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December 6, 2006

Betty J. Gannon
Labor Relations Specialist
Bureau of Prisons
230 N. First Avenue, Suite 201
Phoenix, Arizona 85003

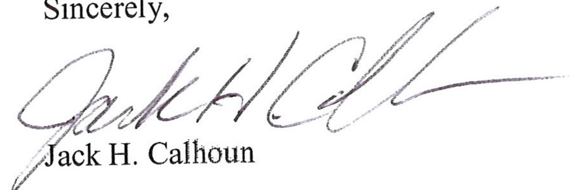
Sam T. Heuer
Coplin & Heuer
124 West Capitol Avenue, Suite 1650
Little Rock, Arkansas 72202

RE: FMCS No. 05-57849 Arbitration

Dear Ms. Gannon and Mr. Heuer:

Enclosed is my Opinion and Award in the matter referenced above. I have also enclosed my statement of fees and expenses.

Sincerely,



Jack H. Calhoun

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Enclosure

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December 6, 2006

STATEMENT OF FEES AND EXPENSES
(IRS Employer No. 81-0458895)

BILL TO:
American Federation of Government Employees, Council of Prisons Local 1242 and Federal Bureau of Prisons, United States Penitentiary, Atwater, California.

RE: FMCS Case No. 05-57849

HEARING DATE: September 14, 2006

FEES:	1.5 days travel Moreno Valley—Atwater—Moreno Valley; 1.0 day hearing; 3.5 days, review, research, write = 6.0 days @ $950.00 per day	$5,700.00
EXPENSES:	Hotel and meals	$311.83
	Travel Moreno Valley—Atwater—Moreno Valley, by automobile, 700 miles @ $.50 per mile	$350.00
TOTAL:		$6,361.83
	½ payable by American Federation of Government Employees	$3,180.92
	½ payable by Federal Bureau of Prisons	$3,180.91

112-05 CA

IN THE MATTER OF THE GRIEVANCE
ARBITRATION BETWEEN

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISONS, LOCAL 1242 Union, and FEDERAL BUREAU OF PRISONS, UNITED STATES PENITENTIARY, ATWATER, CALIFORNIA Agency.	)))))))))))	OPINION AND AWARD

FMCS CASE NO. 05-57849

Jack H. Calhoun
Arbitrator

HEARING HELD
SEPTEMBER 14, 2006
ATWATER, CALIFORNIA

APPEARANCES

FOR THE UNION:

Sam T. Heuer
Coplin & Heuer
124 West Capitol Avenue, Suite 1650
Little Rock, Arkansas 72202

FOR THE AGENCY:

Betty J. Gannon
Labor Relations Specialist
Bureau of Prisons
230 N. First Avenue, Suite 201
Phoenix, Arizona 85003

BACKGROUND

The American Federation of Government Employees, Council of Prison Local 1242 (the Union) and the Federal Bureau of Prisons (the Agency) are parties to a collective bargaining agreement, the Master Agreement, that provides the procedures to be followed when grievances are filed. The Union filed a grievance on June 21, 2005 alleging that the Agency had violated the agreement and applicable statutes and regulations. The Agency responded denying the grievance on the grounds it was not timely filed and lacked specificity. The Union notified the Agency it was invoking arbitration pursuant to the Master Agreement. The Agency responded by stating the notification did not comply with the requirements of the Agreement and stated the matter would be raised as a threshold issue at arbitration. At hearing the parties presented evidence and made argument on the procedural challenges that the Agency had raised. They agreed the arbitration was to resolve the procedural questions. If necessary, a hearing on the merits of the dispute would be held at a later date.

ISSUES

The following threshold issues are to be decided:

1. Whether the grievance was timely filed.
2. Whether the grievance lacked specificity.
3. Whether arbitration was properly invoked.

The Agency argued at hearing that the Union submitted its witness list to the Agency late, in violation of the Agreement; therefore, the Union should not be allowed to call witnesses whose names appeared on its list. The Agency motion was denied. On review, it is apparent the Union submitted the list timely.

RELEVANT PROVISIONS OF THE MASTER AGREEMENT

The following provisions of the parties' Master Agreement are relevant to the issues in dispute:

> ARTICLE 31 – GRIEVANCE PROCEDURE
>
> . . .
>
> Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of a 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 e. If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issues.
>
> . . .
>
> 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 the 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 a 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.
>
> . . .
>
> Section f. The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness list can be exchanged...up to the day prior to the arbitration.

FACTS

On June 10, 2005, Union officials Phillip Rodriguez and Jeremy Schroer wrote a memorandum to Warden Schultz regarding the informal resolution of what they described as portal-to-portal issues. The memorandum stated pre-shift and post-shift work assignments were related to each employee's principal duties and were indispensable to the performance of these duties. Due to the unique security concerns of

the prison, the memorandum pointed out that most employees had to pass through several security barriers to pick up and turn in a variety of equipment that had to be immediately inventoried and accounted for. Moreover, the memorandum continued, employees had to check in and/or attend to other related business, travel to their assigned post, relieve the departing shift employees and receive any necessary briefing from them. According to the memorandum, the Fair Labor Standards Act and the Federal Employees Pay Act require that work of a "preparatory or concluding activity" or a "pre-shift or post-shift" must be credited as hours of work. The concluding paragraph of the memorandum asserted that the Agency had failed to properly credit or compensate its employees for such work in violation of the Fair Labor Standards Act. The Union requested compensation for all bargaining unit employees from May 2002 to May 2005 in the amount of 30 minutes back pay plus interest for each day the Agency was in violation of the law.

Mr. Rodriguez had discussions with Warden Schultz in an attempt to informally resolve the Union's concerns regarding the subject of the memorandum. Both parties did time studies to resolve the portal issues. No resolution was reached.

On June 16, 2005, Gregory Porter, Employee Services Manager, issued a written response to the Union's memorandum dated June 10, 2005. The letter stated that the Union did not say in its memorandum what requirements the Agency had placed on the employees; it did not state who had been harmed nor the dates and times of the alleged violations. Mr. Porter said the Agency had not mandated any pre-shift briefings or post-shift briefings, nor had it required any pre-shift or post-shift business. All employees were given ample time to report to their duties from the key line the letter stated.

Mr. Rodriguez discussed portal-to-portal issues with prison officials in July of 2002 regarding employees who were late in reporting to their duty stations because of duties they had to perform prior to reporting to their duty stations. At that time the Union was willing to settle the issue for a 15-minute compromise. No settlement on the portal-to-portal issue was reached during the ensuing years.

On June 21, 2005, the Union filed a formal grievance with the Warden. In it the Union listed, as Agency violations, the Master Agreement, 29 CFR, the Fair Labor Standards Act and the Portal to Portal Act. It stated that the Agency had failed to properly credit or compensate employees for what the law and regulations deemed to be hours worked. The date of the alleged violations was shown as May of 2002 and "continuing daily." The remedy requested by the Union was compensation for all bargaining unit employees starting from, but not limited to, May 2002 to May 2005. The Union requested that all bargaining unit employees receive 30 minutes plus interest of back pay overtime for each day the prison was in violation of applicable laws and contracts.

On July 7, 2005, the Warden responded to the grievance by pointing out that it was rejected because: (1) It was not timely filed, the contract required grievances to be filed within 40 calendar days of the alleged occurrence, and (2) it failed to provide names of employees harmed and the specific dates and times of the alleged violations. The response noted that the Agency did not mandate any pre-briefing or post-briefing or pre-shift or post-shift business and that all employees were given amply time to report to their assigned post from the key line.

On July 21, 2005, the Union invoked arbitration by issuing a memorandum to Warden Shultz. It listed the Master Agreement, 29 CFR, the Fair Labor Standards Act, and the Portal to Portal Act as areas violated by the Agency. The remedy requested was compensation in the form of 30 minutes overtime plus interest for all bargaining unit employees from May 2002 to the present.

On July 30, 2005, and again by correction on September 30, 2005, the Agency issued its response to the Union's arbitration memorandum. It stated that the Master Agreement, Article 32 required arbitration notification to include a statement of the issues involved, the alleged violations and the remedy requested. The Agency said the Union's notification did not meet the intent of the Agreement.

On August 14, 2006, Mr. Porter authorized, by memorandum, payment to 41 employees for overtime due to what he described as a "portal-to-portal" issue. He indicated he and Ms. Gannon had reviewed the necessary information and determined those 41 employees were due overtime from May 13, 2005 through June 21, 2005.

SUMMARY OF AGENCY'S POSITION

The Agency contends the grievance is not arbitrable because of deficiencies in the grievance and in the invocation of arbitration. The grievance form requires the Union to provide information regarding the directive, executive order or statute alleged to be violated. The Union listed the Master Agreement, 29 CFR, Fair Labor Standards Act and Portal to Portal Act; however, it was apparent that the Union official who filed the grievance did not know what the regulations were and had only based his writing on what had occurred at other institutions. He was unable to provide specific information on what the Agency had violated.

It appeared, according to the Agency, that the Union was alleging that every bargaining unit employee performed unidentified duties every day since May of 2002. The Union did not provide specific information on which employees had performed work for which they should have been compensated. No information was given as to which employees should be compensated, what activities they were engaged in, who ordered them to do the work or when it occurred. It was left to management to attempt to determine what activities might have been performed by whom.

Employees at the prison have a certain degree of autonomy. Supervisors are not located in the exact work area. It is up to individual employees to notify their supervisor if they believe they are entitled to overtime for work that was done but for which overtime was not authorized in advance, the Agency maintains.

A grievance filed in June of 2005 about events that occurred in May of 2002 is not timely, the Agency argues. The term "continuing violation" has often been used to rationalize the Union's failure to abide by the Master Agreement. The Union could have negotiated a reference to "continuing violation" into the Agreement but it chose not to do so. The Agreement forbids the Arbitrator from adding to the contract; therefore, the term "continuing violation" is not applicable to this case. To make it so would amount to altering the Agreement.

The Union relies on statute, the Agency contends. However, such reliance is misplaced. The Master Agreement is controlling and it is clear that grievances must be filed within 40 days of the alleged occurrence. In case after case, the Agency has argued that a grievance was procedurally deficient.

The Union's invocation of arbitration was also fatally flawed. It failed again to provide specific information. The Agency was left with a vague document that did not state how, when, why or which employees were harmed by the alleged violations.

The Agency contends it is not probable that all bargaining unit employees worked 30 minutes of overtime every day from May of 2002. The Union failed to carry out it's contractual obligations when it invoked arbitration.

The Union is experienced in filing grievances and is aware of the requirements, the Agency argues. It is aware other arbitrators have dismissed grievances because of deficiencies. While arbitral decisions are not precedents, it is important to note that other arbitrators have rejected the continuing violation theory. It is the Union's responsibility to ensure that the Agency has enough information to investigate the Union's allegations. In spite of frequent requests, the union has never provided information that would enable the Agency to ascertain the veracity of the Union's claims.

SUMMARY OF UNION'S POSITION

The Union contends the grievance concerns a continuing violation and is arbitrable for the period of time set forth in the grievance. Timeliness is the only issue that can be taken as a threshold matter because of the language of the Master Agreement at Article 31.

Regarding the specificity of the grievance and the invocation of arbitration, the Union contends that the language in the memorandum, informal resolution, invocation and the grievance were sufficient to place the Agency on notice of the claim and substance of the grievance. The Union has filed numerous grievances during the life of the Master Agreement. They have been filed in a similar manner regarding content and

procedure. The instant grievance was filed in the same manner as other portal grievances throughout the Bureau of Prisons. Every portal case for the past three decades has been a continuing violation. The Union has filed grievances in the same manner as the instant grievance on numerous portal cases. There is no requirement that a grievance be drafted in legalese. The Warden knew what the grievance was about and he admitted this at hearing.

The alleged violation is of a continuing nature, the Union asserts. A continuing violation is one where the act of the employer complained of may be said to be repeated from day to day, such as a failure to pay an appropriate wage rate or acts of a similar nature. Numerous arbitrators have held that continuing violations of the contract give rise to continuing grievances in the sense that the act complained of may be said to repeat from day to day. The alleged violation is clearly a continuing violation and every day appropriate compensation is not made is a new and separate violation. Therefore, whenever the grievance was filed would have been within one day of the grievance occurrence and in accordance with Article 31 of the Agreement. The Union has clearly shown that there is a pattern and practice of treating portal violations as continuing violations.

While Mr. Porter stated he could not determine what the issues were from the grievance, he stated that he and Ms. Gannon reviewed employee records and found 41 employees who had worked 30 minutes beyond their shift. Porter admitted these employees were entitled to payment because it was a portal issue. It would seem the same records would have been available in June of 2005, the Union argues. Mr. Porter

admitted he was not aware of a portal-to-portal case that was not based upon a continuing violation.

The Union maintains that the Agency was aware of the portal-to-portal issues in July of 2002. Time studies were performed by both the Union and the Agency. The Agency has admitted the problem existed by the fact it effectuated overtime pay to various employees based solely on a review of their time records. The Warden admitted that, as to specificity, he knew what the grievance was about and that the invocation of arbitration contained the three requirements set forth in the Master Agreement. The record is replete with evidence that a portal-to-portal claim is treated as a continuing violation for purposes of arbitration.

OPINION

The Master Agreement at Article 31 requires that grievances be filed within 40 calendar days of the alleged occurrence or 40 days from the date the grievant could reasonably be expected to have become aware of the occurrence. The arbitrator is to decide timeliness when it is raised as a threshold issue. The grievance was filed in June of 2005. While the Agency argues that it was untimely and should be dismissed, the facts in evidence and the majority of arbitral authority are to the contrary. See *Labor and Employment Arbitration,* Bernstein, Gosline and Greenbaum, Eds., 2nd Ed., Matthew Bender, 2002, 8.03 [5]; *How Arbitration Works*, BNA 6th Ed., 2003, pp. 218-219; and Fairweather's *Practice and Procedure in Labor Arbitration,* Schoonhoven, BNA, 4th Ed., 1999 pp. 129-130. Although a belated filing of a grievance under the terms of a collective bargaining agreement may lessen the retroactive remedy, pay claims invoke a

continuing violation theory that holds that each alleged improper payment constitutes a separate violation of the contract that starts anew the grievance filing period.

Arbitrator Gangle, in *Federal Bureau of Prisons and American Federation of Government Employees, Council of Prisons Local 3379*, 114 LA 1126 (2000), states the prevailing view:

> The principle of continuing violation ordinarily applies in cases where a union wishes to grieve allegations of on-going contract violations, some of which occurred within the applicable grievance-filing time period, and others of which may have occurred in the past, before the applicable grievance-filing period began, but had not been grieved by the union. Such cases may even include alleged improper payments of wages or benefits to employees that have gone on for a long period of time, even years. In such cases, the union has waived its right to grieve the issue because it has failed to file a grievance within the applicable time limitation after the earliest event. Arbitrators, however, tend to agree that such cases constitute continuing violations and that each new paycheck raises a new opportunity for the union to grieve the improper payment of wages.

The Agency argues that since the Union could have negotiated a reference to a "continuing violation" into the Master Agreement but did not, therefore, the continuing violation theory is inapplicable here and to apply it would amount to the arbitrator inappropriately adding to the contract. However, Article 31, Section d is clear and unambiguous, it is the Agency's burden to shown conclusively that the parties' intent was that such language precludes the application of sound arbitral case law that recognizes continuing violations even absent specific contract language that spells it out. The Agency did not show that to be the intent of the parties. The Union could have argued that since the Agency did not negotiate a provision into the contract that precluded the application of the continuing violation theory, the Agency should be banned from raising the issue in opposition to a continuing violation. The point is, specific language in the

agreement is not necessary before the theory may be applied, although specific language prohibiting it would be necessary to preclude its application.

Arbitrator Fincher's holding in *AFGE and Federal Bureau of Prisons,* USP Atwater, California, June 22, 2006, is not persuasive as to continuing violations and is contrary to established arbitral authority. See *Labor and Employment Arbitration, How Arbitration Works* and *Fairweather's Practice and Procedure, infra* and the cases cited therein. His holding was also based on the hearsay statement of a retired management official. The grievance was timely filed in the instant case.

The Agency also believes the grievance lacked the necessary specificity and should be dismissed. The Union argues that specificity is not a proper threshold issues. In the interest of resolving the dispute over specificity and in resolving the procedural issues in their entirety, I will rule on the specificity issue raised by the Agency.

A grievance is not a pleading at law. If, on its face, it provides sufficient information for the employer to respond, it is sufficiently specific. The grievance filed in this case was sufficient to allow the Agency to evaluate and remedy the alleged violations. There is no requirement that it be overly detailed.

Union and Agency officials met and attempted to resolve the substantive issue raised by the grievance. They both did time studies regarding the portal issue. Without further information from the Union than what was on the grievance the Agency found numerous employees who were underpaid over a 40-day period. The Agency is the keeper of the records and the Warden knew what portal issues were about. The Agency was not disadvantaged. It was not necessary that the Union list all affected bargaining

unit employees by name and activity or who their supervisors were. The Agency is in the best position to obtain that information.

The grievance form filed by the Union was sufficient to apprise the Agency of the nature of the Union's allegations. It listed the document, regulations and statutes it believed to have been violated, as the grievance form required. It then specified in what way each listed item had been violated—failure by the Agency to compensate employees for hours worked. The remedy requested by the Union was then set out on the form.

The Agency's third objection raised as a threshold issue was that the invocation of arbitration was fatally flawed, i.e., the Union failed to follow the requirements of the Master Agreement, Article 32. That provision in the contract requires the aggrieving party to notify the other party regarding the issues involved, the alleged violations and the requested remedy. The notification is to be in writing.

This issue is similar to the specificity issue raised by the Agency with respect to the completed grievance form that the Union filed. The memorandum filed by the Union pursuant to Article 32 of the Agreement is essentially a reiteration of what it stated in the filing of the completed grievance form.

The Union gave notice, in writing, to the Agency. It stated the sources of the alleged violations. The issue, while not identified separately as such, was readily inferred by a reading of the requested remedy and the sources of the alleged violations. The remedy itself was set forth succinctly and concisely. It was sufficient to put the Agency on notice of the Union's claim and the substance of its reason for seeking arbitration. The grievance and invocation of arbitration must be read together. There was no need to

cut and paste the issue, violations and remedy from the grievance to the invocation of arbitration notice, although that is essentially what the Union did.

The Agency argues that it is not probable that all bargaining unit employees worked 30 minutes overtime every shift from May of 2002 through the date of the grievance, especially since the prison was not at full capacity for a year. That is no doubt an Agency argument worth noting when the substantive issue goes to hearing. It is not a persuasive argument in this procedural phase of the case. We are concerned here with whether the grievance and the arbitration notification were sufficiently specific to appraise the Agency of the nature of the Union's claim and requested remedy. The evidence on the record compels the conclusion that they did so.

The grievance contained language sufficient to give fair notice to the Agency of a formal complaint requiring a response, to limit the issues for resolution and to notify the Agency of the facts upon which the claim was based. The facts alleged were sufficient to allow the Agency to form a defense. Stated differently, while the grievance did not include the entirety of the Union's case, it did serve to notify the Agency of the allegations against it with enough specificity to enable the Agency to provide a reasonably informed response.

In summary, I conclude that the grievance was timely filed, that it was sufficiently specific and that the Union properly invoked arbitration.

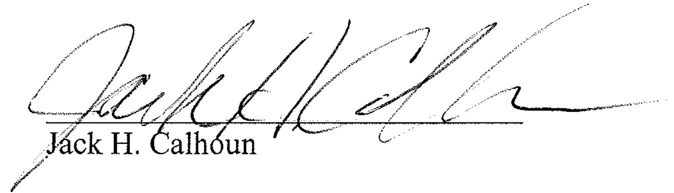
Accordingly, I will enter an award.

AWARD

The grievance is arbitrable.

If the parties are unable to resolve the substantive issue, they are directed to contact me so that I may offer open dates to them for an evidentiary hearing on the merits of this case.

Dated this 6th day of December, 2006.



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