
In the Matter of Arbitration Between:

AFGE, Council of Prison Locals (AFL-CIO)

And

U.S. Department of Justice
Federal Bureau of Prisons
Federal Correction Institution
Elkton, Ohio

FMCS # 13-53960

Overtime Processing

June 5, 2015

As Arbitrator in this matter, on June 20, 2015 I issued a set of findings and Award. The Award stated in part that:

The Agency failed to consistently pay employees for overtime worked during a pay period as part of the payment for services reflected in the pay check for that pay period. It also failed to process such overtime payments as required by Article 18 of the Local Supplemental Agreement. There existed sufficient evidence that these actions were taken in bad faith by the Agency and the Agency is hereby ordered to:

1. Establish procedures that result in employees receiving pay for overtime work at the time of receiving pay for the pay period within which the overtime was earned.
2. Pay employees liquidated damages given that the Agency demonstrated bad faith.....
3. Beginning January 14, 2011 and until Agency processes are adjusted to adhere to this decision, liquidated damages will be paid to those employees whose overtime pay occurred later than receipt of compensation for the pay period in which overtime was performed.
4. The Agency is to pay reasonable Union attorney's fees and costs in this case. Union Counsel is directed to submit an itemized bill to the Agency. If there is disagreement over fees or costs the Agency should engage in good faith with Union Counsel to come to agreement.
5. The Arbitrator expressly reserves jurisdiction to resolve any disagreement that the parties may have over the interpretation or application of the remedy portions of this Award.

In implementing the terms of this award the parties encountered difficulties and returned the issue to the Arbitrator for clarification. The two issues of dispute include:

1. Calculation of liquidated damages for employees.
2. Payment of appropriate attorney fees for the Union

Contentions of the Union

The Union believes that the Agency's obligations under terms of the Award are clear. The Agency is to pay liquidated damages for unpaid overtime for qualified employees from June 14, 2011. This would be consistent with rulings found in Beebe v. United States, 640 F.2d 1283 (1981) and Deason v. United States, 54 Fed Cl. 509 (2002) and the Arbitrator's initial ruling. Clearly liquidated damages should be paid based on the untimely overtime payments covered by this arbitration.

However, in calculating payments to affected bargaining unit members the Agency has stated that it would not pay "Code 34 FLSA" overtime payments. The Agency has provided little explanation or justification to the Union for this action. However, upon comparing specific examples it is clear to the Union that the Agency has indeed consistently excluded "Code 34 FLSA" payments from its calculations of liquidated damages. The Union notes that there is nothing in prior court rulings or the Arbitrator's Award to justify such exclusions.

The Union believes that under the terms of the Award each employee is entitled to liquidated damages for all overtime payments inappropriately delayed as a result of Agency policies.

The Union also notes that it has not been able to reach agreement on the reasonable legal fees to be provided to the Union as a result of the initial Award. It also notes that those fees continue to accumulate as legal time and effort is devoted resolving implementation of the Award.

Contentions of the Agency

The Agency argues that it essentially disagrees with the Arbitrator's decision but has attempted to implement the Award. However, the Agency believes that it has paid enough of a penalty and that the amounts not paid to employees by excluding Code 34 FLSA are trivial or "miniscule" for each employee. Consequently the Agency does not believe any further financial penalty should be imposed on the Agency given payments agreed to at this time.

Opinion

The Award in this Arbitration was clear and explicit. However, after failing to provide justification for its actions, in an e-mail of June 4, 2015 (attached) Mr. Markiewicz, representing the Agency, agreed that regardless of past behavior the Agency would in fact provide all financial benefits consistent with the arbitration award. Thus each grievant will receive all overtime pay and litigated

damages due to them (e.g., Code 34 FLSA will not be used to limit damages paid). Consequently this issue should be moot although as noted below I will retain jurisdiction over implementation of the original award.

In addition, the payment of reasonable legal fees for the Union was required in the original award and is appropriate. Given the passage of time since announcement of the award, if the parties cannot agree on those fees within a reasonable time (e.g., 30 days) then an independent assessment by the arbitrator will be necessary.

Conclusion

The original Award in this matter is to be implemented, including payment for inappropriately delayed overtime compensation that includes work hours classified by the Agency as "Code 34 FLSA." Such payments are to occur prior to June 30, 2015.

Within 30 days the Union is to submit to the Agency an accounting of reasonable legal attorney fees and costs up to an including resolution of the issues in this clarification. If the parties are unable to resolve the issue within 30 days of such submission that statement of expenses is to be sent to the Arbitrator and a briefing will be held prior to a final decision.

As Arbitrator I will retain jurisdiction over both matters. Upon conclusion of implementation of the award the parties will receive an invoice for additional time devoted to resolution of this matter.

Joseph A. Alutto, Arbitrator
June 5, 2015

Attachment – E-Mail of June 4, 2015

Arbitrator Alutto,

The agency is going to go ahead and process the difference in payment to any of the employees that were affected.

Thank you.

>>> "Alutto, Joseph" <alutto.1@osu.edu> 5/28/2015 7:18 AM >>>
Mr. Markiewicz,

As I review materials submitted it is apparent that the Agency has provided

little explanation about the exclusion of "Code 34 FLSA" hours in the calculation of liquidated damages. The agreed upon May 22, 2015 date for any rebuttal has passed. Will you be addressing that issue? Given your previous remedy brief and the passage of additional time allocated for rebuttal if I do not hear from you by June 3, 2015 I will assume that you have submitted your final materials.

Thank you.

-----Original Message-----

From: Mike Markiewicz [<mailto:MMarkiewicz@bop.gov>]
Sent: Wednesday, May 27, 2015 8:27 AM
To: Alutto, Joseph
Subject: RE: Elkton - Extension (Not Here)

I will be out of the office through June 1, 2015. I will have limited e-mail access and will be occasionally checking messages during this time period. I will respond to your e-mail at my earliest convenience.

If your message is urgent please contact our office at 602-379-3791, or you can leave me a voice message at 202-598-7148.

This is an automated reply and it is not meant to accept or authorize service of litigation documents sent by electronic means.

Thanks,
Mike

>>> "Alutto, Joseph" <alutto.1@osu.edu> 05/27/15 08:26 >>>

I will begin reviewing the materials I have received. If you have not shared your responses please do so.
Joe Alutto

From: Mike Markiewicz [<mailto:MMarkiewicz@bop.gov>]
Sent: Friday, May 08, 2015 7:05 PM
To: Alutto, Joseph; Muther, Thomas
Cc: Garrett, Crystal
Subject: Re: Elkton - Extension

See attached.

>>> "Alutto, Joseph" <alutto.1@osu.edu<<mailto:alutto.1@osu.edu>>> 4/21/2015 2:58 PM >>>
Mr. Murther,

It will be your choice and I have no difficulty with the new schedule.

I appreciate your flexibility.

Sent from my iPad

On Apr 21, 2015, at 5:46 PM, Thomas Muther
<tom@cofedlaw.com<<mailto:tom@cofedlaw.com>>> wrote:

<!--[if mso 9]--> <!--[endif]-->

All,

I do not have an objection to this extension. With this said, I was planning on submitting the Union's initial compliance brief either today or tomorrow, with the primary intent of giving the Agency notice of our position and an opportunity to better address our issues involving compliance to date. Therefore, our brief will be submitted far in advance of the new May 8, 2015, deadline.

Regards,

-Tom

Thomas F. Muther, Jr.

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From: Mike Markiewicz [<mailto:MMarkiewicz@bop.gov>]

Sent: Tuesday, April 21, 2015 2:19 PM

To: Thomas Muther; alutto.1@osu.edu<<mailto:alutto.1@osu.edu>>

Subject: Elkton - Extension

All,

I have to leave town all next week so I would like a 1-week extension on everything, as follows:

- Initial briefs due May 8

- Reply briefs due May 22

Thank you for your consideration.