
In the Matter of Arbitration Between

OPINION AND AWARD

American Federation of Government Employees,
Council of Prison Locals, Local # 607

And

FMCS # 13-53960

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

A hearing in the above matter was conducted on Thursday, March 13, 2014 in the Federal Bureau of Prisons Staff Training Center, Elkton, Ohio. All parties were provided full opportunity to present and cross examine witnesses as well as explore all issues believed relevant. Post-hearing briefs were received by the arbitrator on June 3, 2014 and the hearing closed at that time.

Attending:

For the Agency:

Thomas Muther, Attorney
Tim Minter, Local 607 Advocate
Joseph Mayle, Local 607 President
Brian Dickson, Union Vice-President
Phillip Hulett, Garden Worker Supervisor, Chief Stewart
Tricia McMillin, Captain's Secretary
Richard Mario Mashiska, Witness
John H. Rice, Witness

For the Employer:

Michael Markiewicz, Labor Relations Specialist
Theresa Wilson, Human Resource Manager

THE ISSUE

The parties did not agree on a joint statement of the issue and presented different versions for consideration. Ultimately there was agreement that the arbitrator would determine the issue before

him. After considering alternatives raised by the parties, and the initial statement of issue in the "Formal Grievance Form" submitted by the Union, the issue the arbitrator is addressing is the following:

> In the instance at hand did the Employer violate the Master Agreement, Local Supplemental Agreement or relevant provisions of the FLSA in the processing and payment of overtime? If so, what would be the appropriate remedy?

BACKGROUND

The basic facts in this case are not at issue. The Union represents employees of the Federal Correctional Institution in Elkton, Ohio. The Union and Agency entered into a Master Collective bargaining agreement and a Local Supplemental Agreement (LSA). Both parties agree these contracts were in effect at the time of the alleged violations. In particular, the Union has argued that overtime policies affecting bargaining unit members must also conform to requirements of the Fair Labor Standards Act (FLSA) and that the Agency has violated those standards in implementing its policies on overtime payments to bargaining unit members.

The individuals involved are employed in a variety of positions but all carry some portion of responsibility for serving as "correctional officers" responsible for the safe and secure housing of federal inmates. To manage workload the Agency frequently requests that bargaining unit members volunteer for overtime assignments. In such instances elements of both the FSLA and LSA provide guidelines for the parties to follow.

At the Elkton facilities whenever the Agency becomes aware that overtime work is necessary the Activities Lieutenant reviews the computer program that indicates which employees have requested voluntary overtime. The Activities Lieutenant then contacts employees in order of seniority to assess whether they wish to accept the available overtime. An interested employee agrees to the assignment with the Activities Lieutenant and that authorization for the assignment is indicated by the employee's name being added to the Roster Program. Each employee can access the Roster Program and confirm his/her own overtime assignments. However, employees cannot change the Roster Program in any other way as such actions are limited to management officials.

Over time, the Agency has used two systems to ensure that payment is made upon completion of overtime work. Prior to 2013 Lieutenants would print and sign an authorization from the Roster Program which the employee would also sign. In many cases these forms were not prepared due to scheduling and other difficulties. That would delay the time when certification of the overtime commitment could be integrated into payroll systems. Since 2013 the Agency has changed the system such that notification and acceptance by the employee occurs via direct e-mail notice thus eliminating one reason for delays in paying for overtime worked.

Upon evidence of employee acceptance of an overtime assignment the Agency than seeks further "signoffs" or authorizations from a chain of command that includes Captain, Associate Warden,

Health Services Administrator (when appropriate) and Warden. Often this process involves finding a time when a supervisor's office is open and forms are available for appropriate signature. If an office is closed when an employee arrives he/she would have to just keep trying to find a time that worked with their schedule or that of the supervisor. In any event, the chain of approvals and processes involved could and did often take multiple days and indeed weeks to complete.

In addition, the Agency uses the National Finance Center for actual processing of payroll including the payment of overtime. The schedule imposed by the National Finance Center for reporting is such that every two week pay period has a fixed day of the week (e.g., the last Friday of the work period) when all hours worked, including overtime, must be reported with a three or four day period (e.g., the following Monday -Wednesday) after that deadline when any corrections may be reported and captured. But actual payment for corrections would occur in the next pay period cycle since the record is closed on the previous Friday and a new pay cycle begins on Sunday. Thus if overtime is reported after the official reporting date of Friday that overtime might not be paid until the end of the next two week cycle, which at the extreme (e.g., overtime completed on the first Monday of a pay period) could mean a four week delay in payment from completion of the overtime assignment. It is important to remember that the fundamental pay cycle is one in which an employee receives pay for a given two week period at the end of four weeks. In effect, each paycheck lags behind each completed work period by two weeks complicating the issue of tracking overtime payments – and making it very difficult to track payments if payment does not occur along with regular pay for the pay period within which overtime has been worked and recorded.

The multi-tiered layers of administrative approval even after overtime work is approved and performed, as well as payroll processes of the National Finance Center that handles payroll issues, build in a potential number of process delays that often result in employees waiting for overtime payment well beyond payment for the pay period in which they actually worked the overtime hours. Although there are exceptions, there is agreement by the parties that delays in payment were generally <u>not</u> caused by failures of employees to agree to work authorized overtime, to actually complete the overtime assignments, or to file their own required forms.

Over a number of years the Union notified the Agency of its concerns with delayed overtime payments and some compromises were made in processes. However, the Union believed that the unjustified delays continued and grieved the matter on January 14, 2013 noting in the grievance form that on December 12, 2012 the Agency was in violation of the agreement. That grievance alleged that the Agency was in violation of both the Fair Labor Standards Act 29 C.F.R 778.106 and Article 6 of the Master Agreement. The Union subsequently withdrew its claim of a Master Agreement violation and has focused its grievance on the Fair Labor Standards Act violation. The matter moved through all normal grievance processes identified in the Master Agreement and Local Supplemental Agreement and proceeded to arbitration with neither party raising concerns about arbitrability.

Contract and FLSA provisions believed relevant are noted in Attachment A of this report.

CONTENTIONS OF THE UNION

The Union begins by asserting that there is simply no doubt that the Agency has been implementing an overtime payment system that is so deficient in timeliness that employees are not only paid well after their overtime has been completed but often through records that are so complex that accurate accounting for complete payment is difficult. In support of this it points to the fact that upon filing this grievance the Agency conducted an audit of overtime pay and discovered that many employees had not received accurate pay for overtime work. In addition it was apparent that when some employees were paid they had to wait an extra pay period or more for overtime compensation.

The Union notes that the FLSA implementing regulations are very clear about requiring prompt payment of overtime. To begin with wages are "not paid" until paid as part of an employee's regular pay day. The Office of Personnel Management has determined that "overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." It is true that the Department of Labor recognizes that at times overtime compensation cannot be determined until after a pay period ends. However, the Department of Labor also asserts that the excess overtime compensation should be paid as soon after the regular pay period as" practicable." That term is further clarified by stating that the time period involved should be no longer than reasonably necessary to compute and arrange for payment due and should not be a period longer than the next pay after such computation can be made.

In this case there is consistent evidence that the Agency failed to pay for overtime on the regular payday following completion of overtime work. Testimony and evidence indicated clearly that overtime pay was often delayed by multiple pay periods and the Employer has not denied or refuted this reality.

The Union argues that the Agency could indeed have provided payment of overtime in a more timely fashion. To begin with, Union and Agency witnesses testified that through the roster system only the Lieutenants or higher officials had the authority or ability to assign overtime prior to an employee actually completing the assignment. That roster information is available to timekeepers indicating the availability and approval of overtime hours. Once that occurs there is no reason for further delay in calculating earned overtime pay. The additional signed approvals that result in delays are not essential for tracking and verifying overtime worked. Indeed, many of those officials the Agency requires to sign authorization forms have no knowledge of whether overtime work was actually performed. Nevertheless the need to await their signatures serves to delay ultimate payment to employees.

In addition, the Union notes that Ms. McMillin, Captain's Secretary and Ms. Wilson, Human Resources Manager, testified that the Agency routinely processes normal work hour calculations without an employee reviewing or signing pay records prior to submission. If that can be done through the roster for regular work hours it can also be done for overtime hours that are recorded on the same roster.

Finally, the Union argues that the Agency could have developed a much more efficient and effective system of certification of overtime that would allow for timely payments to employees. Rather than waiting for multiple layers of supervision to sign off the Agency could have established a system for more rapid review. It could even have paid overtime based on the roster and then adjusted for any overpayments through T&A as they do in other cases of overpayment.

In light of the above the Union believes it is clear that the Agency has willfully violated Department of Labor regulations and, therefore, FLSA provisions for the payment of overtime to employees.

As a second major line of argument, the Union believes that federal courts and prior arbitrators have reached decisions about overtime pay consistent with its position on the matter. While the FLSA may be silent on timeframes for paying overtime both case law and federal regulations clarify that FSLA wages are "unpaid" unless paid in an employee's regular pay day. Furthermore Department of Labor regulations state that overtime must be paid on the pay day for the work week in which it is performed 29 CFR 778.106. Department of Labor regulations do recognize that when the amount of overtime compensation cannot be determined until after the regular pay period it is acceptable for the employer to pay the overtime compensation as soon after the regular pay period as "practicable." That is further clarified by stating that payment ".. may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next pay day after such computation can be made."

In this case the Union believes that the Agency could use the Roster for payment purposes for the following reasons. First, only Agency officials (e.g., lieutenants) can assign overtime thereby precluding employees from entering incorrect information. Second, employees cannot alter the Roster eliminating any concerns about alterations after the fact. Third, the same roster information is available to timekeepers. Fourth, the Agency already uses the Roster to determine regular pay without signatures from employees, supervisors or the chain of command.

In addition, the Union believes that the Agency also could have developed a non-paper system that allowed supervisory officials to provide more timely signoffs, thereby eliminating delays in processing and payment. Finally the Union argues that even if any new system resulted in errors in payments those events could be adjusted through Time and Attendance adjustments which already occur with regularity for other issues.

The Union notes a series of cases that support its contention that the Agency has an obligation to pay for overtime work in a more timely fashion. These include:

- Beebe v United States – which determined that penalties for failure to pay overtime begin at the end of the pay period in which overtime was earned.

- Biggs v Wilson – which determined that delay of overtime payment by 14-15 days after the end of a pay period was not allowed even though a state budget had not been approved.
- Bureau of Prisons and Arbitrator John Sass award (Florence, Colorado) – Agency's primary reason for delay in overtime payment was multiple levels of review to approve overtime already performed. Arbitrator Sass ruled that the practice violated FLSA and demanded that payment be made off the Roster without additional signoffs; that decision was appealed to the FLRA by the Agency but upheld.

In effect, the Union believes that prior arbitration, FLRA and court decisions address issues identical to the case at hand. In each instance it was determined that failure to pay overtime in a timely fashion constituted a violation of FLSA.

As a third line of argument the Union believes that the Local Supplemental Agreement (LSA) does not provide authority for the Employer to violate federal law. To begin with the Union notes that Article 18 of the LSA states:

> "When an employee has worked overtime, the Employer shall prepare and submit the Overtime Authorization to the affected Employee for his/her signature, as promptly as possible upon completion of the overtime. It is agreed that each staff member will be listed on their own overtime form. Management will ensure the form is prepared within 24 hours of the day worked, then route it as soon as it has been signed by the employee. This shall be done in an attempt to ensure overtime is processed within three weeks of the date it is signed by the employee."

The Union believes the reference to the three week time period does not involve waiving the timely requirement of the FLSA. While the LSA is silent on the FLSA, if the Agency followed FLSA requirements it would be paying employees for overtime within the "three week" time frame recognized in the LSA. The language simply implies that if for some reason the Agency cannot pay within the current pay period it will do so within three weeks. That is consistent with 29 CFR 778.106 that recognizes exceptions to the overtime payment rule when compensation for overtime "cannot be determined." The Union believes this means that the Agency could delay payment of overtime for a three week period if it was not possible to determine the number of overtime hours worked. However, the Union believes that the roster indicates the amount of overtime worked and that is certainly prior to the Monday after the end of a pay period when overall pay is determined.

The fourth line of reasoning pursued by the Union focuses on a belief that the LSA is inconsistent with Master Agreement binding both parties. Article 9 of the Master Agreement allows individual institutions to negotiate Local Supplemental Agreements but within clear guidelines. Specifically,

> "This Master Agreement may be supplemented in local agreements in accordance with this article. In no case may local supplemental agreements conflict with, be inconsistent with,

amend, modify, alter, paraphrase, detract from, or duplicate this Master agreement except as expressly authorized herein."

In addition, Article 3, Section B states:

"..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."

The Union believes that under this provision of the Master Agreement the Local Supplemental Agreement cannot be seen as a commitment to waive FLSA rules. The FLRA action upholding Arbitrator Sass' decision on overtime pay occurred in 2011 and the Office of Personnel Management has been applying Department of Labor regulations to all federal employees since 1997. Given that these actions preceded this grievance, the Employer's assertions that the Local Supplemental Agreement can be interpreted as waiving such policies is inconsistent with Articles 9 and 3 of the Master Agreement.

In addition, the Union notes that there are multiple federal court decisions reiterating that FLSA policies cannot be modified by local agreements even when the changes are sought by employees through negotiated agreements (e.g., Brooks v. Village of Ridgefield Park; Barentine v. Arkansas-Best Freight Systems, Inc.)

In this instance the Union has repeatedly attempted to secure timely payment of overtime. This is evidenced in the testimony of Mr. Minter as well as grievances filed in 2009. These efforts have been thwarted by the Employer even in the face of clear evidence that the Local Supplemental Agreement violated FLSA and DOL policies.

In light of the above the Union believes it has presented a series of arguments demonstrating that the Employer has been violating overtime payment policies applicable to grieving Union members. In light of this the Union requests:

1. Liquidated damages for violations of overtime provisions of the FLSA. Liquidated damages are possible when violations are clearly not "in good faith" and the Employer did not have adequate reason to assume that the action or omission was allowable under FLSA.

2. Liquidated damages should be awarded for the three years immediately preceding the grievance until present and not for the limited period noted by the Employer. This is requested because:

    a. The FLSA allows for three year statute of limitations where willful violations are involved and two years in other cases.

b. The FLRA has held that where there are not mutually agreed upon back pay periods different from those of the FLSA then FLSA back pay provisions should be followed.

3. The Employer should pay all appropriate attorney fees and costs. At a minimum the arbitrator should set a separate briefing schedule for determination of that issue.

4. The arbitrator should retain jurisdiction for purposes of clarifying the decision and ensuring compliance.

CONTENTIONS OF THE AGENCY

To begin with the Agency notes that the issue that should be determined by the arbitrator is simply "did the local processing of overtime forms violate the negotiated language of the Local Supplemental Agreement to the Master Agreement?" In initiating the grievance to be resolved the Union clearly stated that the beginning date of the violation was "December 12, 2012" and that any remedy should be limited to that time period.

Given this the Agency argues that the Local Supplemental Agreement should be the basis for determining any contract violation as it is the result of both parties negotiating an agreement with each other. Agreements in the LSA do not violate any federal policies including the FLSA and thus the LSA should guide any decisions. In this instance the Union is now seeking to change provisions of the LSA and to also ask that any damages be compensated with double the value of overtime already paid. However, the Agency notes that bargaining unit members were paid for all worked overtime and such a demand is simply not reasonable even if one were to determine that a violation of the LSA had occurred. Unlike many of the cases referred to by the Union in its argument, in this case all workers were paid for overtime worked. Therefore, the Agency believes that any request for liquidated damages is not appropriate.

Furthermore, the Employer argues that liquidated damages involving back pay are only supportable when (1) there was unjustified or unwarranted personnel action involved or (2) the action taken resulted in the withdrawal or reduction of pay, allowances or differentials. Neither issue is involved in this instance. The Union's claim is simply that employees received overtime pay later than some might prefer, even though the action taken was within the requirements specified in the LSA. The Agency also notes that with limited resources available liquidated damages impose an economic penalty not appropriate and would impose an unreasonable burden on the Agency and taxpayers.

The Agency believes that the Union simply does not understand how overtime is calculated. In all cases there is a delay involved as there must be affirmation of the appropriateness of the overtime claimed and the fact that it has actually been authorized. That does not occur instantaneously. Instead, there is a need for time to verify worked time and that means that actual payment for the overtime worked does not occur until the pay period after overtime work is performed. Indeed, that is the

pattern from the date of hire for at that time a new employee does not receive first pay until the pay period after the first two weeks of employment four weeks after the first day of work. That common practice is not a violation of the FLSA.

The Employer asserts that the key provision necessary for assessing this issue resides in Article 18 of the Local Supplemental Agreement. That language states:

> "When an Employee has worked overtime, the Employer shall prepare and submit the Overtime Authorization to the affected Employee for his/her signature, as promptly as possible upon completion of the overtime. It is agreed that each staff member will be listed on their own overtime form. Management will ensure the form is prepared within 24 hours of the date worked, then route it as soon as it has been signed by the employee. This shall be done in an attempt to ensure overtime is processed within three weeks of the date it is signed by the employee."

Furthermore, the Employer notes that the language in Article 18 does not violate any provision of the Master Agreement. Indeed, the Agency argues that there is no language in the Master Agreement that specifies any time period within which overtime must be paid.

Similarly, the Agency argues that the language in the Local Supplemental Agreement does not violate 5 CFR part 551 as that provision contains no mention of time limits for payment of overtime, and it denies the relevance of 29 CFR 778.106. Instead the Agency believes that in terms of timeliness of payment for overtime there is a general rule which allows more specific requirements determined through negotiations, which is what has occurred in this case. The appropriate language states "The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends." Clearly this is a general rule that would be affected by any negotiated Local Supplemental Agreement. This interpretation is consistent with the decision of the U.S. Court of Appeals, 7th Circuit (Reich v Interstate Brands Corporation, 57 F.3d574 (195). In effect, Article 18 simply provides the basis for narrowing the general rule in this instance.

The Employer believes that there is ample precedence for understanding that correctional facilities are different from other places of employment. Due to security concerns prison officials are allowed greater discretion as to issues affecting internal security and that has been recognized by the Federal Labor Relations Authority. Bell v. Wolfish, 141 U.S. 20, 547 (1979), Rhodes v Chapman, 452 U.S. 337 (1981).

In terms of prior arbitration decisions relied upon by the Union, the Agency notes that key circumstances differed rendering their precedential value minimal. In the Florence arbitration (FMCS 10-53257) there were two key differences. First, there was no negotiated LSA that addressed the issue of overtime pay. Second, there had been changes in the way that overtime was paid and that was not the fact in this case.

The Employer also believes that the Union's actions must be taken into account. The Union had previously filed a grievance on this matter in 2009 but withdrew the issue from arbitration. If the Union believed there was a basis for its grievance they should have pursued the issue at that time and not attempted to delay and redirect matters in the hope of a larger settlement in their favor. Ms. Wilson, Human Resources Manager, noted that in response to Union concerns the Agency had offered to calculate overtime from the roster system. However, she believed that the Union rejected that solution in hopes of receiving liquidated damages by pursuing the issue through allegation of an FSLA violation. That manipulation of the grievance process should not be allowed.

The Agency notes that this entire case is based on bargaining unit member perceptions and beliefs about payroll processes. In the process they have ignored the realities of how payrolls must be processed and have ignored the consistency between language in the Local Supplemental Agreement and Agency overtime payment procedures. The Agency believes that it has lived within the terms of the LSA and relevant provisions of the Master Agreement.

Finally, the Agency observes that the issue raised by the union simply involves the time at which an employee is paid for overtime. But there is no evidence that the Agency failed to actually pay employees for overtime worked. Pay was received, although there is disagreement about timeliness of payment. Thus to award any monetary benefit, particularly liquidated damages, to employees would mean paying them yet again for overtime worked and that is not appropriate.

In light of the above the Employer asks that the grievance be denied. If that is not the case and it is sustained then the Agency asks that any damages be limited to the period of December 12, 1012 to the date of an award as that is the date noted in the Union's original grievance as the "date of violation."

OPINION

While facts are generally not in dispute there are multiple issues in this case. To begin with, the Union argues that this case is identical to that decided by Arbitrator Sass involving the U.S. Department of Justice, Federal Bureau of Prisons (Florence, CO). Putting aside issues clearly irrelevant to this case (e.g., arbitrability issues), the Florence case pivoted heavily on the fact that the Agency involved made changes in the processing of overtime. Essentially the Agency went from paying overtime earned during the first week of a pay period in the paycheck for that period to paying any overtime in the second half of a pay period to the next pay period. In effect, payment for overtime worked in the second week was delayed until the end of the next period as a result of an arbitrary Agency action. In addition, Arbitrator Sass determined that in the Florence case there was an increase in the number of delayed payments for overtime worked after the arbitrary change in compensation policy. That is not an issue in this case as there was no Union assertion that delays had increased as a result of any changes in overtime compensation practices. Indeed, in this instance the complaint was focused on the impacts of continuation for an existing overtime pay process.

Another difference with the Florence circumstances is that in this case there is a jointly negotiated Local Supplemental Agreement that appears to support the Agency's stated practice of paying for overtime worked. Article 18 appears to establish a jointly agreed upon standard such that from the time an employee submitted required processing of overtime payment would occur within three weeks of overtime work completion. That history of a negotiated agreement on process was missing from the Florence case.

Nevertheless, even acknowledging differences with some facts addressed in the decision of Arbitrator Sass, if one accepts the Agency's position that it is constrained only by the terms of the Local Supplemental Agreement, and that references to FLSA are not relevant, there is still a problem with Agency processes. Agency witness Theresa Wilson, Human Resources Manager and Union witness Tricia McMillin, Captain's Secretary, testified that there were a number of instances in which there were apparent miscalculations in overtime pay and extended delays in approvals, some revealed by an audit requested by the Union. Union witnesses including Mayle, Dickson and Hulett testified to the complexity of processes that made it very difficult to tell exactly when an employee was being paid for overtime, the exact overtime period involved when payment was made and reasons for any delays in payments for overtime.

Some concerns and uncertainties identified by the Union are a natural consequence of the delay that is part of the normal two week pay cycle that could result in payment for work completed four weeks after actual work may be done. For example, if the regular pay period is January 1-14 that means that payment for base pay would not occur until January 28. The pay received on January 28 would be for the work performed between January 1 and January 14. Complicating things further, direct deposit of pay checks would occur on a date other than January 28 leading some employees to wonder what payroll period really was in effect. Article 18 is an effort to ensure that any overtime issues would be resolved within three weeks of authorization and acceptance by an employee. But FLSA requirements are such that payment would be due to the employee on the pay day for the pay period within which the overtime work was completed. Thus if overtime work was completed with the January 1-14 period then the appropriate pay period attributable to the overtime would be the January 1-14 period with an actual payout of wages on or about January 28.

What appears indisputable is that mistakes were being made in overtime payments in three different ways. First, the Agency's own partial audit of overtime payments indicated that at times too much being paid and at times too little being paid. Second, the Agency's decision to delay initiation of processing pay for overtime until all approvals had been completed, even if there was clear evidence that the work was completed, resulted in the three week limit on processing being violated. As a consequence of these two errors payment for overtime work completed often did not occur at the time of receipt of a paycheck for the pay period in which the work was completed. The net result of these errors is that the Agency has a history of violating both FLSA policy and Department of Labor regulations concerning payment for overtime as well as Article 18's commitment to a three week processing of valid overtime work claims.

It is important to note that once these errors were established by its own audit of overtime, a review requested by the Union, the Agency failed to continue conducting audits or change processes to correct matters. The absence of further audits being conducted after the Agency's own efforts revealed difficulties suggests a lack of Agency concern for ensuring that employees received full and accurate pay for overtime hours worked within the time limits agreed to in the Local Supplemental Agreement as well as FLSA. It is not "reasonable" to delay payments for overtime simply because internal review processes are so deficient that appropriate calculations of what is owed an employee and when he/she should be paid are difficult to determine with consistency.

In this regard, perhaps the most telling testimony was from Ms. Wilson, Human Resources Manager. She testified that the Agency essentially halted conducting appropriate audits of payment after audits requested by the Union the Agency uncovered a number of difficulties in timeliness of payments and compensation actually due employees for overtime. It was clear that delays and errors in overtime payments were being made and timeliness of payment for overtime was a legitimate concern regardless of the reasons this may have occurred. Nevertheless, the Agency chose not to aggressively continue its auditing and rectification of overtime payment process errors. Interpreting Ms. Wilson's testimony, the reason for this lack of action was essentially that the Human Resources staff workload was very heavy and there was not enough time or resources to extend the inquiry. That is not a reasonable course of action and goes to the heart of intent. It does not suggest an Employer truly concerned with implementing either 29 CFR 778.106 requiring that payment should not be delayed "beyond the next payday after such computation can be made" or at the next practicable period. It does not represent the actions of an Employer committed to even the spirit of the mutually negotiated Local Supplemental Agreement.

The Union rightfully argues that the core issue here is the violation of Fair Labor Standards Act provisions. That issue is reasonably clear. The Fair Labor Standards Act may not be specific about when employees are to receive payment for overtime, but the general rule is clearly that pay should be on the regular payday for the work period within which overtime occurs. As noted above, 29 CFR 778.106 provides an exemption by stating that delay is possible "when the correct amount of overtime compensation cannot be determined until sometime after the regular pay period." That exemption is tempered by the statement that" payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made." (emphasis added)

In this case it is clear from the testimony of Union and Agency witnesses that if the Agency follows its existing processes, or uses the roster and time and attendance information available, then payment within three weeks from completing overtime work should be possible and reflected in the paycheck for the pay period within which overtime occurred. That agreement is at the heart of Article 18 of the Local Supplemental Agreement and its reference to a three week cycle for processing overtime authorization. Interestingly, although there might be occasional instances of employee failure to complete authorizations in a timely fashion, there was agreement by the parties that employee actions

were not a major factor in extended times required for payment of overtime. That chronic outcome was primarily a reflection on management decisions to create a process that resulted in unreasonable time delays in payment. It is true that rectification of that shortcoming might well require that the National Finance Center to adjust processes but that is the Agency's obligation to resolve. It might even require that the Agency rely on Roster and Time and Attendance data for overtime payment processing as well as normal work week pay calculations – but again that is an alternative for the Agency to assess. In effect, testimony indicated that the Agency, which used as its defense Article 18 of the Local Supplemental Agreement, had not done what it could to actually live up to that agreement.

It adds little to the Agency's credibility when its own witnesses as well as employees noted that many of the officials required to sign off on overtime authorization that has already been approved and worked actually have no ability to stop payment from being made. Ms. Wilson admitted that even if the Warden or others in the chain of command did not believe that overtime should have been authorized they would not be able to withhold payment from an employee who complied with the Roster and worked overtime that was authorized by a lieutenant. If officials cannot stop overtime payments from being made there is no reason to delay payment until they "signoff" the authorization report! As suggested, such a review might well assist in planning future overtime assignments but it is not a reasonable justification for delaying overtime payments for work performed.

Admittedly the language of Article 18 appears to be a bit indefinite in that it states:

> "...Management will ensure the form is prepared within 24 hours of the date worked, then route it as soon as it has been signed by the employee. This shall be done in an attempt to ensure overtime is processed* within three weeks of the date it is signed by the employee."
> *emphasis added

One could argue that the word "processed" does not refer to payment but simply placing the claim for wages in the system. However, there is evidence that even that limited meaning was ignored by the Agency and actually made difficult to implement by the Agency's convoluted approval processes after work was actually completed. In reality processing of overtime claims (i.e., authorization forms) could take any number of weeks and the Agency's internal processes were not designed to ensure adherence to the time limit noted in Article 18.

In the context of the Fair Labor Standards Act and 29 CFR 778.106, Article 18 may well serve to indicate a jointly defined statement of what is "reasonable" and "practicable" in delivering payment for overtime given normal constraints resulting from multi-week, delayed pay periods. At its core Article 18 simply establishes that once an employee actually works overtime the Agency has acknowledged that it can and will process payment of overtime owed within three weeks of the employee's signature. That in effect defines the period "..reasonably necessary for the employer to compute and arrange for payment of the amount due...". But there was little indication that since that agreement the Employer had adjusted and designed its internal systems to consistently meet this commitment and still pay the employee at the time he/she were to be paid for the period during which overtime occurred. One might

accept the Agency's move to the new e-mail notification system as an effort to do so as it eliminated some sources of delay in securing and documenting authorizations and acceptances of overtime assignments. But there is little evidence that the Agency consciously then ensured that the system addressed the major issue of upper administrative levels causing delays. That failure results in lack of compliance with the intent of Article 18 and, therefore, 29 CFR 778.106.

The Agency's argument that if a violation of either the Fair Labor Standards Act or the Local Supplemental Agreement occurred then imposing liquidated damages would be an unfair financial burden is simply not an appropriate reason to mitigate that impact. Similarly, to argue that the period of any damages should be limited to the Union agreement as to the date of violation rather than a three year period is not reasonable given that the Agency had reason to understand this issue was a long standing and continuing concern as far back as 2009.

The Employer also argues that the liquidated damages would unfairly benefit the Union and bargaining unit employees because past grievances were withdrawn and the issue of a Fair Labor Standards Act violation asserted at the last minute. However, any review of facts in this case reveals that the Employer had ample opportunity to determine that its systems were not responsive to contractual and legal requirements. Certainly Union and employee complaints about overtime payment processes and review of the Agency's own audit demonstrating difficulties with the existing system should have raised "red flags" of concern and a commitment to action.

The Agency also has argued that its processes are reflective of the unique custodial responsibility it has for the safety and security of inmates as well as employees. Even in periods of budgetary crisis it must provide services for inmates that ensure safety and wellbeing. Consequently correctional facilities are complex organizations requiring flexibility in operations. All of this is a reasonable description of a special purpose organization. However, the issue here is over processing and paying for overtime worked by employees in the bargaining unit. Agency assertions that operations are so complex, so uncertain and so unique that it cannot operate with reasonable responsiveness to paying for overtime work performed are simply not credible. Many of the difficulties noted by the Agency have resulted from its own internal decisions to require multiple layers of approvals from individuals who often have no basis for asserting that overtime work was or was not done. But these layers of hierarchy delay records processing simply because the Agency apparently requires administrators to do so. The Agency may have reasons for such inefficient processes but they are inappropriate if the impact is to deprive or unreasonably delay payment to employees for overtime work performed.

It is the Employer's responsibility to design internal personnel time and effort systems that fulfil Agency accountability requirements. But the Agency must also create internal processes to ensure that employees receive the overtime compensation they have earned in a timely fashion. To unduly delay payment for work performed is to penalize the very employees upon whom the Agency depends. It is not good policy, and in this case contradicts federal policy and locally negotiated agreements.

Finally, the Employer asserts that it is unreasonable to award liquidated damages since this is simply an issue of disagreement about when over time is paid. The Agency notes that all employees actually received the payment due but disagree as to the timing. To offer multiples of back pay for any violation is unreasonable since payment has been made. But there are problems with that position. To begin with the Agency acknowledges that audits indicated that some employees did not receive all the overtime payment earned and that others did not receive payment in a timely manner. Second, this position ignores the time value of money. Unreasonable delays mean that the funds employees have earned are being withheld from them and, if nothing else, there is implicit lost value for each employee so affected. Therefore, it is reasonable to impose a penalty on the Agency benefitting each employee for the lost value of funds withheld unreasonably.

In this case liquidated damages are particularly appropriate when it is realized that the Agency has had the option of avoiding this outcome by simply relying more completely on Roster data for purposes of both assessing overtime payments due and expediting payment with the three week window noted in Article 18. A choice was made not to do so and that has consequences.

In effect, the Agency has violated the intent of Article 18 of the Local Supplemental Agreement and as a result 29 CFR 778.106. This occurred through delays beyond three weeks in payment for completed overtime work by employees where employees have not contributed to the delay. Even if one could and did ignore the impact of 29 CFR 778.106, the Agency's failure to in good faith implement Article 18 of the Local Supplemental Agreement is a sufficiently serious violation to justify significant penalties.

Given the above, as duly designated arbitrator I hereby make the following:

AWARD

The Grievance is sustained. 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. 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 by (a) knowing that there were errors in the timeliness of overtime payments through complaints and a limited audit conducted by the Agency, (b) failing to extend an audit of overtime payments to all affected employees, (c) failing to do what was necessary to fulfill the obligations of Article 18 of the Local Supplemental Agreement and (d) failing to inquire about whether its actions were in violation of FLSA and Department of Labor regulations despite complaints that this was the case.

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 the overtime was performed.

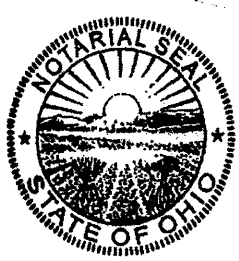
4. The Agency is to pay reasonable Union Attorney's fees and costs in this case. Union Counsel is directed to submit an itemized bill to the Agency. If there is disagreement over fees or costs the Agency should engage in good faith with Union Counsel to come to agreement. In the absence of such agreement the matter is to be returned to the Arbitrator for resolution.

5. The Agency will pay half of the Arbitrator's fees and expenses. The Union shall pay the other half of all fees and expenses (per Article 32. Section d of the Master Agreement).

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.

Joseph A. Alutto, Arbitrator

June 30, 2014



Nora L. Bolon
Notary Public, State of Ohio
My Commission Expires 09-09-2016

Nora L. Bolon
6/30/14

3 Attachments (Attachment A; 5 CFR 551.101-General; 29CFR 778.106-Time of Payment)

Attachment A

Relevant Provisions

- Master Agreement, Article 5, Section a., "... nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106 ... to determine budget ... number of employees ... internal security practices ... to hire, assign, direct ... to assign work ... and to determine the personnel by which Agency operations shall be conducted ..."

- Master Agreement, Article 9, Section b., "Notwithstanding the provisions of this article, the parties may negotiate locally and include in any supplemental agreement any matter which does not specifically conflict with this article and the Master Bargaining Agreement."

- Master Agreement, Article 18, Section p., "Specific procedures regarding overtime assignments may be negotiated locally . . . 2. overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and the Union. . ."

- Master Agreement, Article 31, Section d., "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."

- Master Agreement, Article 31, Section e., "If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue."

- Master Agreement, Article 32, Section a., states, in relevant part, "...However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement." (The agency ***has not*** agreed to modify the written grievance.)

- Master Agreement, Article 32, Section h., states, in relevant part, "...The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: 1. this Agreement; or 2. published Federal Bureau of Prisons policies and regulations."

- Local Supplemental Agreement, Article 18 (5th paragraph), "When an Employee has worked overtime, the Employer shall prepare and submit the Overtime Authorization to the affected Employee for his/her signature, as promptly as possible upon completion of the overtime. It is agreed that each staff member will be listed on their own overtime form. Management will ensure the form is prepared within 24 hours of the date worked, then route it as soon as it has been signed by the employee. **This shall be done in an attempt to ensure overtime is processed within three weeks of the date it is signed by the employee.**" Emphasis added.

5 CFR 551.101 - General.

§ 551.101 General.

(a) The Fair Labor Standards Act of 1938, as amended (referred to as "the Act" or "FLSA"), provides minimum standards for both wages and overtime entitlements, and administrative procedures by which covered worktime must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions and prescribes penalties for the commission of specifically prohibited acts.

(b) This part contains the regulations, criteria, and conditions set forth by the Office of Personnel Management (OPM) as prescribed by the Act, supplements and implements the Act, and must be read in conjunction with it.

(c) OPM's administration of the Act must comply with the terms of the Act but the law does not require OPM's regulations to mirror the Department of Labor's FLSA regulations. OPM's administration of the Act must be consistent with the Department of Labor's administration of the Act only to the extent practicable and only to the extent that this consistency is required to maintain compliance with the terms of the Act. For example, while OPM's executive, administrative, and professional exemption criteria are consistent with the Department of Labor's exemption criteria, OPM does not apply the highly compensated employee criteria in 29 CFR 541.601 to determine FLSA exemption status.

29 CFR 778.106 - TIME OF PAYMENT.

§ 778.106 Time of payment

There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. Where retroactive wage increases are made, retroactive overtime compensation is due at the time the increase is paid, as discussed in § 778.303. For a discussion of overtime payments due because of increases by way of bonuses, see § 778.209.