

required by the Master Agreement, in favor of taking employees off the day shift in order to staff the airlift operation.

Although the Union acknowledges management's right under Article 5 to reassign staff, it nevertheless maintains that Article 18, Section P(1) required that overtime should be distributed and rotated equitably among bargaining unit employees. The Union further maintains that, despite the significantly reduced overtime available under the "new system" that began operation in January 2005, the overtime that existed was not equitably distributed for the years 2005-2007.

Referring to Union Exhibit #2, the Union notes that in the year 2005, of 129 employees on the qualified list, only 33 received airlift assignments which generated some overtime. In 2006, 118 individuals were BPT Qualified, and of that number, 36 received overtime assignments and 82 employees received no airlift-related overtime. Similarly, in 2007, of the 102 qualified bargaining unit employees available for airlift operations, 32 received airlift assignments while 70 did not.

The Union further claims that even under the "new system" favoring day shift workers, overtime was not equitably rotated for the years 2005, 2006, and 2007.

Assuming arguendo that the Agency has the right not only "to unilaterally change its system of awarding assignments to airlift but, further, that the Agency has the right to select airlift participants" for overtime generated strictly on the

day shift, the Union nonetheless contends that day shift overtime was not equitably distributed.

In support of its claim that overtime was not rotated equitably among day shift workers, the Union cites the following data:

In 2005, 92 people on the Day Shift were qualified for airlift overtime. Of that number, 31 received airlift overtime and 61 received no overtime. Of the 31 that did receive overtime, a very few received as many as eight (8) overtime trips while most only had one or two opportunities.

In 2006, 77 people on Day Shift were qualified for airlift overtime. Of that number, 30 actually received airlift assignments and 47 received no overtime. Of the 30 that did receive overtime, one (1) participated in 13 trips receiving 34 hours of overtime. Another received 13 opportunities with 22.25 hours of overtime (See Union Exhibit 2, Bates #0013).

In 2007, 81 bargaining unit employees on the Day Shift were BPT Qualified. Of that number, 30 received overtime; 51 received no overtime. Of the 30 that did receive overtime, a handful of people got 6-8 opportunities and one (1) had 13 opportunities. The individual with 13 opportunities or trips (Robert Marr) received 52.2 hours of overtime.

An additional violation is discerned by evidence that those employees who were not on day shift in 2005, 2006, and 2007 were not treated equitably regarding the rotation for airlift. Whereas Article 18, Section P provides that there shall be equitable rotation for overtime among "qualified employees in the bargaining unit," the fact that BPT and Bus Qualified employees, who did not work the day shift, were largely excluded from overtime opportunities, is deemed a contract violation as follows:

In 2005, 35 people who never worked Day Shift were BPT Qualified. Of that number, two (2) received overtime and 33 did not.

In 2006, 41 individuals who never worked Day Shift were BPT Qualified. Of that number, six (6) received overtime for the airlift and 35 received no overtime.

In 2007, 21 people who never worked Day Shift were qualified for airlift. Of that number, two (2) received overtime and 19 received no overtime. One of the two receiving overtime, Ed Goode, had 41.9 hours of overtime (See Exhibit 4, Bates #0020).

The Union has also found violations among those qualified employees who signed up for overtime in 2006 and 2007* and did not receive it. In 2006, 35 BU members signed up for overtime, with 11 receiving an overtime opportunity and 24 receiving no opportunity. In 2007, of the 34 employees who signed up, 17 received an overtime opportunity and 17 did not. Among those who received overtime opportunities, these opportunities were disproportionately distributed, with Roger Marr receiving 13 airlift trips totaling 52.25 hours.

The obverse of this purported violation was that those who did not request overtime received it while those, in the absence of a sign-up sheet, who requested overtime, did not receive it. For example, in 2007, 15 employees who did not request overtime received airlift overtime opportunities.

A similar pattern was observed among the day shift workers who requested overtime in 2006 and 2007. In 2006, of the 20 requesting overtime, 8 received overtime while 12 did not. In 2007, of the 20 day shift employees requesting overtime, 15 received overtime.

* The Union alludes again to the Agency's inability to produce records for 2005 in contravention of Article 18, Section P(2) which requires the Agency to keep records for two years.

Finally, day shift workers who did not request overtime received it. In 2006, 21 such individuals received overtime, and in 2007, there were 16 individuals who received day shift overtime, although they had not requested it.

Testimony

Local 148 President, Dan Bensinger, testified that the grievance was filed on behalf of qualified bargaining unit employees. He described the airlift operation as a procedure where the Bureau of Prisons transfers inmates by plane to airports, including Harrisburg, PA. These planes are met by buses. Marshals from their respective districts and institutions drop off these inmates. "And at the same time, these vehicles transport inmates to these airports to be placed on the plane to continue their designation from the east coast to the west coast." He recalled that 1-2 buses usually are sent from Lewisburg (Tr. @ 26).

In order to be assigned to the airlift, an officer had to be basic prisoner transportation ("BPT") qualified or Bus qualified (i.e., qualified to drive a van). They must also be nine millimeter qualified, M16 qualified, 12 gauge shotgun qualified and hold a valid CDL driver's license. The BPT qualified officers would incorporate the BUS qualified officers.

After describing the various functions performed by those assigned to an airlift, Bensinger testified that a lieutenant accompanies usually two BUS/BPT qualified officers.

According to Bensinger, prior to January 2005, officers assigned to the airlift were on their day off, shift off or on annual leave. These assignments invariably resulted in overtime.

Referring to the Overtime Sign-Up Sheet for 3/27/06 and 4/3/06 through 6/4/07, Bensinger testified that airlifts were operated on Mondays. Additional information obtained by the Union, pursuant to its June 4, 2007 and August 18, 2007 Data Requests, were overtime records from 1/1/04 through 1/1/06 (U. Ex. #16).

Bensinger noted that beginning on 1/10/05, there was a dramatic reduction in the number of overtime hours allocated. He attributed the reduction from eight hours or more to three hours or less to management's "unilateral change in how they staffed positions to ride the van and busses to the airlift" (Tr. @ 37). As he put it, "They pulled staff off the day shift and assigned them on the airlift operation."

The Union's position on the change was that while management had the "right to reassign -- to control their budget, there was no agreement not to use the computer signup or the procedure of using days off." Prior to the change in 2005, employees would sign up for overtime on Monday when there was going to be a bus run, and a computer printout of those who had signed up would be generated. Those taken off the list for the airlift operation would normally get 8+ hours of overtime. Bensinger recalled the training given to staff and lieutenants in using the overtime sign-up process.

Bensinger saw no conflict in management's general right to reassign staff pursuant to Article 5 limited by the employee's Article 18 "specific rights to have that overtime distributed, rotated equitably among qualified bargaining unit [members]."

Bensinger took issue with management's claim that they couldn't determine if there would be overtime, refining their statement to mean that "they're not sure how much overtime it was going to be each week." Rather than distributing the available overtime equitably, he described management's actions as follows:

- Q. What are they doing?
- A. They're pulling people off the day shift or using staff who are assigned to the visiting room when there's no visiting going on that day. And they created an opportunity to circumvent overtime by using these staff who don't have a job assigned on Mondays, assigned to the visiting rooms.
- Q. When you say they don't have a job, they don't have responsibility?
- A. In this instance because they don't have any visitings, so management reassigns them and gives them a job, either on airlift or driving a van; or if they're qualified, on the driving the bus or relieving somebody who is qualified, and they use the same people over and over and over. A small group of people. (Tr. @ 42-42).

For those employees working the visiting room, who were not BPT or Bus qualified, management would assign them to replace an employee who was qualified. "They might send me to tower four, get the BPT qualified guy that was assigned to tower four and put him on the airlift."

Referring to a document that identified every BPT qualified person who worked or didn't work airlift overtime in 2005, Bensinger testified that several employees worked zero overtime (U. Ex. #2). After reviewing the lists, Bensinger testified that the exhibit indicated non-compliance with the requirements of Article 18 that there be a fair and equitable rotation of overtime.

Next, Bensinger reviewed data from the day shift for the years 2005, 2006 and 2007 and noticed that there was a concentration of overtime in just a few

employees (U. Ex. #3). Another document revealed a lack of equitable rotation among qualified employees "even on the evening and morning watches" (U. Ex. #4).

Although missing data for January through March 2005, information was provided for employees requesting overtime for 2006 and 2007 as well as for those not requesting overtime for those years. Discrepancies were discerned in each case (U. Exs. #5, #6). Among the 46 day shift employees who requested overtime for 2006-2007, 23 received overtime. In 2007, of the 26 employees who requested overtime, 15 received it. In 2006, of the 20 day shift employees who requested overtime, eight employees accumulated approximately 120 hours of overtime while 12 received zero overtime. Conversely, in 2006-2007, 37 employees on the day shift who didn't request overtime received it.

In 2007, 11 of the 34 BPT Qualified employees accounted for 224.40 hours of overtime while 17 employees received no overtime. In 2006, 10 of the BPT Qualified employees accounted for 142 hours of overtime while 23 employees received no overtime. Additional discrepancies are noted above.

On cross-examination, Bensinger testified that the overtime hours for airlifts had changed because more inmates were involved. He acknowledged that most of the overtime in January 2004 was over 2 hours and in May 2005 less than 2 hours.

Referring to the Correctional Services Roster Shift Request, Bensinger testified that he had received his first choice for a shift assignment (A. Ex. #6).

Bensinger acknowledged that the grievance focuses not on all bargaining unit members but only those who are BPT/Bus qualified.

Bensinger acknowledged that the Union's documentation did not include those employees who were offered overtime and refused it when called (Tr. @ 89). The Union's documentation neither indicates the number of times an employee requested overtime nor the dates of the request. He also testified that nothing precluded an employee from requesting the visiting room as a shift. Moreover, assignment to Bus No. 1 or Bus No. 2 are posts that an officer could bid on and be selected by seniority.

He also acknowledged that prior to 2005, when only employees on their day off or annual leave were called for overtime, the procedure was not fair and equitable to those on the day shift who couldn't be called.

Mr. Fred A. Shepperson, Correctional Officer, testified that, although he was BPT qualified and signed up for airlift duty from 2005 to 2007, he received 1-2 opportunities at most. On cross-examination, Shepperson acknowledged that he could have applied for a visiting room shift. However, he preferred weekends off, as opposed to the mid-week days off scheduled for the visiting room employees.

Mr. John Lesho, Correctional Officer, testified that he was employed as Custody, BOP, had signed up on the overtime list, and was pulled off other jobs for the airlift. He would receive approximately 1-2 hours overtime. On cross-examination, Lesho testified that he could have applied for any shift at the institution, including the visiting room.

Mr. Joseph Lutz, Correctional Officer, testified that, although he signed up for overtime, he had never received an overtime assignment, despite working on the day watch. In his experience, airlift overtime was assigned by having an employee in the visiting room "relieve someone on the compound and then those people go out on an airlift" (Tr. @ 108).

On cross-examination, he described the procedure as the CPD roster program where an employee logged in his overtime requests via computer, on a daily, weekly or quarterly basis -- excluding their current shift.

Mr. Brenton Bacon, Correctional Officer, testified that, although he had received overtime in the past, under the new system, he no longer signs up because "I realized I couldn't get it; I just gave up" (Tr. @ 113). On cross-examination, Bacon acknowledged that, given his 17 years seniority, he could have been assigned to the visiting room and obtained overtime, but for his preference for weekend days off.

AGENCY POSITION

The Agency maintains initially that pursuant to 5 U.S.C. 7106 "[i]t is within management's right to determine the budget, determine internal security practices, and assign work and employees." Notwithstanding the Union's acceptance of management's right to manage the budget, the Agency argues that the Union is attempting to "usurp that right by forcing the Agency to incur additional overtime costs."

In the Agency's view, the Roster Committees and overtime are subject to the "Covered By" doctrine as set forth in the Master Agreement. As such, staff are given the opportunity to bid on the post they would like to work for the upcoming quarter, including the Visiting Room assignment on Mondays from which personnel for the airlifts are drawn.

Given Bensinger's testimony that he was familiar with the shift request form and had obtained his first choice, the Agency maintains that employees, based on seniority, could bid for assignments to the visiting room. The testimony of other Union witnesses convinces the Agency that, despite the opportunity they have to bid for a visiting room shift on Mondays, the undesirability of the mid-week days off had dissuaded them. Moreover, the testimony of the Union witnesses revealed that bidding on bus number one and bus number two posts was no different than bidding on any other shift preference.

The Agency discounted the tables and graphs produced by the Union as not only lacking in authenticity, but also insufficient to prove an inequitable distribution of overtime.

Testimony

Lieutenant Larry Weir ("Weir") testified that his duties included roster management, namely to ensure that certain posts on each shift are filled by qualified personnel to ensure "the orderly running of the institution."

He testified that airlifts typically take place on Monday. Other than the one bus crew, which is assigned full time as a five day a week post, there are

airlift one, airlift two, airlift three, etc. assignments depending on the number of buses.

His objective in staffing these positions is to avoid paying overtime and to look at the roster and determine "what available extra staff I have. Could be the four officers that are typically in the visiting room since there's no visiting on Monday." Next, he looks for extras on the roster that don't have specific jobs or "shakedown positions" (Tr. @ 131). An extra/shakedown position or two is assigned to all three shifts. Lt. Weir further testified that "if they're BPT qualified, I use them for the ground crew. If they're bus qualified, I use them to man the second or third bus. If they're neither, then I will use them to relieve people who are on the shift regular time to take those positions who are qualified for the bus or who are BPT qualified."

Occasionally, if there are no qualified employees on the shift, "then I'll have to start selecting people from other shifts," thus incurring overtime costs. On each bus, there are five employees: a lieutenant, two officers and a two person ground crew. Three officers can man a second bus unless the bus is going in a different direction that requires another lieutenant.

From the four staff assigned to the visiting room on Monday, he would begin to staff the buses, provided they are BPT or Bus qualified. "If they're BPT qualified, they're on the ground crew. Are any of them bus qualified? They're on the second bus. If they're neither I'll look on my roster -- and use extras from the visiting room, or any other extras I have on my roster to relive those [BPT/Bus qualified] staff so they can participate in the airlift."

To obtain BPT qualified personnel, Weir testified that he uses the computer generated roster program that "selects staff by seniority and by when they last had their overtime." For bus personnel, he uses a bus rotation list – a list of all bus staff by seniority. Referring to a Special Bus Runs Sheet, dated 1/1/08, Weir testified that the list is in seniority order and he would proceed down the list noting whether the employee had accepted or refused the overtime (A. Ex. #7). In his recollection, staff members often refuse the overtime assignment. In the event the list is exhausted, with assignments remaining to be filled, the mandatory overtime list is utilized on a juniority basis.

Lt. Weir acknowledged that a change had occurred in the hours of overtime distributed since January 2005 – a change which he attributed to more institutions participating in the airlift. He estimated that prior to 2005, it was 8 hours and subsequently 2-1/2 to 3 hours, depending on various factors (e.g., weather).

With respect to shift requests, positions available for the upcoming quarter are posted, employees fill out a shift request and then the roster committee puts the shift requests in order, based on seniority (A. Exs. #8, #9, #11).

On cross-examination, Weir reviewed the ways in which overtime can be avoided beginning with filling a position with regular time.

He distinguished a staff position on a roster that is bid based on seniority from an airlift position that is assigned. Whereas bus one participates in the airlift, it is different from bus two or three which is staffed either through overtime

or shifting around. For special or unplanned bus runs, the bus rotation as opposed to the airlift system is used.

With respect to the airlift system, Lt. Weir starts with the four "guaranteed" employees in the visiting room. These four staff are available on Mondays for the airlift because there is no visitation. Once these visiting room staff are utilized, the extras (i.e. Not Bus or BPT Qualified) are assigned to posts to relieve those that are qualified. Next, he goes to the BPT roster program and selects the first person on the list. In those situations where the employee refuses overtime or doesn't respond to the call, "the overtime list is going to expire, at which point you get anybody you can find to get that position filled" (Tr. @ 160).

In response to a question about how he monitors the overtime records to ensure equitable distribution of overtime assignments pursuant to Article 18(p), Lt. Weir testified as follows:

If he says no or I can't reach him, I check off the appropriate box. It puts him back at the bottom of the list and brings up the next name, and so on, so forth until that - the overtime is filled or I run out of people (Tr. @ 162).

Lt. Weir, without access to the computerized roster program, was unable to validate the acceptance or refusal of overtime by employees on the overtime sign up list or comparable selection information for the ground crew.

Comparing the overtime hours worked on 1/5/04 to those worked on 1/21/05, Lt. Weir could not explain the substantial gap or difference in the overtime hours assigned (U. Ex. #16, Tab 3) (Tr. @ 168). Lt. Weir testified that,

despite his efforts to equitably distribute overtime by basically using the same computerized roster system in 2004 and 2005, he attributed the fact that some employees went an entire year without working any overtime to the following:

- A. That means a lot of these people may or may not have signed up, a lot of these people refused it, a lot of these people couldn't be reached (Tr. @ 172).

In order to determine whether the distribution of day shift overtime was equitable, Lt. Weir testified that he would need, for each airlift in question, "the roster for that Monday to see who was BPT and who was bus qualified available on the roster that day to work" (Tr. @ 176) (U. Ex. #7). He attributed the frequency that certain employees were assigned to the airlift to "regular time Monday on the roster, as opposed to working evening watch with Mondays off. It depends on circumstances. It depends on how many people refused, how many people were signed up that particular Monday, who was available" (Tr. @ 180-181).

On redirect examination, Lt. Weir testified that prior to 2005 there were also employees who did not work overtime.

Mr. Frank Strada ("Strada"), Associate Warden, testified that the overtime changes were made in January 2005, including the elimination of overtime on Mondays via the use of the visiting room staff, to control overtime costs.

On cross-examination, Strada testified that Article 18 did not strictly require the assignment of overtime by seniority, but other factors such as shift request, infractions and qualifications could also be considered. In reviewing shift request, the roster committee generally awards one of three choices.

Mr. Strada did not consider the contract language "qualified employees of the bargaining unit will receive first consideration" to be a limitation on his broad duties to assign overtime, even though he agreed that most of these assignments could not be limited to the day shift (Tr. @ 202-203).

Administrative Lieutenant McFadden testified that his duties included scheduling officers on the quarterly roster. He distinguished 5 day posts from 7 day posts and indicated that closing the visiting room on Monday created another day off. Juxtaposing the Daily Assignment Roster and the Overtime Sign Up Sheet, he identified the bus lieutenants, bus officers and the process inmate officers or ground crew – noting that the ground crew did not need to be BPT/Bus qualified (A. Ex. #9). The Overtime Log for 3/3/08 displays the names of all employees who were assigned, refused or bypassed for overtime on a given date (A. Ex. #11). Because computer generated rosters were previously deleted, the overtime sign up sheet was not always attached to the roster during the period covered by the instant grievance (Tr. @ 212).

On cross-examination, Lt. McFadden testified that prior to the instant hearing, he had not utilized the Overtime Log in his administrative work (Tr. @ 214).

Opinion

Considering the evidence in its entirety, the Arbitrator is persuaded that the Agency violated Article 18, Section P, Paragraph 1 of the Master Agreement by the manner in which it distributed overtime for the airlift operation. Section P, Paragraph No. 1 requires the Agency, once it has determined that the payment

of overtime is "necessary for positions/assignments normally filled by" qualified "bargaining unit employees," to give "first consideration for these overtime assignments" to those qualified employees and then distribute and rotate the assignments "equitably among bargaining unit employees."

The evidence established that the Agency, in order to save overtime costs, which is a management right under Article 5 of the Master Agreement and 5 U.S.C. 7106, changed the procedure for assigning staff to the airlift in January 2005. The effect of this change was not only to reduce the total number of overtime hours available to be distributed to qualified staff, specifically those who were BPT and Bus Qualified, but also to skew the overtime opportunities toward officers assigned to the day shift visiting room on Mondays – the day the inmate airlifts were conducted.

Although the Arbitrator finds no contract violation concomitant with the Agency's decision to unilaterally change the system of assigning overtime in January 2005 so that the total hours of available overtime was reduced, or to make the distribution of overtime more cost effective, the Agency's subsequent administration of the airlift operation that resulted in an inequitable distribution of the existing overtime opportunities constituted a violation of Article 18, Section P(1). This continuing violation is manifest by statistical evidence indicating: (1) BPT Qualified bargaining unit members did not receive an equitable distribution of the overtime for the years 2005-2007; (2) there was not an equitable rotation of the airlift overtime among day shift workers for the years 2005, 2006 and 2007; (3) Non-Day Shift employees, who were BPT and Bus Qualified, did not

receive an equitable share of the overtime distributed for 2005, 2006 and 2007; (4) Qualified bargaining unit employees who signed up for overtime in 2006 and 2007 were not equitably treated in the rotation of overtime; (5) Qualified day shift and other shift employees who requested overtime did not receive overtime, whereas employees on these shifts who did not request overtime received it contrary to the sign up system.

While there is some evidence that overtime opportunities prior to January 2005 were skewed toward those qualified employees who were unscheduled on Mondays, worked an off-shift or who were on annual leave, the instant continuing grievance focuses on the period 40 days before the grievance was filed (i.e. December 19, 2006) going forward to the present. During the timeframe at issue, there is significant evidence that available overtime for the Monday airlift operation was not distributed equitably – that is to say, distributed in a manner where each qualified officer would have an equal opportunity to work overtime on a rotational basis.

Without delving into each category where the inequitable distribution has been documented supra, the Arbitrator finds three examples noteworthy. The Union has produced statistical evidence which shows that in 2005, of the 129 officers on the qualified list, 33 received airlift assignments which generated overtime. In 2006, of the 118 officers who were BPT/Bus qualified, 36 received overtime assignments with 82 receiving no overtime. In 2007, of 102 qualified bargaining unit employees available for airlift operations, 32 received airlift assignments and 70 did not.

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Without delving into each category where the inequitable distribution has been documented supra, the Arbitrator finds three examples noteworthy. The Union has produced statistical evidence which shows that in 2005, of the 129 officers on the qualified list, 33 received airlift assignments which generated overtime. In 2006, of the 118 officers who were BPT/Bus qualified, 36 received overtime assignments with 82 receiving no overtime. In 2007, of 102 qualified bargaining unit employees available for airlift operations, 32 received airlift assignments and 70 did not.

Similar data was produced for day shift workers for the years 2005, 2006 and 2007, with approximately one-third of the day shift workers qualified for airlift overtime actually receiving it.

The Arbitrator concurs with the Union in its claim that a prima facie case of inequitable distribution of overtime tantamount to a violation of Article 18, Section P(1) has been presented, thereby shifting the burden to the Agency for an explanation of the ostensible inequitable distribution of overtime. Conceivably, the Agency could have provided an explanation of why several employees who signed up for overtime never received it while several other employees who sought no overtime were beneficiaries.

In this regard, the testimony of Lt. Weir, with respect to the methodology he utilizes to distribute overtime was unavailing. Whereas Lt. Weir described a process whereby he first selects the visiting room personnel and then uses extras/shakedown positions to relieve officers who may be BUS/BPT qualified before accessing the computerized roster for BPT qualified officers and the Bus rotation list for Bus qualified officers available for overtime assignments, the Arbitrator found subjective elements in his decision making process that contributed to the random, inconsistent distribution of overtime. In the final analysis, the Agency failed to rebut the Union's prima facie case.

Given the fact that Lt. Weir's explanation for the discrepancies identified by the Union between those qualified employees who requested overtime and didn't receive it from 2005-2007 on various shifts and those who received a disproportionate amount of the overtime assigned was that several employees

either could not be reached on the overtime lists or refused overtime when offered, the paucity of data produced by the Agency in support of its contention negates this defense. Evidence, for example, that 27% or 52.25 hours of the overtime worked by day shift workers in 2007 went to one employee, Robert Marr, contradicts the Agency's assertion that equitable distribution was its objective.

In the absence of the daily rosters that Lt. Weir testified were needed to explain the discrepancies – rosters which the Agency maintains that the Union should have sought in its data requests – the Arbitrator finds that the magnitude of unexplained discrepancies alone permit an adverse inference to be drawn that at some level the Agency's distribution of overtime was arbitrary, as distinguished from the equitable rotation mandated by Article 18, Section P(1).

Although the Agency, once the Union's prima facie case predicated on statistical evidence was established, could have rebutted the Union's case by establishing that the dearth of overtime allocated to certain qualified officers as well as the substantial overtime allocated to other officers was attributable to the factors cited by Lt. Weir, the Arbitrator finds that Lt. Weir's testimony, standing alone, is insufficient to reduce the Union's case in chief below the preponderance of evidence necessary to prevail. Moreover, Lt. Weir acknowledged that the "screen" daily rosters would not indicate whether an employee had refused overtime or whether the Agency was unable to reach them.

Therefore, the Arbitrator concludes that the unavailability of the computer generated rosters was neither pivotal evidence in the Union's case on the merits nor sufficient for Agency purposes in negating the Union's burden of proving its case by a preponderance of the evidence.

Finally, the case involving Council of Prison Locals AFGE Local 3584 and Dept. of Justice, Federal Bureau of Prisons, Federal Correctional Institution at Dublin, CA (2004) seems relevant to the instant matter. Arbitrator McCurdy relied, as here, on aggregate statistical data to find that the Agency had violated Article 18, Section P by not distributing overtime equitably among the bargaining unit members.

It is also noteworthy that in Dublin, the Arbitrator rejected the Agency's claim that other factors had accounted for the discrepancies, such as: the employee was already working on a regular shift; the employee had called in sick; the employee was on annual leave; or, the employee's shift overlapped the overtime available. In granting the Union's adverse inference based on the Agency's "shredding" of the overtime records, Arbitrator McCurdy not only nullified the Agency's defense to the inequitable distribution of overtime, he also found a violation of Article 18, Section P(2) which required retention of these records for two years.

Although the instant Agency's violation of Article 18, Section P(2) is not relevant during this liability phase of the arbitration hearing, the Agency's response that there was "no requirement to maintain this information" for the two

year period back to August 18, 2005 might permit a similar adverse inference to be drawn during the damages phase of the arbitration hearing.

In conclusion, the Arbitrator finds that, while the Agency retains its Article 5 right to assign overtime, this right is not absolute in that the right to assign overtime is subject to the provisions of Article 18, Section P, Paragraph 1 requiring such overtime to "be distributed and rotated equitably among bargaining unit employees."

Having found the Agency liable for violating the Master Agreement, the Arbitrator shall retain jurisdiction to enable the parties to submit evidence concerning the alleged damages (e.g., back pay) and attorney fees and costs. Given the finding that a continuing violation exists, the Arbitrator reiterates that the Union's claim for back pay begins 40 days prior to the filing of its formal grievance on January 29, 2007 or back to December 19, 2006.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I issue the following:

AWARD

- 1) The instant grievance was timely filed in accordance with Article 31, Section d.
- 2) The grievance statement complied with the Article 31, Section f, Block 6 standard with respect to specificity of charge.
- 3) The Agency violated Article 18, Section P, Paragraph 1 of the Master Agreement by distributing overtime in a manner that was not equitable.
- 4) With respect to remedy, the Arbitrator shall retain jurisdiction for sixty (60) days or until September 22, 2008 to enable the parties to submit evidence regarding alleged damages (e.g. back pay), attorney's fees and costs. The time period applicable to the back pay remedy is from December 19, 2006 to the date of this award.

July 21, 2008


Robert T. Simmelkjaer
ARBITRATOR