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May 3, 2022

U.S. Department of Justice
Federal Bureau of Prisons
Labor Relations Office – South
346 Marine Forces Drive
Grand Prairie, TX 75051

Attn.: John W. Weeks,
Labor Relations Specialist

Reid Coploff, Esq.
McGillivary Steele Elkin LLP
1101 Vermont Avenue N.W.
Washington, D.C. 20005

Re: FCI Loretto - and – AFGE Local 3951 (Mutual Shift Swaps)
FMCS Case No. 210414-05810

Dear Mr. Weeks and Mr. Coploff,

Enclosed is my Opinion and Award in the above matter. My invoice is also enclosed.

Thank you.

Sincerely,

Stuart Lipkind

SIL:hs
Encs.

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May 3, 2022

Reid Coploff, Esq.
McGillivary Steele Elkin LLP
1101 Vermont Avenue N.W.
Washington, D.C. 20005

Re: FCI Loretto - and – AFGE Local 3951 (Mutual Shift Swaps)
FMCS Case No. 210414-05810

For Arbitration Services Rendered

Hearing Held December 8, 2021	$750.00
Cancellation of scheduled second day (December 9, 2021)	750.00
Study of Record and Preparation of Award (2.5 days)	1,875.00
	$3,375.00

Note: Each party has been billed 50% of Arbitrator's Fees and Expenses

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration

FMCS Case No. 210414-05810

between

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
LORETTO, PENNSYLVANIA

Re: Elimination of Mutual Shift Swaps

"Agency"

– and –

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3951
LORETTO, PENNSYLVANIA

"Union"

APPEARANCES

For the Agency
John W. Weeks, Labor Relations Specialist

For the Union
McGILLIVARY STEELE ELKIN LLP
Reid Coploff, Esq., Of Counsel
Sarah Block, Esq., Of Counsel

Before: Stuart Lipkind, Esq., Arbitrator

BACKGROUND

This grievance challenges the Agency's January 31, 2021, unilateral elimination of negotiated mutual shift swap practices by which employees were permitted to trade shifts within the same pay period, upon supervisor approval, and put in their 40 hours per week by working two (2) days of double shifts (16 hours per day) and one day of an 8 hour shift, all at regular time and not overtime. The Union alleges the Agency's action violates the parties' agreements and constitutes an unfair labor practice. It asks for an award compelling the Agency to restore the mutual shift swaps practices *status quo ante* and post an appropriate notice. In the alternative, if the swaps are found to violate the Fair Labor Standards Act ("FLSA") and implementing pay regulations, then it asks for recovery of overtime compensation for all instances where employees worked in excess of eight (8) hours in a work day as a result of a mutually swapped shift from February 16, 2018, through January 31, 2021, plus liquidated damages equal to the unpaid overtime and reasonable attorney's fees and expenses.

On November 2, 2021, a pre – hearing conference was held via Webex. At that time, hearing dates and exhibit protocols were established. The parties confirmed their agreement to bifurcate this proceeding by trying the issue of liability first. They agreed if the Agency is found liable upon the Union's claims, the parties will then confer and attempt to resolve any issues of damages and if no resolution is reached, they will return for an additional hearing before me on damages.

On December 8, 2021, a hearing was held via Webex. During the hearing, both parties were given full opportunity to present evidence and argument in support of their respective positions. They did so. A stenographic transcript of the hearing was taken. At

the close of the hearing, a schedule for submission of post - hearing briefs and reply briefs was agreed upon. On February 28, 2022, both parties submitted post - hearing briefs. On March 14, 2022, the Union submitted a reply brief. The Agency did not submit a reply brief. On March 21, 2022, I declared the record closed.

DISCUSSION AND FINDINGS

The Issues:

The parties were unable to agree upon a statement of the issues. They authorized me to frame the issues presented by their dispute. The following basic issues are presented for my determination:

1. Does the grievance meet the form and specificity requisites of Article 31(f) of the Master Agreement? If not, what shall be the remedy?

2. Was the grievance timely filed? If not, what shall be the remedy?

3. Did the Agency violate the Master Agreement and or Local Supplemental Agreement, or commit an unfair labor practice, when it eliminated mutual shift swaps resulting in employees working more than eight (8) hours in a work day or more than forty (40) hours in a week, effective January 31, 2021? If so, what shall be the remedy?

4. In the alternative, if the parties' mutual shift swap practice was not exempt from overtime pay requirements prescribed by law, did the Agency violate the Fair Labor Standards Act and applicable regulations by not compensating bargaining unit members at premium overtime rates for those hours worked in excess of eight (8) in a work day as a result of mutually swapped shifts? If so, what shall be the remedy?

Findings of Fact

The material facts are not in dispute and are found as follows, after having heard and assessed the credibility of all witnesses and upon my careful consideration of all evidence and arguments presented:

1. The Union represents bargaining unit employees at Federal Correctional Institution, Loretto, Pennsylvania ("FCI Loretto"), including correction officers and other titles. (Transcript, at 38).

2. The parties are bound by a Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals, AFGE. (Joint Exhibit No. 4). The Master Agreement allows employees to exchange shifts with one another, subject to approval by a supervisor after consideration of staffing and security needs and provided no overtime cost is incurred. (*Id.*, Article 18 section m, see, page 12, *infra*).

3. The Master Agreement also permits the parties to negotiate compressed work schedules pursuant to federal law codified at Title 5 of the United States Code ("U.S.C."), at the local level and subject to national review for technical and legal compliance. (*Id.*, Article 18, section b, see, page 12, *infra*).

4. From 2001 through January 31, 2021, employees at FCI Loretto were allowed to swap shifts within the same bi-weekly pay period, resulting in completion of their 40 hours of work per week in three (3) days instead of five (5), by working two (2) days of sixteen (16) hour tours and one (1) day of an eight (8) hour tour. (Testimony of Union President Francis Bailey, Transcript at 40; testimony of Officer Justin Eckenrode, Transcript, at 131-32). They did so after completing a form listing the employees who were swapping shifts, the date(s) and shifts in question, and containing a statement the

swaps will occur within the same pay period and will ensure no overtime cost will be incurred by the institution. The forms were then given to an Administrative Lieutenant for consideration of security and staffing needs of the institution before approving the swaps. (Bailey, Transcript, at 45). The resulting approved, sixteen (16) hour tours were all considered regular time, not overtime, with all hours paid at the employee's regular rate without premium overtime pay. (Eckenrode, Transcript, at 131-32; Bailey, Transcript at 46, 71). This practice was accepted and followed consistently by the parties from 2001 through January 31, 2021, as confirmed by testimonies from the Agency's Human Resources Manager, Melissa Smith, and from Union President Bailey. (Smith, Transcript, at 164 – 165; Bailey, Transcript at 39-40).

5. During these twenty (20) years, the parties' swap practice was also reflected in three (3) negotiated agreements:

A) A November 16, 2001, Memorandum of Understanding ("MOU") provided for mutual shift swaps between two (2) or more employees within the same pay period and noted the swaps would result in a sixteen (16) hour tour of duty in a single work day. The MOU required a form be signed and given to a supervisor for approval, identifying the shifts and containing language waiving overtime that would otherwise normally be paid. (Union Exhibit No. 19). The MOU was received during the hearing as evidence of how long the mutual swaps practice has been in place, but with the understanding the MOU expired and was followed by a July 31, 2017, 2017 Local Supplemental Agreement (noted below in subparagraph C) addressing the ongoing practice. (Transcript, 42 – 43).

B) The Master Agreement allowed employees to request exchange of shift hours with one another as described above, with the proviso no overtime cost would be incurred by the exchange. (Joint Exhibit No. 4, Article 18 section m).

C) A July 31, 2017, Local Supplemental Agreement ("LSA") provided for mutual swapping of shifts, stating at Article 18, Section m: "The employer and the Union agree all employees involved in a mutual swap of shifts and posts will complete and sign the attached waiver form (Attachment 1) for the purposes of pay administration." (Union Exhibit No. 2 at page 9). The waiver form included a statement that "Mutual swaps will ensure that no overtime costs will be incurred, and mutual swaps will occur within the same pay period." (*Id.* at page 18).[1] Said statement on the waiver form was earlier recommended by then – Deputy Chief of Labor Relations in the Central Office, Jana Gill, on July 21, 2017 during a national review for legal and technical compliance, and was adopted. (Union Exhibits No. 1 and 3).

6. These swaps enabled employees to attend to childcare and medical appointments while still providing 40 hours of work per week. The Agency makes no claim the swaps adversely affected its mission. It concedes they were approved by the Agency (Agency opening statement, Transcript at 141 - 142).

7. On January 13, 2021, the Agency's Associate Warden and Labor Management Relations ("LMR") Chair, Joshua Bolar, notified Bailey, via written memorandum, that effective January 31, 2021, mutual shift swaps resulting in employees working sixteen

[1] Although the Agency asserted during the hearing that the 2001 MOU was no longer in effect at the time of the hearing, I find that fact immaterial. The Agency has not disputed the mutual shift swap practice was in effect and followed from 2001 until its unilateral elimination on January 31, 2021. As noted, the practice was confirmed by the 2017 LSA, which remains in force.

(16) hours in a single day would no longer be permitted. (Union Exhibit No. 4). Bolar's memorandum restricted future swaps to those not resulting in an employee working more than eight (8) hours in a given day or more than forty (40) hours in a given week. It also barred employees from fulfilling their forty (40) hour workweek in three (3) days by working sixteen (16) hour days at regular time. According to the Agency, these restrictions were announced to comply with contractual provisions requiring supervisors ensure no overtime costs will be incurred from requested shift swaps, and to comply with the FLSA and government pay regulation 5 CFR 551.501, both alleged by the Agency as requiring premium overtime pay at time and one half for all hours worked in excess of eight (8) hours in a day or forty (40) hours in a workweek, for non - exempt employees. (*Id.*).

8. Smith believed swaps resulting in employees working more than eight (8) hours in a day violated the FLSA because the right to premium overtime pay under the FLSA could not be waived. (Smith, Transcript, at 167). Implicit in her belief is her understanding the FLSA governs the swaps at issue. Smith is not a lawyer and had no specific training on the FLSA. (Smith, Transcript at 161 - 162).

9. The Union responded to Bolar's memorandum by demanding its rescission and demanding bargaining over the Agency's change to the existing practice. (Union Exhibit No. 5). The Agency answered by arguing the practice was unlawful and disclaimed any duty to bargain over it, citing 5 CFR 551.501, as requiring premium overtime pay for hours worked beyond the regular eight (8) hour day, and invoking the FLSA as barring employees from waiving overtime pay. (Union Exhibit No. 6).

10. The Union again demanded rescission of Bolar's memorandum, asserting the swaps are a negotiated, alternative work schedule as defined by 5 U.S.C. (Union Exhibit No. 7). The Union believed overtime was not paid to employees who worked sixteen (16) - hour tours as a result of swapped shifts because the arrangement was considered an approved, compressed work schedule not requiring overtime pay under applicable statutes. (Bailey, Transcript, at 46 - 47). The Agency answered by disputing the mutual shift swap practice was a compressed work schedule. It did not rescind Bolar's memorandum. (Union Exhibit No. 8).

11. The parties thereafter remained at odds over the issue, with the Union giving the Agency documentation from an unfair labor practice case involving the Federal Detention Center in Miami, Florida. According to the Union, the employer's unilateral cessation of shift swaps in that case was challenged as a violation of its duty to bargain under federal labor law. The Agency received the documentation, which included a settlement document without a tribunal ruling on the merits, but did not reverse its decision to eliminate the parties' mutual shift swap practice effective January 31, 2021. (Union Exhibits 16, 17, 18; Transcript, at 90).

12. On February 3, 2021, the Union filed an informal resolution memorandum with the Agency. (Union Exhibit No. 24).

13. On February 16, 2021, with the matter remaining unresolved, the Union filed a formal grievance with the Agency. (Joint Exhibit No. 1). On March 16, 2021, the Agency denied the grievance in writing. (Joint Exhibit No. 2.) On April 1, 2021, the Union invoked arbitration. (Joint Exhibit No. 3). Thereafter, I was appointed to hear and determine the parties' dispute.

Relevant Statutory Provisions

Federal Employees Flexible and Compressed Schedules Act

* * * * * * *

5 U.S.C.§6121

* * * * * * *

(5)"compressed schedule" means (A) in the case of a full-time employee, an 80-hour biweekly basic work requirement which is scheduled for less than 10 workdays, ...

* * * * * * *

(7) "overtime hours", when used with respect to compressed schedule programs under sections 6127 and 6128 of this title, means any hours in excess of those specified hours which constitute the compressed schedule; ...

* * * * * * *

5 U.S.C.§6127 - Compressed schedules; agencies authorized to use

(a) Notwithstanding section 6101 of this title, each agency may establish programs which use a 4-day workweek or other compressed schedule.

* * * * * * *

5 U.S.C.§6128 – Compressed schedules, computation of premium pay

(a) The provisions of sections 5542(a) and 5544(a) of this title, section 7453(e) of title 38, section 7 of the Fair Labor Standards Act (29 U.S.C. 207), or any other law, which relate to premium pay for overtime work, shall not apply to the hours which constitute a compressed schedule.

(b) In the case of any full-time employee, hours worked in excess of the compressed schedule shall be overtime hours and shall be paid for as provided by the applicable provisions referred to in subsection (a) of this section. ...

* * * * * * *

5 U.S.C.§6131 - Criteria and Review

* * * * * * *

(c)(3) (A) If an agency and an exclusive representative have entered into a collective bargaining agreement providing for use of a flexible or compressed schedule under this subchapter and the head of the agency determines under subsection (a)(2) to terminate a flexible or compressed schedule, the agency may reopen the agreement to seek termination of the schedule involved.

(B) If the agency and exclusive representative reach an impasse in collective bargaining with respect to terminating such schedule, the impasse shall be presented to the Panel.

(C) The Panel shall promptly consider any case presented under subparagraph (B), and shall rule on such impasse not later than 60 days after the date the Panel is presented the impasse. The Panel shall take final action in favor of the agency's determination to terminate a schedule if the finding on which the determination is based is supported by evidence that the schedule has caused an adverse agency impact.

(D) Any such schedule may not be terminated until (i) the agreement covering such schedule is renegotiated or expires or terminates pursuant to the terms of that agreement; or (ii) the date of the Panel's final decision, if an impasse arose in the reopening of the agreement under subparagraph (A) of this paragraph.
...

* * * * * * *

Federal Service Labor Management Relations Statute

* * * * * * *

5 U.S.C.§7116 – Unfair labor practices

(a) For the purposes of this chapter, it shall be an unfair labor practice for an agency

(1) to interfere with, restrain or coerce any employee in the exercise by the employee
of any right under this chapter;

* * * * * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

* * * * * * *

Relevant Federal Regulations

5 C.F.R. Part 551 – Pay Administration Under the Fair Labor Standards Act

* * * * * * *

5 C.F.R.§551.501 Overtime pay.

(a) An agency shall compensate an employee who is not exempt under subpart B of this part for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay, except that an employee shall not receive overtime compensation under this part … (6) For hours of work that are not "overtime hours," as defined in 5 U.S.C. 6121, for employees under flexible or compressed work schedules; …

Relevant Contractual Provisions

Master Agreement

* * * * * * *

Article 3 – Governing Regulations

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules and regulations.

1. Local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules and government-wide regulations in existence at the time this Agreement goes into effect.

* * * * * * *

Article 5 – Rights of the Employer

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

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and

2. in accordance with applicable laws,

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

* * * * * * *

Article 18 - Hours of Work

* * * * * * *

Section b. The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 USC.

1. **any agreement reached by the local parties will be forwarded to the Office of General Counsel in the Central Office who will coordinate a technical and legal review. A copy of this agreement will also be forwarded to the President of the Council of Prison Locals for review. These reviews will be completed within thirty (30) calendar days from the date the agreement is signed;**
2. **if the review at the national level reveals that the agreement is insufficient from a technical and/or legal standpoint, the Agency will provide a written response to the parties involved, explaining the adverse impact the schedule had or would have upon the Agency. The parties at the local level may elect to renegotiate the schedule and/or exercise their statutory appeal rights; and**

3. any agreement that is renegotiated will be reviewed in accordance with the procedures outlined in this section.

* * * * * * *

Section m. Employees may request to exchange work assignments, days off, and/or shift hours with one another. Supervisory decisions on such requests will take into account such factors as security and staffing requirements and will ensure that no overtime cost will be incurred.

* * * * * * *

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 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.

* * * * * * *

November 16, 2001 Memorandum of Understanding Between FCI Loretto PA and AFGE Local 3951 [Union Exhibit No. 19)

This Memorandum of Understanding will expire the same day as the Master Agreement. If the expiration date of the Master Agreement is extended for any reason, this Memorandum will also be extended.

The Employer and the Union agree that when a mutual swap of shifts and/or posts occurs between two or more employees that consists of a sixteen hour tour of duty in the same work day, those employees involved will waive their overtime pay normally incurred. This mutual swap will occur within the same period.

All employees involved in the mutual swap of shifts and posts will sign the attached waiver form for the purpose of pay computation.

The waiver form will then be attached to the daily roster to reflect the employees correct assignment and for computation of any night shift differential pay that may occur from the mutual swap.

Both parties agree that this MOU will be evaluated on a Quarterly basis to ensure that it is being adhered to as outlined above. If any problems should arise, either party will notify the other as soon as possible and attempt to reach a resolution.

* * * * * * *

July 31, 2017 Local Supplemental Agreement between FCI Loretto PA and AFGE Local 3951 (Union Exhibit No. 2)

PREAMBLE

This Supplemental Agreement is made and entered into by and between the Federal Bureau of Prisons, Federal Correctional Institution, Loretto, Pennsylvania, hereinafter referred to as the "Employer", and the American Federation of Government Employees, Council of Prisons Locals, Local 3951, hereinafter referred

to as the "Union." This Supplemental Agreement and the Master Agreement between the Federation of Government Employees/Council of Prison Locals together constitute a bargaining agreement between the Employer and the Union. It is affirmed that both parties hereinafter agree to fully support and adhere to the Master Agreement and agree that the mission of the institution is paramount.

All articles in this Supplemental Agreement will be numbered so as to coincide with the same topics in the Master Agreement.

* * * * * * *

Article 18 - Hours of Work

* * * * * * *

Section m. The Employer and the Union agree all employees involved in a mutual swap of shifts and posts will complete and sign the attached waiver form (Attachment 1) for the purposes of pay administration.

* * * * * * *

Attachment 1

FCI LORETTO OVERTIME WAIVER AGREEMENT FORM FOR MUTUAL SWAPS OF SHIFTS AND POSTS

Officer _____ and officer _____ are requesting a mutual swap of shifts and posts for the following date(s) _____.

I, officer _____, will work on (date) _____ (post) _____ and (shift) _____ for officer _____.

Officer _____, will work on (date) _____ (post) _____ and (shift) _____ for officer _____.

Employees may agree to swap work assignments, days off, shift hours and/or posts with one another. Before approving a swap, supervisors will take into account security and staffing requirements of the institution. Mutual swaps will ensure that no overtime cost will be incurred and mutual swaps will occur within the same pay period.

Printed Name and Signature _____ Date _____

Printed Name and Signature _____ Date _____

* * * * * * *

Positions of the Parties

The Union argues the Agency's procedural defenses lack merit. As to form and specificity, it contends its grievance was filed on the proper form and provides detailed statements in sections 5 and 6, enabling the Agency to evaluate its exposure, provide a reasonably informed response, and remedy the violations claimed. The Union points to its letter invoking arbitration as further detailing its claims. It asserts an award by arbitrator Kasarda in *MCC New York and AFGE Local 3148* (2021) is distinguishable and not persuasive. In its view, the Agency's request to dismiss the grievance for lack of specificity should be denied.

The Union maintains its grievance was timely filed as to its claim the Agency wrongfully eliminated mutual shift swaps entailing employees working sixteen (16) hour tours. It maintains the grievance was filed on February 16, 2021, only sixteen (16) days after the effective date of the Agency's action eliminating the swaps (July 31, 2021), and well within the forty (40) – day time period set forth in Article 31, Section d for filing of grievances.

The Union alleges its grievance was timely filed as to its alternative claim for recovery of back pay overtime in the event the swaps are not a compressed schedule and found to have violated the FLSA for failure to pay premium overtime for hours worked more than eight (8) in a day as a result of shift swaps. It argues under the Master Agreement, statutory claims asserted in a grievance are timely if grieved within the appropriate statutory limitations period where that period is longer than forty (40) days. It contends its grievance was also timely filed under its alternative claim under the doctrine

of continuing violation. For these reasons, the Union maintains the Agency's request to dismiss the grievance, as untimely, should be denied.

As to the merits, the Union argues its grievance should be sustained. It contends the shift swap practice is a negotiated condition of employment enforceable through the grievance procedure of the contract. It contends the practice is memorialized in the parties' agreements and is also a past practice accepted by both parties and consistently followed for twenty (20) consecutive years, until its unilateral elimination by the Agency. The Union maintains the Agency breached the Master Agreement and LSA by eliminating a negotiated condition of employment.

The Union disputes the Agency's defense of illegality. It argues the swaps constitute a lawful, compressed work schedule allowed by Title 5 of the United States Code and applicable federal regulations, without the payment of overtime. It contends provisions of 5 U.S.C. §§6120 *et seq* remove compressed work schedules from the premium overtime pay provisions of the FLSA and thereby undermine the Agency's claim the swaps illegally treated hours worked as regular hours and not overtime hours. In the Union's view, the sixteen (16) hour tours resulting from the swaps were part of a negotiated, lawful, compressed work schedule, which Congress excluded from the FLSA overtime mandates and authorized the parties to negotiate. Therefore, it insists the Agency had no right to eliminate the swaps for illegality, and remained bound to continue them as a negotiated condition of employment.

The Union alleges the shift swap clause in the parties' 2017 LSA passed muster during national review except for language on the swap form recommended by Gill, which was agreed to and adopted by the parties. The Union claims the national review

allowed the provision to stand and the swaps continued thereafter until the Agency's action eliminating them effective January 31, 2021.

The Union alleges the Agency's elimination of the swaps and refusal to bargain constitute an unfair labor practice. It contends the Agency improperly altered an existing condition of employment and repudiated the parties' negotiated agreements, in violation of its duty to bargain. The Union disputes the "covered by" doctrine relieves the Agency of its duty to bargain over its decision to eliminate the swaps. Even if that doctrine applies, the Union maintains the Agency was still bound to comply with the shift swap practices because they are explicitly covered in the LSA and must be followed.

For all these reasons, the Union argues its grievance should be sustained and the shift swaps restored.

In the alternative, the Union contends if I find the shift swap practice is not a compressed work schedule allowed by law without payment of premium overtime, then I should find the Agency violated the FLSA by failing to provide premium overtime pay for hours worked beyond eight (8) in a work day as a result of the swaps. It argues the Agency cannot have it both ways and should be adjudged liable for back pay overtime to those employees who swapped shifts and worked in excess of eight (8) hours in a work day without receiving time and one half premium pay. The Union urges these employees are entitled to double overtime back pay as liquidated damages under the FLSA, citing 29 U.S.C.§216(b). It contends liability should be assessed for a period of three (3) years prior to the date the grievance was filed, upon its view the Agency willfully violated the FLSA by knowingly or recklessly disregarding its obligation to pay overtime.

In short, the Union insists its grievance is meritorious. It asks for an award

a) finding the parties' negotiated shift swap practice was a lawful compressed work schedule allowed by law without payment of premium overtime, b) finding the Agency violated the Master Agreement, the Local Supplemental Agreement and past practice, and committed an unfair labor practice, by unilaterally terminating a negotiated shift swap practice effective January 31, 2021 without bargaining with Local 3951, c) directing the Agency to post a notice to all bargaining unit members detailing the Agency's unfair labor practice and informing employees of their rights, and d) directing the Agency to restore the parties' negotiated shift swap agreement and practice. In the alternative, should I rule the parties' shift swap practice was not a lawful compressed work schedule, the Union asks for an award a) finding the Agency liable to bargaining unit employees for non – payment of overtime compensation at time and one half for all hours worked in excess of eight (8) in a work day as a result of a swapped shift during the period from February 16, 2018, through January 31, 2021, b) finding the Agency liable for liquidated damages equal to each bargaining unit member's back pay in accordance with Section 216(b) of the FLSA, c) finding the Agency violated the FLSA and did so willfully within the meaning of 29 U.S.C.§255(a), by failing to pay overtime to the affected employees for all hours worked in excess of eight (8) in a work day as a result of a swapped shift, and d) awarding recovery of the Union's reasonable attorneys' fees and costs under 29 U.S.C.§216(b) and 5 U.S.C.§5596. Should I find the Agency liable for damages under the FLSA, the Union requests a period of sixty (60) days after issuance of my award to seek agreement with the Agency on the amount of damages to be awarded. Should the parties be unable to resolve the issue of damages on their own, it asks that I retain jurisdiction to determine damages and fees to be awarded.

The Agency, on the other hand, argues the Union's grievance fails to comply with procedural requisites of the parties' Agreements, and lacks merit.

As to the procedural issues, the Agency suggests the grievance was not filed on a BOP formal grievance form as required by Article 31, Section F of the Master Agreement. It points to blocks 5 and 6 of the filed grievance form as requiring identification of the directive, order or statute violated, and a statement detailing how each such mandate was violated. The Agency argues the grievance fails to meet these requirements and improperly asserts violations of contractual provisions without detailing how those provisions were violated. It acknowledges Article 31, Section F provides a forty (40) day time period for filing a grievance, measured from the time of occurrence or from the date the filing party can reasonably be aware of the occurrence. However, the Agency takes issue with the Union's allegation of a continuing violation with respect to violations asserted under the Union's alternative claim for relief. The Agency argues the Master Agreement makes no provision for assertion of continuing violations. Therefore, it reasons, the Union's alternative claims for failure to pay overtime required by the FLSA would have occurred on the dates of non – payment of overtime and would have to be presented in a separate grievance. In the Agency's view, the grievance is untimely and must be dismissed. It argues I have no jurisdiction to decide the merits where the Union has failed to comply with the procedural requirements of the parties' contract.

As to the merits, the Agency agrees the swaps resulted in employees working sixteen (16) – hour shifts at regular pay and are a valid compressed work schedule accruing no right to overtime pay. It points to a 2014 award by arbitrator Skonier, where an arrangement for similar swaps by recreation department personnel, although

unwritten, was found by the arbitrator to be a valid compressed work schedule with no right to premium overtime pay. The Agency alleges employees in the instant case swapped shifts and completed their 40 – hour work week in three (3) days, leaving them four (4) days off without being charged leave. In these circumstances, it argues no right to overtime accrued and the Union's alternative claim for back pay overtime should be rejected.

At the same time, the Agency argues the swaps were illegal under provisions of the FLSA and implementing regulations, because they did not include premium overtime pay for hours worked beyond eight (8) in a day. It contends its refusal to bargain over elimination of the swaps was not an unfair labor practice because in its view, employers have no duty to bargain over elimination of illegal practices. As well, the Agency alleges no duty to bargain arose because the parties already covered the subject of shift swaps in their Master Agreement and LSA. In its view, the swaps would incur FLSA overtime costs to the employer, in violation of the contract, warranting their elimination.

The Agency concedes the swaps were locally negotiated and are a valid compressed schedule, but insists they are not an official compressed schedule. It acknowledges the parties bargained their shift swaps provision in the 2017 LSA, but claims "… the LSA has nothing to do with a compressed work schedule" and suggests the national review required by the Master Agreement for locally – negotiated compressed schedules was not performed. In support of this theory, the Agency contends Gill's July 20, 2021, review letter was issued by her and not by the Office of General Counsel. The Agency claims no official compressed schedule was ever adopted for the custody department at FCI Loredo. It insists absent an officially adopted compressed

schedule, overtime pay is required for swaps of more than eight (8) hours and will violate the contract's prohibition against shift swaps incurring overtime cost.

The Agency maintains the Union's reliance upon the Miami unfair labor practice case documents is misplaced. It asserts those documents are not relevant to this dispute and were not shown to involve elimination of sixteen (16) hour shifts worked as a result of shift swaps. The Agency notes its Time and Attendance Reporting Handbook defines compressed work schedules as covering employees on a fixed schedule calling for more than eight (8) hours on some days so he or she can work less time on other days in the pay period and provides overtime is not earned for hours over eight (8) in a day or over forty (40) in a week which are part of the compressed scheduled work tour. It maintains no employees were harmed by elimination of the sixteen (16) hour a day shift swaps.

In short, the Agency insists the Union's grievance is procedurally defective and lacks merit. It asks the grievance be dismissed.

Opinion

Certain preliminary comments are appropriate. As an arbitrator, my role is a limited one. It is to interpret the parties' Agreements as written. If the parties' Agreements are clear on their face, and if from the parties' chosen words their intentions are manifest, then I am without power or authority to deviate from those intentions. In addition, where the parties' Agreements incorporate applicable federal laws, I must keep faith with the parties' intentions by giving those laws due regard.

With these principles in mind, I turn to the issues presented.

Procedural Issues

I find the grievance meets the form and specificity requirements of the Master Agreement. It was filed on a Bureau of Prisons ("BOP") grievance form (Joint Exhibit No. 1, page 2) and meets the detail requirements of the form. Box 5 of the form calls for a listing of the directive, order or statute violated; the submitted form does so, listing the statutes, and contractual provisions, allegedly violated. (*Id*). Box 6 of the form calls for a statement of the way in which the cited directives were violated and tells the grievant to be specific; the form submitted provides a detailed, four (4) – paragraph narrative statement describing the Agency's actions constituting the claimed violations (termination of negotiated mutual shift swap practices by notice dated January 13, 2021, effective January 31, 2021; refusal to bargain over its termination of the practices as communicated to the Union on January 19, 2021; breach of the LSA, "which permits employees to mutual[ly] swap shifts in order to work a lawful compressed schedule …"; violation of parties' "past practice", detailed in block 6 with the statement "Since at least November 2001, the parties have been subject to a negotiated agreement permitting employees to mutually swap shifts as long as the swaps occur within the same pay period and no overtime costs are incurred", with the practice having been "… negotiated and reaffirmed in the parties' Local Supplemental Agreement dated July 31, 2017 …". *(Id.)*. A detailed statement is also set forth explaining the Union's alternative claim. (*Id*).

As submitted, I find the grievance meets the requirements of the parties' grievance procedure and fulfills the function of a grievance by providing sufficient

information to enable the Agency to evaluate the Union's claims, prepare a defense and potentially remedy the alleged violation(s).[2]

I find the grievance timely as to the Union's claim the Agency wrongfully eliminated swaps effective January 31, 2021. The Master Agreement prescribes a forty - (40) day time period from the date of occurrence (or from the date the grievant reasonably knows of the occurrence) to file a grievance. (Article 31, section d, *supra*). The Union timely filed its grievance on February 16, 2021, which was sixteen (16) days after the Agency's elimination of the swaps and well within the 40 - day filing period.

I also find the grievance timely as to the Union's alternative claim, which alleges if the Agency is correct that the prior shift swap practice was illegal for failure to pay premium overtime required by the FLSA, then the Agency has violated the FLSA by failing to pay overtime compensation. At Article 31, section d of the Master Agreement, *supra*, the parties agreed if a claim is grounded in statute and the statute provides a longer period of limitations for redress of a violation, the longer period of limitations will prevail over the forty (40) day filing period otherwise provided. My reading of section d is consistent with the view expressed by the Federal Labor Relations Authority in *AFGE Local 3882 and FCI Ray Brook, New York*, 59 F.L.R.A. 469, 471 (2003), wherein the FLRA stated,

> In this case, as the Union points out, the last sentence of Article 31, Section d provides that where a particular statute establishes larger

[2] The December 14, 2021, award of arbitrator Kasarda submitted by the Agency is inapposite on its facts and not persuasive. There, the grievance was so lacking in information as to the employees involved and the dates and manner of violation as to impel the arbitrator to find insufficient detail to enable the Agency to ascertain the core elements of the union's claim. The Union's grievance in the instant case does not suffer from those deficits.

> time limits for claims filed under the statute, those time limits, rather than the 40- day contractual limit, shall apply under the grievance procedure. On its face, the sentence would appear to incorporate 29 U.S.C.§255(a) into the grievance procedure.

The FLSA provides a limitations period of three (3) years to redress willful failures to pay overtime required by the statute, and two (2) years for non – willful failures. 29 U.S.C.§255(a). If I were to find the swaps practice illegal, then the Union's alternative claim would be timely at least as to instances of alleged non-willful failures going back two (2) years before the February 16, 2021, filing of the grievance. It would also be timely as to alleged instances of willful failures going back three (3) years before the February 16, 2021, filing of the grievance. Subject to these parameters, I am satisfied the alternative claim was timely grieved.

For the above reasons, I reject the Agency's procedural challenges to arbitrability, and shall exercise jurisdiction over the merits.

Merits

For the reasons discussed below, I conclude the Agency violated the Master Agreement, Local Supplemental Agreement and past practice, when it eliminated swaps resulting in employees working more than eight (8) hours in a day or more than forty (40) hours in a given week, effective January 31, 2021. As remedy, I shall annul Bolar's January 13, 2021, memorandum and order the Agency to restore the mutual swaps practice as it existed prior to January 31, 2021 and to do so, forthwith.

At the outset, it is clear from Bolar's memorandum (Union Exhibit No. 4) that the premise of the Agency's action is his contention the sixteen (16) – hour shifts resulting from the approved swaps required the Agency to incur premium overtime costs under the FLSA and 5 C.F.R. 550.111. Bolar asserts these costs would contravene the parties'

contractual covenant (expressed in Article 18, section m of the Master Agreement, *supra*) that swaps not cause overtime costs to the institution. However, I find this premise erroneous because the swaps were a lawful, compressed work schedule whose hours, by law and regulation, are all payable as regular time and not as overtime. Therefore, their performance incurs no overtime costs to the Agency.

The Federal Employees Flexible and Compressed Schedules Act, (hereinafter, the "Schedules Act"), codified at 5 U.S.C.§6120 *et seq*., expressly removes hours comprising a compressed work schedule from the overtime pay requirements of the FLSA. See, 5 U.S.C.§6128(a), *supra* (stating section 7 of the FLSA, or any other law, relating to premium pay for overtime work, "shall not apply to the hours which constitute a compressed schedule"). It provides only hours worked *in excess* of the compressed schedule shall be overtime hours and shall be paid for as provided by the FLSA. See, 5 U.S.C.§6128(b), *supra.* (italics supplied). From these statutory provisions, I find Congress intended hours worked as part of a compressed work schedule are regular hours payable at the employee's regular rate, and not at time and one half. See, 5 U.S.C.§6121(7), *supra*, (defining 'overtime hours' as "any hours in excess of those specified hours which constitute the compressed schedule") .

Consistent with the Schedules Act, hours worked as part of a compressed work schedule are also excluded from the overtime pay mandate of 5 C.F.R.§551.501(a), *supra* (stating an agency shall compensate non – exempt employees at time and one – half "… *except that an employee shall not receive overtime compensation under this part … (6) For hours of work that are not overtime hours as defined in 5 U.S.C. 6121, for employees under flexible or compressed work schedules"*. (italics supplied).

Are the tours of more than eight (8) hours in a day or more than forty (40) hours in a week, resulting from mutual shift swaps approved for scheduling by management and worked by bargaining unit members, compressed work schedules within the meaning of the Schedules Act? They are, indeed. The record establishes these swaps meet the definition of a compressed schedule set forth in the Act.

The Schedules Act provides the following definition:

5 U.S.C.§6121(5) "compressed schedule" means (A) in the case of a full-time employee, an 80 hour biweekly basic work requirement which is scheduled for less than 10 workdays, ...

It is undisputed the employees here are full-time and required to work 40 hours per week or 80 hours bi-weekly. I find their requests to swap shifts were approved by supervisors and resulted in their schedules being adjusted so they worked 40 hours in three work days or 80 hours in six work days. The resulting schedule for these employees plainly meets the statutory definition of a compressed schedule. As such, I find all hours worked under these swaps were payable as regular hours only and not as overtime, pursuant to the Schedules Act, and constituted a lawful, compressed work schedule.

My conclusion is not altered by the Agency's argument the swaps were not "official" compressed schedules. Frankly, in the context of the Scheduling Act, I find the "official" label meaningless. The only requirements set forth in the statute for hours to constitute a compressed schedule is that they meet the aforementioned definition, and be consistent with collectively bargained provisions. (5 U.S.C.§§6121(5), 6130). The

swapped shifts performed at FCI Loretto plainly meet these tests. In its post - hearing brief, the Agency concedes these swaps are valid compressed schedules. Just so.[3]

I reject the Agency's suggestion the hours worked by employees in performing their swapped shifts are not compressed schedules because the LSA swaps provisions were not subjected to national review. The record contains admissions by two (2) Agency officials, Gill and Moser, that the national review called for by the Master Agreement was conducted. See, Union Exhibit No. 1, page 1 (Gill: "The above referenced agreement [the LSA], signed off by the union and management, has been reviewed by our office in accordance with the Master Agreement and national agreements".). See also, Joint Exhibit No. 2, page 3 (wherein Moser, responding to the grievance, states, "Consistent with … the Master Agreement, all LSAs are subject to national review and may be stricken if they conflict with the Master Agreement or applicable laws and regulations. *FCI Loretto's LSA underwent this review.*") (Italics supplied). I am persuaded the national review required by the Master Agreement for local supplemental agreements was performed. To the extent the Agency suggests otherwise, its argument is rejected.[4]

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[3] Notably, the Master Agreement incorporates by reference all laws, which *per force* must include the Schedules Act. See, Article 3, Section B of the Master Agreement, *supra* ("In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules and government-wide regulations in existence at the time this Agreement goes into effect".). Therefore, it is beyond cavil the parties agreed to be bound by the Schedules Act in their administration of the contract.

[4] The Agency's argument General Counsel is required to "review" local supplemental agreements is not supported by the language of Article 18 section m of the Master Agreement. That provision states the review shall be "coordinated" by General Counsel. No claim is made the LSA review was not duly coordinated. The admissions by Gill and Moser establish the review was conducted in accordance with the Master Agreement. Moreover, the Agency implemented the LSA after review for a period of 4 years, without challenging the review.

I find after national review, the LSA was adopted with clear language stating, at Article 18, section m, "… all employees involved in a mutual swap of shifts and posts will complete and sign the attached waiver form (Attachment 1) for the purposes of pay administration". (Union Exhibit No. 2). The waiver form, in turn, contained the parties' negotiated statement, "Employees may agree to swap work assignments, days off, shift hours and/or posts with one another. Before approving a swap, supervisors will take into account security and staffing requirements of the institution. Mutual swaps will ensure that no overtime cost will be incurred and mutual swaps will occur within the same pay period." It is appropriate to read these two (2) statements together, as the parties plainly adopted them both to memorialize their mutual swaps accord.

These contractual provisions are clear and unmistakable in their meaning. By their chosen language in Article 18, section m, I find the parties have expressed their intent to allow employees to request supervisors to approve mutual shift swaps using the form. By their negotiated statement on the form, I find the parties expressed their intent to allow such swaps to be requested without any limitation on duration of the resulting shifts, the only provisos being the swaps must be approved by a supervisor, performed within the same pay period, and incur no overtime costs to the institution. Notably, the language adopted on the negotiated form expresses no restriction against swaps resulting in a sixteen (16) hour tour. It is therefore reasonable to infer the parties did not intend to prohibit such swaps, provided they were approved and performed within the same period and incurred no overtime costs.

Suffice to say, I find the parties' mutual swaps are a condition of employment enforceable under the collective bargaining agreement, which the parties define as being

the Master Agreement and their Local Supplemental Agreement (LSA) (See. Union Exhibit No. 2, page 3, "Preamble"). The swaps are authorized by the shift exchange terms of the Master Agreement (Joint Exhibit No. 4, Article 18 section m, *supra*) and amplified by the locally negotiated LSA, which codifies procedures for swapping of shifts by employees (Union Exhibit No. 2, page 9, Article 18, section m, *supra*). Any concern as to whether the sixteen (16) - hour swaps were specifically within the parties' intention to allow upon approval by a supervisor is resolved by consideration of the parties' practice, which is well established in this record and gives meaning to the contract language. Their clear, longstanding practice was to allow such swaps upon approval by a supervisor, including those resulting in employees working a double shift of sixteen (16) hours at regular time. I am persuaded the parties intended their contract to apply to these swaps. Frankly, no other conclusion is reasonable.

The swaps also meet the criteria of a binding, enforceable past practice because on this record, I find, they were worked with the approval of the Agency and the Union, on a consistent basis, over an extended period of time, in this case, twenty (20) years. I also conclude the parties' swaps practice was entirely consistent with their negotiated agreements. As such, I find the swaps were protected against unilateral alteration by the Agency without bargaining, and are an enforceable as part of the contract under well – settled criteria. See, *AFGE Nat'l Council of HUD Local 222*, 60 F.L.R.A. 311, 314 (2004).

The Agency's action eliminating these swaps also violates the Scheduling Act, which requires compressed schedules not be terminated absent bargaining and resort to the federal impasse panel. See, 5 U.S.C. §6131(D), *supra*. Since the Master Agreement

expressly requires the parties to administer their agreement in compliance with federal statutes, I find the Agency's termination of the compressed schedule arrangement without bargaining and resort to the federal impasse panel violates the Scheduling Act, and thereby also violates Article 3, section b of the Master Agreement, *supra* ("In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules and government-wide regulations in existence at the time this Agreement goes into effect.").

For all the foregoing, I find the Agency violated the Master Agreement, the LSA, and established past practice, when it eliminated mutual shift swaps resulting in employees working more than eight (8) hours in a day or more than forty (40) hours in a given week, effective January 31, 2021. As remedy, Bolar's January 13, 2021, memorandum is annulled. The Agency shall, forthwith, restore the mutual shift swaps practice as it existed prior to January 31, 2021.

In light of my determination, the Union's alternative claim for relief is moot.

In light of my determination and remedy awarded, the Union's assertion of an Unfair Labor Practice is moot.

In all, the Union's grievance is sustained to the foregoing extent.

AWARD

1. The grievance meets the form and specificity requirements of the parties' collective bargaining agreement.

2. The grievance was timely filed.

3. The Agency violated the Master Agreement, the Local Supplemental Agreement, and established past practice, when it eliminated mutual shift swaps resulting in employees working more than eight (8) hours in a day or more than forty (40) hours in a given week, effective January 31, 2021.

4. As remedy, the January 13, 2021, Memorandum issued by Bolar is annulled. The Agency shall, forthwith, restore the mutual shift swaps practice as it existed prior to January 31, 2021.

5. In light of my determination, the Union's alternative claim is moot.

6. In light of my determination, the Union's assertion of an unfair labor practice is moot.

7. The Union's grievance is sustained to the foregoing extent.

Dated: May 3, 2022

Stuart Lipkind, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF ULSTER)

I, Stuart Lipkind, Esq., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

Dated: May 1, 2022

Stuart Lipkind, Esq.
Arbitrator