IN THE ARBITRATION PROCEEDINGS BETWEEN

THE PARTIES BEFORE JOE H. HENDERSON

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
COUNCIL OF PRISON LOCALS,
(AFL-CIO) LOCAL 1242,

Union,

and

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
UNITED STATES PENITENTIARY
ATWATER, CALIFORNIA

Agency.
_____/

DECISION RE
OVERTIME REMEDY

FMCS Case No. 09-03294

Date of Hearing: 2/11/2010

For the Union:

Michael T. Pazder
Legal Rights Attorney
AFGE District 12
316 W. Mission Ave, Ste 108
Escondido, CA 92025
(760) 233-7600

For the Agency:

Michael A. Markiewicz
Agency Representative
Federal Bureau of Prisons
Labor Management Relations West
230 N. First Avenue, Ste 201
Phoenix, AZ 85003
(602) 379-3791

Joe H. Henderson
Arbitrator
PO Box 1828
Santa Rosa CA 95402
(707) 838-9910

The above proceeding was heard on February 11, 2010, at the United States Penitentiary Atwater in Atwater, California. The Decision and Award in this matter was sent on or about June 7, 2010.

Item 8 in the Remedy stated: The Arbitrator will retain jurisdiction over this matter for a period of 120 days from the date the parties make a decision as to the list of employees designated in remedy 3 above in order to assist the parties if called upon.

On September 23, 2011, Mr. Markiewiez, the Agency Representative, sent "Agency's Reply Brief on Remedy" to this Arbitrator and Mr. Pazder, the Union Representative. The Union responded that the Agency has chosen in its reply brief to not address the issue of back pay remedy and submits two emails in response.

ARBITRATOR'S DECISION AND REMEDY
June 7, 2010

The Agency violated Article 18, Section P, of the Master Agreement when it failed to distribute and rotate overtime opportunities in an equitable manner among bargaining unit employees.

The Agency violated Article 18, Section P, of the Master Agreement when it failed to maintain overtime records for two years.

REMEDY

1. The Agency will maintain overtime records for a period of two years as provided in the Master Agreement.
2. The Agency will cease and desist from continuing to violate the Master Agreement in the method overtime is assigned.
3. The parties will meet, within 30 calendar days of this decision to determine who and what amount of overtime pay is owed for each overtime violation for the time from January 2008 to the filing of the grievance on May 12, 2009. There has been a continuing violation of the Master Agreement.
4. Back pay will be granted to the employees determined to be affected due to the unwarranted and unjustified personnel action committed by the agency since January 2008.
5. The parties will devise a method to resolve future overtime assignments that are consistent with the Master Agreement.

6. The Agency will provide training to no less than three (3) representatives of the Union, of the Union's choosing, on how to read and interpret the overtime printouts/data.
7. The overtime printouts/data will be made available to the Union on a monthly basis.
8. The Arbitrator will retain jurisdiction over this matter for a period of 120 days from the date the parties make a decision as to the list of employees designated in remedy 3 above in order to assist the parties if called upon.

The parties at the Hearing stipulated that the Arbitrator could retain jurisdiction as to remedy.

Agency's Reply Brief on Remedy

The Agency believes the Arbitrator's duties in the merits of this case *functus officio*. The Arbitrator retained jurisdiction for 120 days. By an email dated February 28, 2011, the Union notified the Arbitrator that the parties met and they did not come to any type of agreement. The Union Representative requested new hearing dates from the Arbitrator. However, no hearing was ever held. The Arbitrator's jurisdiction ended on June 27, 2011. The Agency continues to work with the Union on a solution, not because the Agency believes the Arbitrator's jurisdiction is still in effect but rather because failure to follow the terms of an arbitration award could be an unfair labor practice.

Despite the Agency's consideration that the Arbitrator is *functus officio,* the Agency will reply to the Arbitrator *arguendo*.

The HR Manager has met with the local Union officials many times and explained why the Union's list of affected employees is improper. Some of the reasons included: secretaries on the list who are not qualified to work correctional officer overtime; some employees were already paid the overtime; and employees who worked overtime the day before which would be improper as their name would have dropped to the bottom of the list.

The Arbitrator is confined in any remedy to the Back Pay Act. It must be determined who actually would have worked overtime and whether that particular employee would have been willing and able to work. A blanket award of overtime would violate the Back Pay Act. The Union believes every employee should automatically receive an overtime payment, which would be contrary to the Back Pay Act.

Elkouri & Elkouri states that a violation of overtime rights must be based upon a clearly established past practice or upon showing that the grievant actually did suffer damages rather than temporary postponement of an overtime work opportunity. As witnesses testified and documents proved, there were plenty of overtime opportunities. Therefore, employees who were properly bypassed only had a temporary postponement of an overtime work opportunity.

The Union failed to produce witnesses to testify that they were in fact eligible and qualified for certain overtime assignments. There may be a variety of factors on why a certain employee cannot work overtime. Consequently, we do not know which employees would have been willing, ready and able to work on a particular day in question. Therefore, any monetary relief would be based on speculation and would be contrary to the Back Pay Act.

The Agency believes the Arbitrator's duties are *functus officio*. Assuming, *arguendo*, that the Arbitrator still has jurisdiction, then the Arbitrator's award in this case is not a final decision but an interim decision and the Agency still has the ability to file appropriate appeals on either the functus officio argument or on the merits/remedy of the case if the Arbitrator does, in fact, issue a final decision. The Agency believes any award of overtime payment would be based strictly on speculation, which would violate the Back Pay Act.

Union's Response

In response to the Agency's new argument regarding your jurisdiction over this matter, I also wanted to point out to you that your Award actually states that you will maintain jurisdiction over this matter for 120 days from the date that the parties agree on a list of the employees to be paid, which did not happen and has now been presented to you for your decision since the parties were not able to reach an agreement.

The Union is very disappointed that the Agency has chosen in its reply brief to not address the issue that is before you regarding the appropriate back pay remedy. Instead, the Agency has made an argument about your jurisdiction over this matter and attempted to relitigate the merits of the case that were already addressed in your Award from June 2010. The Union has made good faith efforts to work with the Agency on implementing your award since that time and to this date the Agency still has refused to cooperate.

It is unfortunate that the Agency did not raise these arguments prior to this time and instead wasted everyone's time by giving the impression that it was working on resolving the back pay remedy. The Union was not placed on notice that the parties would be submitting written argument to you on your continued jurisdiction over your Award or on the merits of your Award.

While the Union is convinced that it is clear that you extended your jurisdiction well beyond that 120 day period when the Union notified you that your assistance was needed, and that your jurisdiction continued until this point through email communication and phone calls with no objection from the Agency, the Union would ask that if you decide to issue a decision on

this baseless claim, the Union first be given an opportunity to provide its own written argument for why you still have jurisdiction over this matter.

If the Agency wanted to appeal the merits of your decision, its timeframe to file exceptions with the FLRA has long since passed. Not only are those arguments improper to be presented to you at this point and long past due, but the Agency should be well aware that its legal arguments about which employees can and cannot receive back pay in a case exactly like this do not have merit. *U.S. Dept. of Justice, Federal Bureau of Prisons, FCI Sheridan, OR and AFGE Local 3979, 55 F.L.R.A. 28 (1998).*

The Union respectfully requests that you issue a decision on the only issue remaining before you in this matter, which is the amount of back pay due to each affected employee in accordance with your Award. The Union believes it has provided sufficient information to demonstrate the appropriate remedy.

ARBITRATOR'S COMMENTS ON THE EVIDENCE/DOCUMENTS

The Union at the Arbitration hearing in 2010 appeared with 12 to 15 storage boxes of time records and shift schedules. The Arbitrator would have had to spend months deciphering the data, if he could. That resulted in the Decision sending the determination calculations to the parties. The parties to this date have not been able to reach agreement on the distribution of the amounts due the employees. The final submission by the parties (I did not count the pages) are 4 1/4 inches thick (a ream of paper 500 sheets is 1 1/2 inches thick); this means that the final submission was approximately 1,440 pages. The Agency submittal was about 1 inch thick, approximately 340 pages, printed on one side. The Union submittal was about 3 1/4 inches

(approximately 1,100 pages), all but about 20 pages were printed on both sides, for a total of approximately 2,160 pages. The combined total about 2,500 pages.

AGENCY EXHIBITS EXPLANATIONS:

- PART 1 – INITIAL SUBMISSION REVIEW (WORKING PAPERS) OF UNION FIGURES – DATED 10-11-2010 (Note: Mr Porters comments on these pages.)
- PART 2 – AGENCY 2ND LOOK OF THE UNION'S WORKING PAPERS (2nd OFFER) – MR PULLINGS COMMENTS WITH E-MAIL RESPONSE, July 13, 2011.
- PART 3 – AGENCY ADJUSTMENTS, July 14, 2011, FROM MR PORTER, HRH, MAKING TWO ADJUSTMENTS.
- PART 4 – AGENCY 2ND LOOK OF UNION WORKING PAPERS (2ND OFFER), WITH MR. PULLINGS COMMENTS WITH E-MAIL RESPONSE AND WRITTEN RESPONSE, July 17, 2011.
- PART 5 – E-MAIL FROM MR. PULLINGS (7-17-2011), PROBLEMS: RESOLVING ISSUE.
- PART 5 – E-MAIL FROM MR. PORTER TO MR. MARKIEWICZ, AGENCY REPRESENTATIVE (8-12-2011), ISSUE: MEETING DOCUMENTS.

UNION EXHIBITS IDENTIFIED:

Guide to Appendices *A*, B, C, D and E

Appendix A - Correlates the time period June 2, 2008 to May 12, 2009, where over-time records were made available.

Where employees were identified as being skipped, a "Working Papers for Individual Staff" was produced which indicates the staff member's name (per the roster record), the date skipped, the time skipped, and the hours of back pay owed with a total for each page. Some staff members have multiple pages in this appendix.

Key: D/O = Day off, SL = Sick Leave, A/L = Annual Leave, FFLA= type of sick leave, FMLA type of annual leave and or sick leave (Person who uses FMLA is not entitled to Overtime)

Some staff no records were provided for in Appendix E and that is referenced on the work sheets.

Appendix B - This appendix (along with Appendix C) correlates the time period January 1, 2008 to June 1, 2008 where "overtime offer" and "sign up list" records were not made available. The tables identify, day by day, shift by shift - the total number of overtime instances assigned by the agency for the dark period that the bargaining unit qualified to work pursuant to 18.p.

In establishing criteria for identifying affected staff members, we used the party's Master Agreement Article 18 section p (which was in effect, and remains in effect). Specifically, 18.p states, "when management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these assignments, which will be distributed and rotated equitably among bargaining unit employees." In the absence of records indicating proper offers made, all "qualified employees" were available to work each overtime available to the "bargaining unit" and were therefore able to sign up and receive offers for overtime on the roster program.

We adopted the following methodology for quantifying the overtime opportunities offered in the absence of records: We analyzed the Daily Roster Records provided for the *dark period* of no records where "offers made" and "sign up" lists could not be referenced. We identified all the overtime opportunities the agency filled, day by day, January 1, 2008 to June 1, 2008. We also identified each individual bargaining unit member available to be offered overtime pursuant to 18.p. - for each pay period covering the dark period (see Appendix C).

In quantifying the aggregate amount of back pay owed, we considered two options carefully:

(1) To conclude that each bargaining unit member was qualified, available, and ready to accept or decline the instance of each overtime assigned, therefore resulting in a skip of every member of the unit for each opportunity, minus the staff member actually assigned the overtime. Ultimately, we decided against this notion due to uncertain mitigating factors like a person exceeding the 16 hour consecutive limit, a person being on leave, or not holding Basic Prisoner Transport qualification for medical overtime, etc.

(2) To conclude that, had the agency followed the appropriate order on the sign up lists, and had the agency documented the offers pursuant to 18.p(1) and 18.p(2); the agency could have only paid and assigned each overtime once, and to one individual. This is the methodology we adopted. To arrive at the aggregate amount listed in the settlement agreement, we calculated the total number of overtime instances assigned during the dark period, and multiplied that number by a median (GS-8 Step 4) base pay rate. The aggregate amount of back pay for this period is $200,000.00 to be divided into 11 equal pay periods and then equally divided among the Appendix C bargaining unit staff for each pay period.

We took less than doubling what we figured for Appendix A, D and E. If the union was to double what was calculated in appendix A the total amount would be approximately $240,000.00.

Appendix C - List of "bargaining unit members" by pay period (January 1, 2008 to June 1, 2008).

Appendix D - List of days overtime was available and the staff who were skipped. A staff member cannot be paid for more, than one overtime per day, unless they were on their day off or on annual Leave (Vacation) at which time the staff member may work 16 hours or more of overtime a day. A staff member cannot be paid for overtime if they were on sick leave. Types of sick leave include, Sick Leave, FFLA, FMLA, Leave without Pay (LWOP)

Appendix E - individual Rosters provided to the Union from G. Porter after the first settlement offer was given. States the individual staff members days off, sick days used annual leave etc.

ARBITRATOR'S COMMENTS AND FINDINGS

Comments Regarding FUNCTUS OFFICIO

The Agency argues that the Arbitrator's jurisdiction is no longer effective and is now *Functus Officio*. The Arbitrator does not agree with the Agency. The decision provided: *The Arbitrator will retain jurisdiction over this matter for a period of 120 days from the date the parties make a decision as to the list of employees designated in remedy 3 above in order to assist the parties if called upon.*

The 120 days have not started to run because there has not been a mutual agreement between the parties.

The lack of mutual agreement is further demonstrated by memos from Mr. Porter, HRH, to Gary Pullings of the Union: (1). 7-13-2011, "I reviewed the documents you provided me with concerning the Union 2nd offer. I believe we are coming closer together, however, there are some differences that need to be ironed out." (2). 7-14-2011, "I made two adjustments to what I sent you the other day."

The Agency has never provided the records of the "overtime offered" and "sign-up list" records for the period of January 1, 2008 to June 1, 2008.

The arguments put forth above clearly show that the parties have not agreed to a list of employees to receive the benefits designed in remedy 3 in the Decision of this matter.

The Decision calls for mutual agreement of the parties. It is obvious that there has not been mutual agreement of the parties.

FINDINGS

(The following is quoted from **ngl.natca.net**/natcalmr/backpayact.pdf)

"An arbitrator is authorized to award back pay only when he/she makes three determinations. The arbitrator must find that:
1. An agency personnel action, with respect to the grievant, was unjustified or unwarranted;
2. Such unjustified or unwarranted personnel action resulted in the withdrawal or reduction of all or part of the grievant's pay, allowances, or differentials; and
3. But for such action, the grievant otherwise would not have suffered such withdrawal or reduction in pay, allowances, or differentials.

Although the Back Pay Act dictates that certain determinations must be made, the Act does not dictate the manner in which these findings are made. Consequently, the arbitrator is given broad discretion in the way he/she makes the necessary determinations."

The above statement of an arbitrator's necessary findings were addressed in the Decision after the hearing. However, to make my position clear, the following is stated:

1. The actions of the Agency in disposing or failing to retain the work records were unjustified and unwarranted; they violated Agency policy and the Collective Bargaining Agreement as to the assignment of overtime. The Agency failed to follow the overtime assignment procedures.

2. The actions of the Agency resulted in the loss of overtime opportunity and pay for numerous bargaining unit members.

3. The Agency's actions were the cause of the lost pay opportunity. The bargaining unit members denied the overtime are entitled to compensation.

Comments Regarding BACK PAY ANALYSIS

GROUP VIOLATIONS – (**ngl.natca.net**/natcalmr/backpayact.pdf)
"When a grievance claims that a group of employees were injured by the Agency's unwarranted personnel action, the arbitrator must identify each individual affected and make the necessary findings for each individual in order for a back pay award to be valid."

OVERTIME CASES – (**ngl.natca.net**/natcalmr/backpayact.pdf)
"The FLRA has ruled that an award of back pay is appropriate for an employee who was entitled to perform overtime but was denied the right to do so. Moreover, the FLRA has concluded that a back pay award does not violate management's statutory rights to direct employees and assign work. However, the analysis in cases dealing with the issue of lost opportunity for overtime is more extensive.

The arbitrator must not only find the initial requirements for back pay awards, but he/she must make three additional determinations:
1. Was the grievant deprived of the opportunity to work overtime?
2. Was the grievant ready, willing and able to work the overtime?
3. Would the grievant have worked the overtime but for the unwarranted violation?

Once the arbitrator has identified the lost overtime opportunity, he/she may only award the amount of back pay sufficient to make the grievant whole.

The arbitrator may not substitute his judgment for that of the agency with regard to whether work shall be performed on an overtime basis or whether the grievant was qualified to work the overtime. Those determinations are inherent in management's statutory right to assign work.

It is important to note that arbitrators are not required to award back pay for lost overtime opportunities. In some cases, the arbitrator may award the grievant make-up Overtime or priority consideration the next time management assigns overtime."

UNAVAILABILITY OF DOCUMENTS

January 1, 2008 through June 1, 2008; 11 pay periods

June 2008 through September 2008

October 2008 through December 2008

January 2009 through February 2009

The "overtime offer" and "sign-up list" for January 1, 2008 to June 1, 2008, for 11 pay periods. Binders with Daily Assignment rosters for the June 2008 through September 2008, October 2008 through December 2008, and January 2009 through February 2009 were provided to the Arbitrator by the Union. The records were not retained by the Agency; they do not now exist due to the actions of the Agency.

The Union addressed only the January 1, 2008 Through June 1, 2008 material period in the proposal they submitted.

The Union, in its second offer, seeks overtime payments to be distributed as listed on the 70 pages identified as Appendix C in the Union submittal. The listing shows the job assignment, job number, and the name of the employee. The Union estimates the employees listed would have received overtime amounting to $200,000.

The Agency argues that the payment of a lump sum for distribution of money would violate the Back Pay Act, which requires the identification of an employee and the dollar amount that is due.

The Arbitrator is of the opinion that the information submitted by the Union in Appendices C, D, and E of the Unions 2nd Offer provides the information which is sufficient to

establish the Bargaining Unit members who would have been available for the work assignment and be paid for the time that the records are not available.

FINDINGS AS TO MISSING RECORDS – January 1, 2008 to June 1, 2008

The Agency's failure to retain the necessary documents was a violation of policy and the Collective Bargaining Agreement. To deny the Bargaining Unit members the overtime payment due to the action of the Agency in not retaining the appropriate records would be a gross injustice to the Bargaining Unit members.

The Union submitted sufficient evidence at the Arbitration to show that the Agency violated the Collective Bargaining Agreement and the award is based on that determination.

AWARD ON REMEDY

Union's Second Offer, Appendix's A, B, C, and E are incorporated into this Decision as though they were set forth in their entirety herein.

The Union's Second Offer submitted to the Arbitrator is accepted and the award is for the Union as set forth in their 2nd offer.

1. For the period June 2, 2008 to May 12, 2009, where "overtime offer" records exist, the Agency will pay overtime back pay (for the accumulated total hours indicated to each employee listed in Appendices A and D of the Union's 2nd offer. Payment will be made in accordance with the Federal Back Pay Act, U.S.C. §5596(b)(A)(i). The amounts paid to the employee shall include the overtime pay, allowances, and differentials the employees would have received during the

period. The amounts paid shall include the appropriate interest calculated in accordance with 5 U.S.C. §5596(b)(2).

2. For the period January 1, 2008 to June 1, 2008 where "overtime offers" and "sign up list" records were not provided, the Agency pursuant to Appendices B and C of the Union's 2nd Offer will disburse the aggregate sum of $200,000 in back pay for the 11 pay periods between January 1, 2008 to June 1, 2008. Each employee listed in Appendix C shall receive an amount equal to $200,000, divided by the total number of "qualified employees" listed in Appendix C.

The following additions and/or deletions shall be made to the Union's second offer:

1. Celeste Aguirre is not eligible for payment as the Unit Secretary; she does not qualify for Custody overtime.

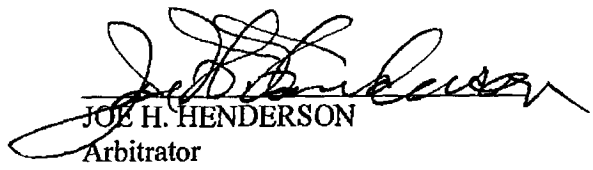
2. Arceo Jr, hired July 20, 2008, is not eligible for overtime before that date.

3. Mark Castro will have 8 hours added for a total of 168 hours.

4. Richard Johnson, change date from 2/08/2009 to 02/09/2009.

DATED: October 31, 2011

Respectfully submitted,



JOE H. HENDERSON
Arbitrator