitrator

Louis M. Zigman, Esq.  
473 South Holt Avenue  
Los Angeles, CA 90048

Dated: August 13, 2013

Appearances

For the Union

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For the Employer

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### Introduction

The hearing was held on May 15, 2013 before Louis M. Zigman, Esq., neutral arbitrator, in Victorville, CA. The union was represented by Thomas F. Muther, Esq. and Joshua L. Klinger, Esq. and the employer was represented by Steven R. Simon, Esq. and Daniel Waugh, Esq.

The hearing was limited to the employer's motion to dismiss the grievance.

Both parties were afforded an opportunity to present evidence and to examine witnesses. After the conclusion of the hearing both parties filed written closing briefs. The matter stood as submitted as of July 3, 2013.

Based on the evidence and contentions of the parties, I issue the following ruling.

### Statement of the Case

A grievance was filed by the union on behalf of all affected bargaining unit employees at the Federal Correctional Complex, alleging violations of the Fair Labor Standards Act (FLSA), the Back Pay Act, the Portal to Portal Act of 1947; and the Master Agreement, asserting that the affected employees should have been paid overtime for pre and post-shifts. The claim, characterized as a "continuing violation," seeks overtime pay of approximately 30-45 minutes of work for approximately 2 1/2 years.

As noted above, the employer made a motion:

"Dismiss all pre-grievance claims and to limit post-grievance claims to only two posts conceivably presented in accordance with the explicit requirements of this contract - Perimeter Patrol and Rear Gate."<sup>1</sup>

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<sup>1</sup> Inherent in that motion is also a request for dismissal of all claims for all of the other posts.

### Background and Material Facts

In March 2012, the union was informed of the possibility of a violation of the FLSA and violations of the Master Agreement.

On April 5, 2012, the union's president, Donald Shults, sent a memo to Complex Warden F. Quintana, thru the Acting Associate Warden, FCC Victorville, B. Jurgensen, stating the union's belief that:

"There is an on-going portal to portal issue at the complex. Bargaining unit employees are working more than 10 minutes a day conducting pre and post shift work without being compensated. The Union would like to set up a meeting to try to informally resolve this issue. Please let me know when you both will be available next week for a meeting."

Copies of the memo along with an email on April 5 at 3:13 was also sent to Associate Warden, Andre Matevousian.

Mr. Matevousian called Mr. Shults the same day and told him that he was out of town. Mr. Matevousian asked if they could meet upon his return and Mr. Shults agreed.

At the regularly scheduled monthly Labor Management Relations Meeting on April 12, 2012, one of the management representatives asked if there were any portal to portal issues.

The union's response was:

"Pre and post not being compensated. (shift change out, vehicle inspections). The Union will provide Management with specifics and Management will schedule a date to meet to discuss."

On April 16, 2012, Human Resources Manager, John Ward, who was in attendance at the April 12th meeting emailed Mr. Shults that they would like to schedule a meeting on April 19th "to address the portal memo you submitted to the Complex Warden."

Mr. Shults agreed and Mr. Ward subsequently provided two of the union's executive board members with official time to attend the portal to portal meeting.

On April 19, 2012, the parties met and briefly discussed the union's concerns. The meeting ended without resolution and with the management team telling the union that a third party would probably have to resolve the issue.

On April 22, 2012, the union filed its grievance.

On May 15, 2012, Mr. Quintana sent the union a two paragraph written response, to wit:

"This letter is in response to your grievance filed on April 22, 2012, ...

Article 31, of the Master Agreement, Section f. (2), states, 'when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director.'

Therefore, for the above reason, your grievance is procedurally rejected."

On June 5, 2012, the union sent a letter to the employer's Western Regional Director, Robert McFadden, invoking arbitration, pursuant to Article 32 of the Master Agreement.

The letter was as follows:

"In accordance with Article 32, Section a of the Master Agreement, AFGE Local 3969 is hereby invoking arbitration on the Portal to Portal grievance that was initially filed on April 22, 2012 (attached). Management issued its response on May 15, 2012.

The issues, as alleged in the grievance are:

[The full language set forth in the grievance followed]

The Union disagrees with the Agency's assertion that the grievance was incorrectly filed."

## Pertinent Provisions of the Master Agreement

### 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 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 statutes provide for a longer filing period, then the statutory period would control.

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 shipping 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;

2. when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director;

3. when filing a grievance against a Regional Director, the grievance will be filed with the Director of the Bureau of Prisons, or designee;

4. in cases of violations occurring at the national level, only the President of the Council of Prison Locals or designee may file such a grievance. This grievance must be filed with the Chief, Labor Management Relations and Security Branch, Central office; and

5. grievances filed by the Employer must be filed with a corresponding Union official.

Article 32 - Arbitration

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement. (My emphasis)

United States Code

29 U.S.C. § 225:

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act --

(a) if the cause of action accrues on or after May 14, 1947 -- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

The Grievance

Formal Grievance Form

U.S. Department of Justice

Federal Bureau of Prison

1. Grievant(s)

AFGE Local 3869, and Employees of Victorville, Complex

2. Duty Station

Federal Correctional Complex - Victorville Adelanto, CA

3. Representative of Grievant(s)

Thomas F. Muther, Jr., Attorney at Law  
Minahan & Muther, PC

4. Informal Resolution attempted with (name of person)

F. Quintana, Complex Warden, A. Matevousian, Associate Warden, J. Ward Human Resources Manager

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

To include but not limited to: Fair Labor Standards Act (FLSA), 29 U.S.C. § 254 (a) (b), Back Pay Act, Portal to Portal Act of 1947; 5 C.F.R 550,112, 5 C.F.R § 551.412; Master Agreement Articles 3, and 18, Other Pay acts and statutes, and any other Supplemental Agreements, MOU's, polices, rules, regulations, and laws.

6. In what way were each of the above violated? Be specific.

The Custody staff or Non-Custody staff on augmented shifts have to do the following:

The door to the lobby of FCI is secured at all times and staff have to wait to be 'buzzed' in preventing staff to enter the Institution in a timely manner, this is before being screened and metal detected.

After staff and all of their personal belongings are then screened they need to put on their duty belt, belt keepers, and boots. Then staff must be processed through the two sets of electronically locked sally port doors and another electronically controlled door, which are opened by the Control Center Officer, to get into the Institution. Then staff is required to wait in long lines in front of the control center where the Control Officer is responsible for issuing out the following minimum equipment radio, keys, and hand restraints, upon receiving their keys they have to count the keys to match the key count tag and inspect all keys for cracks or broken keys. Staff assigned to posts with 24 hour, once inside the institution and past the Control Center staff is then required to contact Operations Lt. who will tell them of any pertinent information. Once on the post the officer must inventory all equipment, check assigned keys for cracked and/or broken keys. Then they must sign the inventory form stating that all the equipment is present and accounted for and note any discrepancies. Staff working in the Special Housing Unit must be visually verified via closed circuit camera at the outer door to the Special Housing Unit by Control Room staff. Control Room staff then calls the Special Housing Unit Officer in Charge via radio the identity of staff at the outer door. The Special Housing Unit Officer in Charge will request via radio to have the Control Center Officer disengage the electronically locked outer sally port door. Once inside the sally port the Special Housing Unit officer will manually unlock the second sally port door so that staff may enter the Special Housing Unit. After all officers report to their post it is also the responsibility of the officer working the post to pass down information regarding the area/port. This Information is extremely vital to staff safety. The information given to the relieving officer can save his or her life. Officer assigned to Special Housing must account for equipment in Officer's station and also in the disciplinary Hearing Officer's office. The oncoming Officer can then let the off-going officer leave the post and/or exit the unit. While all staff are in transit from the Front Lobby, to and from their assigned posts, they are required to be vigilant; constantly supervise, correct and report inmate behavior as well as respond to institution emergencies. Staff must stop at lieutenant's office before and/or after their shifts to track down and sign overtime. The overtime slips are rarely printed off and that can create additional time of up to 30 minutes to have the supervisor electronically look up the particular overtime shift, print it off, sign it then hand it to the staff member to sign and place in the captain's box for review.

The Perimeter Patrol and Rear Gate Officers have to do the following:

Report into their vehicle and start to inventory all the equipment that is in the vehicle. They must account for all equipment, ammunition, firearms and keys located in the vehicle before they can let the other officer go. Each Perimeter/Complex Patrol Officer is responsible for all equipment in the vehicle and if any ammunition/equipment is missing they must notify the Operations Lieutenant immediately before anyone can be relieved. They then have to sign the inventory form stating that all equipment, ammunition and weapons are present and accounted for and note any discrepancies/damage. The Perimeter/Complex Patrol Officer must also do an inspection of the vehicle to ensure that it is in proper working order and note any discrepancies/damage. This includes a visual inspection of the interior and exterior of the vehicle, vehicle fluids, gauges, tires and tire pressure. Tower #6 staff have to count bullets and similar duties at the mobile patrol but with additional less-than lethal munitions and weapons. Rear gate is required to stay until all vehicles have left the secure perimeter. This is a daily occurrence and when the officer's request to be compensated the supervisor discredits the claim and makes a comment to the effect that it is only 30 minutes....

In order for Non-Custody staff to report to their posts they must do the following:

After staff and all of their personal belongings are then screened, they need to put on their duty belt, belt Keepers, and boots. Then staff is required to wait in long lines in front of the control center where the Control Officer is responsible for issuing out the following minimum equipment: radio and keys. Upon receiving their keys they have to count the keys to match the key count tag and inspect all keys for cracks or broken keys. Then staff must be processed through the two sets of electronically locked sally port doors and another electronically controlled door, which are opened by the Control Center Officer, to get into the Institution. Staff may then proceed to their assigned working area. While all staff are in transit from the Front Lobby, to and from their assigned posts, they are required to be vigilant, constantly supervise, correct and report Inmate behavior as well as respond to institution emergencies.

7. Date(s) of Violation(s)

This is a Portal to Portal violation and is a continuous violation that occurs every day and continues to occur.

8. Requested remedy (i.e. what you want done)

- I. Back pay with interest per the FLSA, Portal to Portal Act of 1947, and/or the Back Pay Act for the uncompensated pre-shift & post-shift work.
- II. Reasonable attorney fees be awarded by a third party if sent to Arbitration.
- III. Make every Employee whole by compensating each Employee that is affected 30-45 minutes of overtime a day plus liquidating damages for 2.5 years. This is equivalent to 130 hours a year staff are required to work.
- IV. Overlap or stagger shifts as to eliminate future problems.
- V. Any other remedy that the Arbitrator deems appropriate.



9. Person with whom filed

Francisco Quintana

10. Title

Complex Warden

11. Signature of Grievant(s)

None

12. Signature of Representative

Donald Shults

Positions of the Parties

Employer's Position

The employer asserted that the undersigned should:

"Dismiss all pre-grievance claims and limit post-grievance claims to the only two posts conceivably presented in accordance with the explicit requirements of the contract - Perimeter Patrol and Rear Gate."

In this regard, the employer contended that the invocation of the arbitration did not comply with the requirements in Article 32 because the grievance and the invocation of arbitration lacked specificity. As for example, the grievance and the invocation identified only four posts, even though there are 30 posts with seven shifts with a total of approximately eight hundred employees.

Therefore, by not listing the other posts, the arbitration cannot apply to those other posts.

As support for its position, the employer pointed to Article 31(f) which requires that grievances must be filed on Bureau of Prisons 'Formal Grievance' form and that *block 6* on that form asks:

"In what way were each [of the statutes and articles in the Master Agreement] of the above violated? Be specific. ..."

Similarly, Article 32(a) requires that the invocation of arbitration include a statement of the issues involved, the alleged violations, and the requested remedy.

The employer maintained that the invocation did not include the issues, violations and remedy and therefore in the absence of the required specificity the undersigned should "dismiss the grievance." (citations omitted)

The employer also contended that because informal resolution efforts are mandatory under Article 31(b), the grievance should be dismissed because the union failed to comply with this requirement.

According to the employer, the Union engaged in, at most, "minimal informal resolution efforts," and those minimal efforts did not satisfy the requirement in Article 31(b) - "A reasonable and concerted effort."

Turning next to the union's claim for damages and compensation for pre-grievance claims, the employer asserted that Article 6 (q) of the Master Agreement and the Slade-Sorrels MOU, "squarely and unambiguously precludes" all pre-shift and post-shift wage and hour claims not presented by the next business day. Further, Article 31(d) of the Master Agreement requires the filing of a grievance within forty (40) days of when the grieving party knew, or reasonably should have known, of the grievable occurrence.

Again, according to the employer, the forty day grievance filing deadline in Article 31(d) is also applicable to statutory wage and hour overtime claims in continuing violation cases, citing *USP McCreary*, 2007 WL 2049703, which involved a continuing violation class overtime grievance. The employer also cited the *Restatement (Second) of*

*Contracts Section 202(2)* for the position that arbitrators must give effect to the plain and clear meaning of a contract - and - according to the employer, the language is clear that the statutory period of limitations does not invalidate the 40 day provision in the Master Agreement. (Other citations omitted)

Accordingly, the employer stated:

"All wage and hour claims for putative pre-shift and post-shift work are contractually extinguished absent prompt filing the next business day."

The employer also maintained that Arbitration precedent precludes pre-grievance claims in continuing violation cases based on the language in the Slade-Sorreles MOU, citing *FBOP FCI Milan-and-AFGE Local 1741*, 2006 WL 241896, limiting back pay claims to date that the arbitration panel was requested.

According to the employer:

"This precedent under this contract is fully consistent with general arbitration precedent, citing Elkouri & Elkouri, *How Arbitration Works*, Chapter 5 Section 7 A.ii. Continuing Violations pp. 218-219 (6th edition, 2003) ('arbitrators permit the filing of [continuing violation] grievances at any time, although any back pay would ordinarily accrue only from the date of filing')."

In view of the foregoing, the employer maintained:

"That the Perimeter Patrol and Rear Gate post claims meet both the informal resolution and specificity requirements of this contract.

The Union's evidence at best shows that only two posts are both raised in the alleged informal resolution meeting and identified in the Grievance, Perimeter Patrol (Mobile) and Rear Gate. ... Accordingly, under any reading of the record only those two posts are conceivably presented under the terms of this contract. ... Putative claims as to all other posts, positions and departments should be dismissed for non-compliance with procedural requirements of this contract. *FPC Seymour Johnson*, 2006 WL 2355160 pp. 7-9; *FCI Forrest City*, 2002 WL 31267797 pp. 19-20."

### Union's Position

While noting that the employer contends that the union did not engage in attempts to informally resolve the grievance, the union maintained that that contention is simply not true.

In this regard, the union noted that the evidence is undisputed that the parties engaged in an informal meeting on April 19 but no resolution was achieved. The union also noted that the Complex Warden, Mr. Quintana and his subordinate Associate Warden, Mr. Matevousian, were invited but the Human Resources Manager, Mr. Ward, was designated in their place.<sup>2</sup>

Based on the foregoing, the union maintained that the employer's argument has no merit.

Turning next to the employer's contention that the grievance should be denied because it is not specific, the union initially noted that the Master Agreement does not establish any level of specificity. More particularly, the union pointed out that the word "specific" isn't even in Article 31 of the Master Agreement. The only place specificity is mentioned is in block 6 of the employers' grievance form. According to the union, the grievance does provide plenty of information about the nature and scope of the dispute.

The grievance identifies those employees whom the allegations cover; all custody employees and all non custody employees in the bargaining unit who work at the FCC Victorville Correctional facility, including correctional officers, case managers, correctional counselors,

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<sup>2</sup> While noting that the employer contends that Mr. Matevousian did not attend the April 19th meeting, the union pointed to Mr. Shults' testimony that he did and that the union's notes of the meeting showed Mr. Matevousian. The union also noted that after Mr. Matevousian initially flat out denied attending that meeting, he later testified that he simply couldn't recall if he attended or not.

recreation specialists, teachers, etc. While also noting that the grievance does not specifically set out each and every custody and non-custody position at FCC Victorville, the union asserted that the clear intent of the grievance is to cover all bargaining unit employees who work within FCC Victorville.

As such, the union stated that:

"[Its] grievance provided the Agency clear notice of the scope of the Union's grievance (i.e. all bargaining unit employees); the factual basis for the grievance (i.e. examples of 'pre-shift' and 'post-shift' duties employees are performing which they are not getting paid for); the alleged violations of law (FLSA and implementing regulations); and the specific remedy that the Union is seeking on behalf of the bargaining unit. In fact, Warden Quintana, unlike his attorneys, had no lack of understanding regarding the nature and scope of the grievance."

Based on the foregoing, the union maintained that the employer's argument that the grievance should be deemed not arbitrable based on a failure of specificity, has no merit.

While noting that the employer initially contended that the grievance was not arbitrable because it raised a National issue, the union noted after it informed the employer that it was not alleging any dispute regarding national issues, the employer did not raise that contention in its closing brief.

According to the union, the employer simply misconstrued the nature and scope of its grievance.

In completing its argument, the union stated:

"The Union's grievance ... relates solely to unpaid overtime compensation that bargaining unit employees should be compensated for before and after commencement of their shifts including but not limited to the donning of a duty belt, metal clips, metal chits, chains, and radios after the metal detector as compensable work under the portal to portal act."

In view of the foregoing, the union maintained that the employer's argument that the grievance should be deemed not arbitrable because it involves a matter under the National Agreement has no merit.

Turning next to the employer's contention that the grievance was not properly filed because it was filed with the Complex Warden, the union pointed to Article 31 (F) (1).

As support for its position, the union stated that the grievance involves the employer's failure to properly compensate overtime to bargaining unit employees at the FCC Victorville facility. Inasmuch as the Captains under the Warden have the authority to approve overtime for hours, Article 31 requires the Union to file the grievance with the CEO.

Based on the foregoing, the union maintained that the employer's argument that the grievance should be deemed not arbitrable because it was not filed properly has no merit.

Turning next to the employer's contention that the grievance was not filed in a timely manner, the union initially pointed out that the employer did not raise that defense before the hearing and therefore should be barred on the basis of waiver as an untimely objection.

On the other hand, the union maintained that the grievance is arbitrable because the FLSA statute of limitations applies, pointing to Article 31(d).

Thus, according to the union:

"The MLA grants an exception to the 40 day time frame for filing a grievance where 'statutes provide for a longer filing period, then the statutory period would control.' ... The FLSA provides for a two year (or, in the case of willful violations, three year) statute of limitations for filing claims -9 U.S.C. § 225(a) (2013). Given the MLA's deference to statutory filing periods, the overtime issues cited by the Union clearly falls within the 2 (or 3) year filing." (citations omitted).

As additional support for its position, the union noted that the Fair Labor Standards Act is a statute where continuing violations are permitted as a matter of law. (citations omitted). As has been held by many arbitrators, FLSA grievants are seeking recovery for a series of repeated violations of an identical nature, each of which gives rise to a new cause of action.

The union continued:

"The standard for determining whether an employment practice constitutes a continuing violation was set forth in *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980); (citations omitted) Each failure to pay overtime constitutes a new violation of the FLSA. ...

Accordingly, based on well settled FLSA case law and arbitration decisions the Agency's timeliness argument is without merit as it relates to the portal grievance."

In view of the foregoing, the union maintained that the grievance is timely.

The union therefore seeks a ruling from the undersigned denying the employer's motion.

#### Analysis and Conclusion

After considering the evidence and the positions of the parties, I find that the evidence does establish that the parties participated in the informal resolution process prior to the filing of the grievance.

As noted above, the evidence is undisputed that the parties met on April 19, 2012 where they discussed the grievance. The fact that Mr. Quintana did not participate in the meeting is irrelevant inasmuch as the weight of the evidence disclosed that his designees, Mr. Matevousian and Mr. Ward, participated.

With respect to the issue of specificity, I note that the grievance identifies that it covers all of the employees, "custody staff and non-custody staff at the at the Victorville, CA Federal Correctional Complex," - which by implication includes all 30 posts and all employees in the bargaining unit who worked time (overtime) during their pre and/or post shifts.

Additionally, the information described in block 6 of the grievance form amply describes that nature of the time involved pre and/or post shifts and that that time is claimed as overtime requiring overtime pay. While each individual who the union believes is entitled to the overtime pay and how much time each is entitled to has not been identified, the fact is that the employer should know the nature of the grievance and what is being grieved.

Given the fact that the grievance was appended to the invocation of arbitration, the evidence demonstrates that the invocation included sufficient information with respect to the issues (alleged failures to have paid the employees for time worked pre and/or post shifts), alleged violations (of specifically enumerated statutes and Master Agreement provisions) and requested remedy (described in block 8 of the grievance).

With respect to the pre-grievance claims, I found the union's contentions persuasive that the language in Article 31(d) specifically provides for a an exception to both the 40 day period in the same article and the one business day time frame in Article 31(q), because the last sentence in Article 31(d) specifically states that the longer



filing period for grievances alleging violations of statutes is to be applied.

The employer's "interpretation" as with reference to the Restatement (Second) of Contracts Section 202(2); to Article 31(q) and to the Slade-Sorreles MOU is interesting, but not persuasive.

While there may be other defenses to claims preceding the grievance filing, I am only dealing with a *motion to dismiss* and for the reasons noted above, do not find the employer's contentions, persuasive.

As the union pointed out and I agree, there is a generally well accepted arbitral principle that doubts as to procedural defenses should be resolved against the forfeiture of grievances. On the other hand, forfeitures are to be enforced where the language is clear as to the parties' intent to forfeit/dismiss grievances based on procedural violations. (citations omitted).

In this regard, I also note the employer did not point to language in the Master Agreement where both parties specifically agreed that the failure to file the grievance in a timely manner - or the failure to include the issues, allegations and/or remedy - shall result in the grievance being forfeited or to be dismissed. Many collective bargaining agreements contain such language.

While one can certainly "argue" that the use of the phrase "must be filed" or "will be filed" in Article 31(d) and (f) and in Article 32, requires the grievance to be dismissed against the approximate 28 posts for such a failure, that argument is simply "an interpretation" by the employer. It is an *interpretation* because that interpretation appears reasonable on its face. However, and as noted above, there was no evidence proffered by either party as to what the parties intended as the result of such a failure - and more importantly - there is no evidence that the failure was to result in dismissal.

Further, one can also "argue" that these procedural failures would result in other options, i.e., delays in the process until fulfilled, waivers of back pay on the basis of equitable principles, etc. Again, in the absence of clear and unambiguous language setting forth both parties' intent that procedural failures are to result in dismissals of grievances, and in light of the generally accepted arbitral policy of avoiding forfeitures except in clear cut situations, I did not find the employer's position persuasive that the grievance should be dismissed.

In view of the foregoing, the motion to dismiss is denied.<sup>3</sup>

Because of the potential of numerous claims on behalf of numerous employees, the union is ordered to provide the employer with a list of the names of each employee, the date(s), times and amount of overtime compensation being sought on behalf of each, no later than September 29, 2013, unless the parties mutually agree on some other date.

Respectfully submitted,

Louis M. Zigman, Esq.  
Arbitrator

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<sup>3</sup> Busk v. Integrity Staffing Solutions, Inc. 713 F.3d 525 is not applicable to the motion to dismiss.