



**APPEARANCES**

**For the Employer:**

Elizabeth Blackmon, Labor Relations Specialist

**Also Present:**

Ronnie R. Holt, Warden  
Thomas Chmely, Acting Captain, Roster Lieutenant  
Marianne Coratello, Human Resource Management  
Joan Heim, Warden's Secretary

**For the Union:**

Pati Manbeck, Chief Steward, Advocate

**Also Present:**

Jim Seidel, Vice President, Local 3020  
Eugene Jacobs, Steward, Co-Advocate  
Mark Durick, Grievant  
Jim Shaup, Bargaining Unit Member

**PRELIMINARY STATEMENT**

The parties, United States of America, Federal Bureau of Prisons, Department of Justice ("Employer" or "Agency") and Council of Prison Locals, American Federation of Government Employees, Local 3020 ("Union"), having failed to resolve a dispute involving the back pay for Union advocate use of personal time following a denial of official time, proceeded to final and binding arbitration pursuant to the terms of their collective bargaining agreement ("Agreement"). Grievance was filed on November 19, 2004 and moved to arbitration in a timely manner. Robert A. Creo, Esquire was appointed to serve as impartial Arbitrator from a panel of arbitrators established by the Federal Mediation and Conciliation Service at FMCS Case No. 05-52327. The Arbitrator assigned his own Case Number 05-007 to the Grievance. An oral hearing was held on Wednesday, October 5, 2005 at the Schuylkill Federal Correctional Institute in Minersville, Pennsylvania. All witnesses were sworn and sequestered. Both parties were given full opportunity to present evidence, to cross-examine the witnesses and to argue their respective positions. The parties declined to make a stenographic record of the hearing. The parties stipulated that the Arbitrator has full authority to resolve any arbitral challenges or procedural issues and/or to decide the case on its merits. The parties stipulated to the Issue. Post-hearing briefs were filed by the parties by November 22, 2005. Neither party objected to the publication of the Opinion and Award.

## **BACKGROUND AND SUMMARY OF TESTIMONY**

There are few, if any, material facts in dispute. The Arbitrator, therefore, relies upon the recitations of the parties briefs and repeats, summarizes or paraphrases the recitations contained therein.

On March 9, 1998, a Master Agreement between the Federal Bureau of Prisons, Department of Justice and The Council of Prison Locals went into effect. The Mission of the Federal Bureau of Prisons is to protect society by confining offenders in the controlled environments of prisons. This Grievance involves denial of requests for official time to conduct Union business. Grievant submitted a number of requests for official time between September 2004 and October 31, 2004, to represent a terminated employee in a MSPB case, to participate in local negotiations, and in order to prepare for an arbitration hearing, FMCS case number 04-53-208. Many of those requests were denied. The Union contends that the Agency's denial led Grievant to use sixty-one (61) hours of uncompensated personal time to perform his representational duties. The Agency contends that although Management is not always able to grant Grievant every request for Official Time due to staffing issues and the mission of the Agency, it was able to grant Grievant 224 hours of Official Time from January 1, 2003 through October 30, 2004.

On or about November 19, 2004, Local 3020 filed a Grievance with Warden Ronnie R. Holt alleging the Agency's repeated denials of Grievant's requests for official time and noted the violations of the collective bargaining agreement and federal law. The Grievant's payroll records show that he used 96 hours of Official Time during the months of September and October 2004. The Agency follows the Master Agreement when reviewing Official Time and the approval, use, and denial of the same. On or about December 8, 2004, Warden Holt denied the Grievance by stating the amount of official time granted to Grievant was "reasonable" and in compliance with Article 11 of the Master Agreement. The Union then invoked arbitration of this matter.

At the October 5, 2005, arbitration hearing, the Agency raised challenges to the arbitrability of the Grievance. The Agency contends that the Grievance did not meet the notification requirements negotiated by the parties. The Agency provided a response to the Union on December 8, 2004; the Union provided the written notification invocation memo to the Agency on September 21, 2005. The Union claims that because it is dated December 28, 2004, it is timely.

There was testimony regarding the procedures, especially the process of date stamping and or initialing of documents in the Warden's office. Witness Joan Heim, Warden's secretary, testified regarding the procedures for handling Union correspondence detailing the method of processing documents. Any Union correspondence to the Warden is dated and time stamped by her or the Associate Warden's secretary. A copy is made for the Union after it is stamped and then it is filed in the log book. Guidance has been provided to staff members that may work in the Associate Warden's Office in the absence of the Associate Warden's secretary. The guidance states if both the Warden's Secretary and the Associate Warden's secretary were unavailable, they should see Mr. Robinson. If he is also unavailable, they are to ask the Union

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to return when one of them (either the Warden's Secretary or the Associate Warden's Secretary) will be. Witness Heim also testified that several documents were received from the Union on December 28, 2005, the date of the invocation memo. Witness Jim Seidel, Vice President, Local 3020 testified that his copy of the Intent to Pursue Arbitration did not have the date stamp or signature to indicate receipt in the Warden's Office.

Witness Thomas Chmely, Acting Captain, Roster Lt., testified the Agency's denial of official time for the Grievant was due to institution needs. He explained the rosters for each date in question. For each date, there were not staff available to provide a relief and/or there were already people being pulled from various positions and/or for overtime on those dates. One of the dates that Grievant was unable to be relieved was due to Mr. Seidel, Vice President, Local 3020, being relieved in his place. On Wednesday, September 22, 2004, Grievant had been adjusted to attend an LMR meeting per a request from chief steward, Pati Manbeck. Initially Mr. Seidel was not approved to attend the meeting, but Grievant relieved Mr. Seidel so that he could attend.

Grievant testified since he had no prior experience in preparing for an MSPB trial or an arbitration hearing. Given the considerable amount of work required to properly prepare for these proceedings and meet established deadlines, Grievant requested 12 days of official time. He used the limited amount of official time that the Agency approved during September to prepare required documents and meet MSPB deadlines. Grievant also had to participate in LMR meetings and local negotiations. He was forced to use personal time in order to effectively continue his representational duties as a Union official. Grievant provided a detailed account of the amount of personal time that he utilized for his representational and Union duties, to Professor Robert T. Simmelkjaer, Arbitrator. Grievant had to educate himself on both the processes and procedures required by both the MSPB and arbitration. The Union was short staffed, and Grievant had to work on all of these things simultaneously with minimal help from others.

Witness Jim Shaup, Bargaining Unit Member, held the position of Union Secretary during this time. He testified that the Union had a great deal of work during September and October 2004. Mr. Shaup was a participant in an arbitration hearing that occurred on November 4, 2004 and he believes that the Union would not have been properly prepared for this hearing if Grievant had not completed the necessary work at home. Mr. Shaup discussed the matter of Grievant's requests for official time with Captain David Bebow and Administrative Lieutenant Joseph Reed. Witness Shaup testified that both Mr. Bebow and Mr. Reed stated that Grievant was requesting "too much" official time, and he would not be approved for anymore. Mr. Shaup countered that Grievant had a considerable work load, but Mr. Bebow and Mr. Reed would not relent and maintained that the previous approvals for official time were sufficient. Witness Shaup noted in his testimony that Mr. Bebow and Mr. Reed would not consider Grievant's workload as a valid explanation for the requests for official time, but rather based their denials on the number of hours he had already used.

Witness Jim Seidel testified that Union had limited staff, however all Union

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representational duties had to continue and all active Union Officials were involved in numerous other projects and were unable to assist Grievant. Both Witness Seidel and Witness Shaup testified that the Union would not have been ready for the arbitration hearing if Grievant had not performed sixty one (61) hours of Union work at home and the affected employees would have been misrepresented by the Union. These sixty one (61) hours were in addition to his already worked week.

FCI Schuylkill created a program to assist management in meeting staffing needs because of staffing shortages. This program helps in preventing the vacating of posts, and all but eliminates the payment of overtime. Witness Jim Seidel discussed the Coverage Assistance Program (CAP program) during his testimony. This program allowed management to use non-correctional services staff to cover correctional posts when the correctional roster was short. The CAP program was being used daily during the time Grievant requested official time. There is no limit on the amount of non-custodial staff that can be utilized on any particular day during this program. Management had the ability to replace Grievant with a non-custodial staff member.

The following documents were entered into the Record.

The following Joint Exhibits:

1. Master Agreement, March 9, 1998 through March 8, 2001
2. Grievance dated November 19, 2004
3. Informal Resolution of Back Pay for Mark Durick dated November 17, 2004
4. Memorandum to James Seidel, Vice President, AGFE Local 3020, from Ronnie R. Holt, Warden, dated December 8, 2004
5. Memorandum to Ronnie R. Holt, Warden, from Jim Seidel, Vice President, Local 3020, dated December 28, 2004
6. Code 5 USC Sec. 5596 dated January 22, 2002
7. Code Sec. 550.805 revised January 1, 1998
8. United States Code Annotated Currentness Title 5 Sec. 7131,
9. Email to Lt. Reed from Mark Durick dated September 14, 2004
10. Email to Lt. Reed from Mark Durick dated September 18, 2004
11. Durrick- Daily Assignments dated August 6, 2004 through December 17, 2004
12. Email to David Bebow from Patti Manbeck dated September 9, 2004

The following Employer Exhibits:

1. Instructions for Associate Wardens' Office Updated September 16, 2004
2. Negotiations memorandum to Neil Robinson, LMR Chairperson, Associate Warden (P) from J. Seidel, Vice President, AFGE Local 3020 dated July 30, 2004

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3. Federal Service Impasse Panel Request For Assistance dated December 15, 2004
4. Official Time memorandum to David Bebow, Captain, from J. Seidel, Vice President, AFGE Local 3020 dated October 20, 2004
5. Official Time memorandum to all assistant directors, regional directors, and wardens from W.I. LeBlanc, Jr., Assistant Director Human Resource Management Division
6. Positions identified to be returned and Staffing Report dated May 16, 2004 through May 29, 2004
7. Employees with paid transaction codes, Union Business on Official Time, for the end of August through the end of October
8. Pay period from September 19, 2004 through October 30, 2004
9. Email to David Bebow from Patti Manbeck dated September 16, 2004
10. Daily Assignment Roster dated September 22, 2004
11. Daily Assignment Roster dated September 15, 2004
12. Daily Assignment Roster dated September 16, 2004
13. Daily Assignment Roster dated September 20, 2004
14. Daily Assignment Roster dated October 3, 2004
15. Daily Assignment Roster dated October 5, 2004
16. Daily Assignment Roster dated October 20, 2004
17. Daily Assignment Roster dated October 27, 2004
18. Daily Assignment Roster dated October 28, 2004
19. Daily Assignment Roster dated October 29, 2004
20. Daily Assignment Roster dated October 31, 2004

The following Union Exhibits:

1. Off duty hours of work from September 15, 2004 through October 31, 2004 to Professor Robert T. Simmelkjaer from Mark D. Durick
2. Case: Social Security Administration and AFGE, Local 3231 dated August 22, 1985
3. Case: AFGE, Local 987 and U.S. Department of the Air Force, Air Force Materiel Command, Robins AFB, GA dated September 28, 2001
4. Case: U.S. Department of Agriculture Rural Development, Washington, D.C. and American Federation of State, County and Municipal Employees Local 3870 dated December 30, 2004

**PERTINENT PROVISIONS OF THE AGREEMENT**

**Article 11- Official Time**

**Section a.** Official time is defined as paid duty time used for various labor relations and representational obligations in accordance with laws, rules, regulations, and this Agreement.

1. reasonable official time will be granted to elected/appointed Union officers, designated

- stewards, and other representatives authorized by the Union, in accordance with this article and to the extent that official time falls within the duty hours of the Union Officer, steward, and/or representative affected;
2. the Union and the Agency recognize that the granting of official time may ultimately lead to improved labor management relations. Such a relationship is in the interest of all parties, including the public, and
  3. except when specifically agreed to in advance, travel-related expenses for the Union's use of official time will not be paid by the Employer.

....  
**Article 7- Rights of the Union**

**Section e. . . .**

1. local Union representatives desiring to perform and discharge their responsibilities must request the time from their supervisor prior to leaving the work site. When Management initiates the need for a representative, Management will coordinate with the affected supervisor and secure the representative's relief. If initiated by the Union, the representative will inform the supervisor of the anticipated time that the representative will be away from the work site, where the representative may be contacted, and the general nature of the function to be performed (i.e. meeting, complaint, etc.). It is understood that specific individuals or problems will not be discussed;
2. for the purpose of representation (i.e., investigatory examinations, to assist an employee with a problem, disciplinary meetings, etc.), the supervisor will ensure that the designated representative is expeditiously relieved. If the representative is unable to be relieved, the function that the representative requested to be relieved for will be rescheduled to a time when the representative is able to attend.

....  
**Article 31- Grievance Procedure**

....  
**Section g. . . .**

1. if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and

....  
**Article 32- Arbitration**

**Section a.** In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the Arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

....  
**Section b.** The arbitrator's award shall be binding on the parties. However, either party,

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through its headquarters, may file exceptions to an award as allowed by the Statute.  
The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

....

**RELEVANT STATUTORY PROVISIONS**

Title 5 U.S.C. 7131 (d): Except as provided in the preceding subsections of this section- (1) any employee representing an exclusive representative, or (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative, shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Title 5 USC 5596 (b)(1): An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials of the employee- (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect- (I) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period

Title 5 Section 550.805, Back Pay computations: (a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee- (1) The employee shall be deemed to have performed service for the agency during the period covered by the corrective action and (2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

**OTHER RELEVANT POLICY PROVISIONS**

Memorandum of Understanding Coverage Assistance Program (CAP)

**POSITIONS OF THE PARTIES**

**Summary of Employer Brief**



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The Union's Grievance should be rejected because the Union did not meet the notification requirements negotiated by the parties. Although the Agency provided a response to the Union on December 8, 2004, the Union did not notify the Agency in writing of this intent prior to the expiration of the time limit of thirty (30) days as required in the Master Agreement.

The Union did not provide the written notification invocation memo to the Agency until September 21, 2005 when requested by Marianne Coratello, Employee Services Manager. Although the Union claims that because it is dated December 28, 2004, it is timely. The invocation memo is not date stamped or initialed as is the standard operating procedure for document handling in the Warden's office.

Witness Joan Heim, Warden's secretary, testified regarding the procedures for handling Union correspondence. She testified that if the Union brings correspondence for the Warden, she or the Associate Warden's secretary would date stamp and sign the correspondence, make a copy for the Union, and file the correspondence in the log book. Witness Heim also testified that they have provided guidance for staff members that would be working in the Associate Warden's Office in the absence of the Associate Warden's secretary. The guidance states if both her and the Associate Warden's secretary were unavailable, they should see Mr. Robinson. If he is also unavailable, they are to ask them (the Union) to return when one of them (either the Warden's Secretary or the Associate Warden's Secretary) will be. Witness Heim also testified that several documents were received from the Union on December 28, 2005, the date of the invocation memo. Witness Jim Seidel, Vice President, Local 3020 testified that his copy of the Intent to Pursue Arbitration did not have the date stamp or signature to indicate receipt in the Warden's Office.

The Union is familiar with the process of date stamping Union correspondence. Witness Seidel testified that he had sent a memo to the Captain and requested that the Captain utilize a similar process.

Although the Union verbally informed the Agency and an arbitration panel was selected, the grieving party did not provide the Agency with the intent to invoke arbitration until approximately five months after receiving the final response on December 8, 2004. This was well beyond the thirty (30) calendar days allowed in the Master Agreement. Although the invocation is dated December 28, 2004, it was not received by the Agency, date stamped and signed for by the Warden's or Associate Warden's secretary, nor filed in the log-book with correspondence received on that date.

The Union was not specific in identifying what section of rule, regulation, or statute the Agency allegedly violated as negotiated by the parties.

In the Grievance, Section 5, the Union stated the Agency violated the Master Agreement, Article 11, Back Pay Act, 5 U.S.C. 7131 5596, 5 C.F.R. 550-805, and Privacy Act, 5 U.S.C. 552 (a)(g)(4).

In the invocation Statement of Issues, the Union stated: Management has violated the

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following: the Master Agreement, Article 11, Back Pay Act, 5 U.S.C. 7131 5596, 5 C.F.R. 550-805, and Privacy Act, 5 U.S.C. 552 (a)(g)(4), but not limited to any other applicable Bureau Policy and Federal Statutes and Regulations.

It is neither the duty nor the responsibility of either the Agency or the Arbitrator to pour through each and every Directive, Executive Order, or Collective Bargaining Agreement to try to figure out what violation the Union is claiming. It is the grieving party's responsibility to point out clearly and precisely the sections contained within the rules, regulations, statute, or collective bargaining agreement, etc., that were allegedly violated, Federal Transfer Center, Oklahoma City, OK vs. AFGE Local 171, Oklahoma City, OK, 24 January 2002 (FMCS 01-05831). Therefore, the Grievance is not procedurally arbitrable.

The Union has previously submitted the Issue to Professor Robert T. Simmelkjaer, Arbitrator. The issue at hand is the request for reimbursement of official time for preparation for FMCS Case #04-53208. This case is on-going and has not been resolved to date. The Union has previously submitted a request for the reimbursement of the same hours of time to Professor Robert T. Simmelkjaer, Arbitrator for the above-mentioned case.

Although the Union claims that Grievant was not given enough official time, official payroll records show that he was granted 224 hours of Official Time from January 1, 2003 through October 30, 2004.

Grievant's official payroll records from pay period 21 (ending 10/31/04) revealed 224 hours of Official time year to date. The records also show that he was granted 96 hours of official time during the months of September and October 2004, the months we are here to discuss. When asked if the records were accurate, Grievant testified that there was no reason to believe it is not accurate.

The Union does not dispute the fact that the when the Agency denied official time, it was due to institution needs.

Witness Thomas Chmely, Acting Captain, Roster Lt., testified that each time the Agency denied official time for Grievant, it was due to institution needs. He explained the rosters for each date in question. For each date, there were not staff available to provide a relief and/or there were already people being pulled from various positions and/or for overtime on those dates.

The Union does not dispute the fact that on one of the dates that Grievant was unable to be relieved it was due to Mr. Seidel, Vice President, Local 3020, being relieved in his place.

On Wednesday, September 22, 2004, Grievant had been adjusted to attend an LMR meeting per a request from Patti Manbeck. Mr. Seidel was not initially approved, yet was relieved by Grievant so Mr. Seidel could attend the meeting.

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The Union does not dispute the fact that the primary mission of the Federal Bureau of Prisons is to protect society by confining offenders in the controlled environments of prisons. Witness Holt testified that the security of the institution is the primary function of the Federal Bureau of Prisons.

**Cases cited by Employer:**

1. Federal Transfer Center, Oklahoma City, OK vs. AFGE Local 171, Oklahoma City, OK, 24 January 2002 (FMCS 01-05831).

**Summary of Union Brief**

The Union contends the Agency's repeated denials of Grievant's official time requests were unreasonable, constituted an intentional and unwarranted personnel action, and requires monetary remedy to make the employee whole. The Agency has violated article 11, section (a) of the negotiated agreement and Title 5 USC 7131.

During the arbitration hearing conducted on October 5, 2005, Grievant testified that during the time period he occupied the position of Parliamentarian, and Advocate for MSPB and Arbitration Hearings. As such, he made several requests for official time during the months of September and October, 2004. Grievant informed his supervisor of his request for official time that the time requested was necessary to prepare for an MSPB trial, an arbitration hearing, and labor management relations issues. Grievant informed his supervisor in his request for official time that the time was necessary for the preparation of documents and witnesses, research, depositions, pre-hearing conferences, administrative filings, Bureau Of Prisons staff coordination, and other matters pertaining to both an arbitration hearing and an MSPB appeal. He requested twelve (12) days of official time for the month of October, totaling 96 hours. Grievant was granted only three (3) of the days he requested for the month of October, equivalent to a shortage of 72 hours (or 9 days.)

Grievant testified since he had no prior experience in preparing for an MSPB trial or an arbitration hearing and given the considerable amount of work required to properly prepare for these proceedings and meet established deadlines, he reasoned it would be necessary to request 12 days of official time. Grievant further testified he used the limited amount of official time approved by the Agency during the month of September in preparing required documents to meet imminent MSPB deadlines. In addition, it was also necessary for him to participate in LMR meetings and local negotiations. As a result, Grievant was forced to use personal time in order to effectively continue his representational duties as a Union official. In a letter to Professor Robert T. Simmelkjaer, Arbitrator, Grievant provided a detailed account of the amount of personal time utilized to effect his representational and Union duties. Being unfamiliar with both the MSPB and Arbitration processes made his work even more cumbersome, as he had to also educate himself on both the processes and procedures required by both proceedings. Grievant also testified the Union was very short staffed, and he had to work on all of those things simultaneously with minimal help from others. Grievant provided a very detailed description of both the amount of time used, and the exact Union duties he

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worked on during those time periods.

Grievant testified the Union requested to informally resolve this issue with the Agency. The Agency failed to respond to this request. On November 19, 2004, the Union filed a Grievance on Grievant's behalf, which was subsequently denied by Warden Holt on December 8, 2004.

Witness Jim Shaup, Bargaining Unit Member, testified that during this period of time he held the position of Union Secretary. He testified that the Union was inundated with a great deal of work during September and October 2004. Mr. Shaup stated that he was a participant in an arbitration hearing that occurred on November 4, 2004. Witness Shaup testified that he did not believe the Union would be properly prepared for this hearing had Grievant not completed the work necessary for the hearing at home. Witness Shaup also testified he discussed the matter of Grievant's requests for official time with Captain David Bebow and Administrative Lieutenant Joseph Reed. Witness Shaup testified that both Mr. Bebow and Mr. Reed made statements that Grievant was requesting "too much" official time, and he would not be approved for anymore. Mr. Shaup countered that Grievant's work load was considerable; however, Mr. Bebow and Mr. Reed would not relent. They continued to maintain that previous approvals for Official time were sufficient. Witness Shaup noted in his testimony that Mr. Bebow and Mr. Reed would not consider Grievant's workload as a valid explanation for the requests for official time, but rather based their denials on the number of hours he had already used.

Witness Jim Seidel testified that during the months of September and October, 2004, the Union was inundated with a great deal of work. He further testified that despite the Union having limited staff, Union representational duties had to continue and that all active Union Officials were involved in numerous other projects and were unable to assist Grievant.

Because of staffing shortages, FCI Schuylkill created a program to assist management in meeting staffing needs. This program helps in preventing the vacating of posts, and all but eliminates the payment of overtime. Witness Jim Seidel discussed the CAP program (Coverage Assistance Program) during his testimony. He said this program enabled management to use non-correctional services staff to cover correctional posts when the correctional roster was short. Even management acknowledged there was a program in place to assist them in covering correctional staff shortages. Witness Chmely testified that the staff on the Daily Assignment Roster with the "CAP" next to their names indicated those were non-custody people filling in correctional posts. As a matter of fact, although the Agency presented several rosters to demonstrate just how short staffed they were, those rosters clearly demonstrate the existence and use of the CAP program to address those very needs. The CAP program was being used daily during the time Grievant requested official time. Although Witness Chmely testified that he believed they were short staffed on the days Grievant requested official time, he also testified management was using non-custodial staff to fill posts that were vacated because of staff shortages on those same days. There is no limit on the amount of non-custodial staff that can be utilized on any particular day during this program. Management

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clearly had the ability to replace Grievant with a non-custodial staff member.

The Agency's argument that they were short staffed on all of the days Grievant requested official time is fallable. Witness Chmely testified that he told the Union that he would not be able to provide them with the Union witnesses for this arbitration hearing because the institution was "short staffed." When asked how, then, he was able to provide them, he said he moved some people around. This clearly shows that while sometimes it may be inconvenient to move staff around, where there is a will, there is a way. Witness Chmely's testimony that he believed it would have been difficult for him to provide official time for the days Grievant requested in October 2004, is easily refuted based on his own testimony that he also said he would not be able to provide those Union witnesses for today's hearing, and then he found a way to make all of the witnesses available. Management also demonstrated their callousness toward the Unions request for official time, when Witness Chmely testified that he told Vice President Seidel that he was going to flip a coin in order to choose who would and would not be allowed to attend the arbitration hearing.

The Union contends that the testimony of Lt. Thomas Chmely is also misleading. The Daily Assignment Rosters for Sunday, October 3, 2004, Friday, October 29, 2004, and Sunday, October 31, 2004 were introduced into the arbitration by the Agency thru Lt. Chmely's testimony, in support of the Agency's assertions that there was a shortage of staff on the days Grievant requested official time. Grievant did not request official time for those three specific days. Therefore, any staffing problems occurring on those three days is completely irrelevant, and cannot be considered as evidence. In view of the fact most staffing shortages are caused by unforeseen circumstances, such as sick leave, it is noted the Agency could have identified any day of the year as having staff shortages. Further, the Agency did not provide rosters for the actual days Grievant was denied official time, namely October 6, October 7, October 19, October 21, and October 26, 2004. The Agency's position that official time could not be granted on the days Grievant requested because of staff shortages becomes moot, because the Agency failed to introduce the correct rosters for the days in question. It is impossible, therefore, to determine if there were actually staff shortages on those days. Additionally, Witness Chmely testified that some of Grievant's requests for official time were made for his scheduled days off, and for this reason were not granted. However, Grievant's schedule was in fact changed, and he was granted official time on September 2, 2004, September 9, 2004, and September 23, 2004, which were his regularly scheduled days off. Many times in the past his schedule was changed to accommodate his official time needs.

Although the Agency claimed that Grievnat had been granted a "reasonable" amount of official time, Witness Holt testified that he did not know how much official time Grievant had been granted. When Warden Holt was asked to refer to the Agency's response to the Grievance, he indicated Grievant had received 128 hours of official time. However, during the hearing Elizabeth Blackmon, Labor Relations Specialist and Marianne Coratello, Human Resource Manager both informed Warden Holt that his information was inaccurate and Grievant had used considerably less official time hours. Ms. Coratello admitted the number was increased to include days granted to Mr. Durick in November. The Union contends this addition is

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unfair because that time is outside of the Grievance parameters. Therefore, Warden Holt's denial of our Grievance was based on misinformation and not 5 U.S.C., as he stated in his response. When Warden Holt was asked if he knew why Grievant needed the official time, Warden Holt testified that he did not know why. Additionally, he could not explain his own interpretation of "reasonable official time" other than to say he believed Grievant had received "enough." The Union contends that the Agency could not possibly make a valid determination of reasonableness when its CEO did not know how many hours were granted nor for what purpose the hours requested were to be used. What is clear is the fact that the official time was denied and Grievant had to perform essential Union work on his own time without compensation because of the Agencies shortcomings.

The Agency said in their opening statement "the Union will tell us that Mr. Mark Durick was not given enough official time although his official payroll records will show that he was granted 224 hours of Official time from January 1, 2003, thru October 30, 2004." Again, the Grievance covers September 2004 and October 2004, and no hours given before or after that date should be included. It should be noted, the increase of official time stemmed from MSPB and Arbitration Case deadlines, the additional time was not needed prior to September 2004. However, since the Agency has chosen to use those numbers to bolster their argument that Grievant received a large amount of official time, then it must be broken down to show that this amount is actually twenty eight days spread out over a twenty one month span. This amounts to approximately 10.6 hours per month, to represent approximately three hundred employees. The Agency also introduced a list of employees with paid transaction codes, Union Business on Official Time, for the end of August through the end of October to demonstrate previous official time usage by people other than Grievant. It must be pointed out that these numbers are misleading because the workload is not evenly distributed. The need for official time is dependent upon the tasks, not the individual. In addition many of the hours noted by the Agency were used for Union training, caucuses, and conventions, and not performing representational duties.

Finally, we disagree with the Agency's argument that Grievant voluntarily chose to work on Union business during his personal time. Both Witness Seidel and Witness Shaup testified the Union would not have been ready for the arbitration hearing if Grievant had not performed sixty one (61) hours of Union work at home and the affected employees would have been misrepresented by the Union. These sixty one (61) hours were in addition to his already worked week.

By the reasons stated above and during the hearing, the Union has proven unequivocally that Grievant requested official time. This time was reasonable, it was necessary, and clearly in the public's interest. Moreover, the repeated denials for official time gave Grievant no choice but to perform Union duties on his own time, sixty one (61) hours of time that should have been compensated with official time. By failing to pay Grievant for performing these duties, the Agency withheld pay to which he was entitled to, and therefore, he suffered a reduction in pay under section 5 C.F.R. 550.805, and Title 5 section 5596 (See also 105 FLRR 1 132 U.S. Dept. of Agriculture Rural Development and American Federation of State, County,

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and Municipal Employees, Local 3870.) Grievant is entitled to be compensated for the sixty one hours at a time and a half rate in accordance with those statutes. (See also 85 FLRR 1-1359 Social Security Administration and AFGE Local 3231.) The Union contends management at FCI Schuylkill rely exclusively on LMR representatives from Washington, D.C., to prepare and present their cases. Therefore, FCI Schuylkill management has little or no experienced basis to determine what is reasonable official time for the Union to prepare for and present arbitration and MSPB cases before a hearing or trial without dialog from the Union. Management at FCI Schuylkill failed to consult with the Union to determine what a reasonable amount of official time for Grievant would be, and unilaterally decided what was reasonable, necessary, and in the public interest. The Agency's denial of his requests for official time were improper, as the Agency claimed the reason they denied our Grievance was because Grievant had already been allotted a "reasonable" amount of official time. Yet, during testimony, Warden Holt did not know how many hours Grievant had received, nor did he know what the time was needed for. He based his denial of our Grievance on the misinformation provided to him by his supervisors, not Title 5 U.S.C. Lt. Reed and Captain Bebow based their denials of his requests for official time on their belief that he had used too much official time already. Their denial was based on a previous use and not on a demonstrated current need. Further, it was not until the arbitration hearing that the Agency even offered, as an excuse, that they were short staffed. Yet, they failed to provide the proper rosters for the right days to prove their argument. Even if the Agency was troubled by staffing shortages, they could have attempted to work with Grievant and reschedule his official time, rather than flatly deny it. The Union contends the Agency could make a staffing shortage argument for practically every day of the year. If they were allowed to deny official time based solely on staffing shortages, the Union would never be granted official time. Additionally with the CAP program, even staff shortages could have been overcome. It is clear the Agency had manpower resources and procedures in place to cover staff shortages in the custody department, but chose not to in Grievant's requests for official time. Nor did they make an attempt to accommodate his requests by rescheduling for a time when they believed they were not so short.

Grievant requested a reasonable amount of official time in order to fulfill his representational duties. A duty which was designated by the parties collective bargaining agreement as deserving of official time in Article 11 section c (8). There is no limit as to the number of hours a Union representative may request, yet management, thru Supervisors Lt. Reed and Captain Bebow, chose to deny his needed official time based on the number of hours Grievant had been granted in previous months. As a result, Grievant was forced to perform recognized official time duties on his own time and in accordance with federal law he must be compensated for this time. A Unions duty to represent comes from federal law, and is not to be performed at a persons leisure. Deadlines and duties do not stop, and a Union should neither be controlled nor crippled by administrative indifference. Official time is the life blood of a federal employee's Union. Without it, we would have no Union.

Therefore, we request that you sustain the Grievance, and order the Agency to make Grievant whole by granting monetary reimbursement in the amount sixty one hours of pay at a time and a half rate plus interest . The Union also requests that you order the Agency to cease

and desist from this violation, and any other award(s) deemed necessary or appropriate by the Arbitrator.

**Cases cited by Union**

1. 105 FLRR 1 132 U.S. Dept. of Agriculture Rural Development and American Federation of State, County, and Municipal Employees, Local 3870
2. 85 FLRR 1-1359 Social Security Administration and AFGE Local 3231

**ISSUE**

- 1) Is the Grievance arbitrable?
- 2) Did the Agency violate policy, law, rule, and the Master Agreement by denying Grievant official time?

If yes, what shall the remedy be?

**DISCUSSION AND FINDINGS**

The Grievance is arbitrable. The Arbitrator accepts the Union's facts and contentions on the timeliness of the processing of the Grievance. The Arbitrator finds that although the notices were not date and time stamped, Management was fully aware that this Grievance was pending and not withdrawn. The Arbitrator finds that Management was not prejudiced by any alleged failure to timely process the Grievance nor any lack of specificity. The Agency had actual knowledge of the dispute over the failure to grant official time to Grievant.

The Arbitrator finds in favor of the Union on the merits. The Arbitrator agrees with the Union's argument that the Agency's repeated denials of Grievant's requests for official time were unreasonable, and the Grievant shall be paid for the sixty-one (61) hours of official time that was denied. This shall compensate Grievant for the personal time which was used to prepare for hearings. As noted, Grievant held the position of Parliamentarian, and Advocate for MSPB and Arbitration Hearings, and his request for official time was necessary to prepare for an MSBP trial, an arbitration hearing, and labor management relations issues, in which he had no prior experience. The Arbitrator finds that if Grievant had not completed the necessary work during his personal time, the Union would not have been properly prepared for the hearing.

The Arbitrator does not accept the Agency's argument that the denial of official time was mandated due to the staff shortage. The Agency did not make an attempt to reschedule Grievant's official time for a time when they were not so short staffed. The Arbitrator also agrees with the Union's argument that because of the new CAP program, Management may have had the ability to replace Grievant with a non-custodial staff member. The Union contention that this is the very reason why this program was created, to prevent the vacating of posts, and all but eliminate the payment of overtime is not unreasonable. Although this may have been inconvenient for the Agency, to move staff around, the Arbitrator finds that they had



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manpower resources and procedures in place to cover staff shortages in the custody department without creating an undue hardship.


The Arbitrator does not accept any argument that Grievant was properly denied official time because he had already been granted 224 hours from January 1, 2003, thru October 30, 2004. The issue is the legitimacy of the request based upon work load. The Union was faced with MSPB and Arbitration Case deadlines which had to be met to properly represent members of the bargaining unit. The Arbitrator finds that this time spent by Grievant was reasonable and was necessary for the Grievant to educate himself on both procedures.

The Arbitrator finds that Grievant's requests for official time was denied and he had to perform essential Union work on his own time because of the Agencies shortcomings and should be paid for the sixty-one hours of official time that was improperly denied.

**AWARD**

The Grievance is arbitrable. The Grievance is granted. The Grievant should not have been denied official time. The Grievant shall be paid for the sixty-one (61) hours of official leave time which was improperly denied by the Agency.

It is hereby so Ordered this 12th day of December 2005.

  
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ROBERT A. CREO, Esquire  
Arbitrator  
Pittsburgh, Pennsylvania