In the matter of Arbitration between . . . . . .

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AFL-CIO, LOCAL 1145

AND

FEDERAL BUREAU OF PRISONS U. S. PENITENTIARY, ATLANTA, GEORGIA

RE: FMCS FILE NO. 13-53859-3

ATLANTA, GEORGIA, SEPTEMBER 19, 2013

BRIEFS FILED: OCTOBER 30, 2013

ARBITRATOR: Linda S. Byars

APPEARANCES:

For the Union

Vance Bryant, Vice President Local 1145

For the Employer

Loretta A. Burke, Labor Relations Specialist

BACKGROUND

By Grievance form dated January 28, 2013 and citing the Preamble, Article 4 Section (a) (b) (c), Article 6, Section b(2), and "any other applicable laws, rules or regulation," the Union described the following alleged violation:

> The Union has become aware that Management has decided as a cost saving measure to require the Programs staff to take a day of in lieu of holiday pay when the holiday falls on their scheduled off day. The established past practice at USP Atlanta was always that Programs staff was given the option to take the holiday off pay or the additional day off in lieu of holiday pay. For example who is a Case Manager in Alpha Cell House Mrs. Destiny Brooks scheduled off days are Sun/Mon/Tues. Mrs. Brooks was scheduled off on Monday May 28, 2012 (Memorial Day). Mrs. Brooks was not required to take a "day off" in lieu of holiday pay. She was paid for the holiday that fell on her scheduled off day. On December 20, 2012 Mrs. Brooks provided the Local 1145 with a copy of her Time and Attendance sheet for Pay Period 26 and she has been required to take Wednesday December 26, 2012 of (sic) in lieu of holiday pay since her scheduled off day falls on December 25, 2012. Mrs. Brooks stated that she did not request to take Wednesday off and just like Memorial Day she expected to be paid holiday pay for being scheduled off during the holiday. Mrs. Brooks was not notified verbally or in writing of Management's intentions of requiring her to take this additional day off. Mrs. Brooks worked on Wednesday December 26, 2012 but was not compensated for Holiday pay for the scheduled off day of December 25, 2012. Mrs. Brooks also was not compensated for January 1, 2013 which also fell on her scheduled off day. Management started requiring the Detention Center Programs staff to take a "day off" in lieu of holiday pay while Programs staff in the Housing Units received holiday pay for the holiday falling on their scheduled off day. Now Management seems to be attempting to require all Programs staff to follow these procedures. These new procedures were implemented without informing the Local 1145 of the change and not negotiating the change of a long term past practice. The Local 1145 was also made aware that these new procedures were not consistent with all the Bargaining Unit Programs staff. The Union contends that the procedure of not requiring Bargain unit employees in Programs to take a "day off" in lieu of holiday pay was a consistent long term practice understood by the parties therefore should be a binding past

> practice. The Local 1145 attempted resolution of this issue but was given no response from Management. [Joint Exhibit No. 3.]

The Grievance alleges that the violation(s) occurred on "December 25, 2012, December 26, 2012, January 1, 2013 and Continuously." [Joint Exhibit No. 3.] As the requested remedy, the Union asks for the following:

> Cease and Desist the practice of requiring bargain unit employees in Programs to take the day off in lieu of holiday pay
> Negotiate with the Local 1145 all changes that affect employees working conditions
>
> Be made whole for all lost or denied pay (including statutory interest) which Bargain unit employees would have normally earned if they were not required to take a day off in lieu of holiday pay by the Agency
>
> Enhanced Attorney fees
>
> Anything deemed necessary and appropriate by a Third Party [Joint Exhibit No. 3.]

Absent a response from the Agency, the Union appealed to arbitration.[1] The Grievance came before the Arbitrator at hearing on September 19, 2013 in Atlanta, Georgia. At the request of the parties, the record remained open for the Time and Attendance record for Destiny Brooks for Pay Period 26, and the Arbitrator received the documents on September 27, 2013. The parties also agreed that the record would remain open for post-hearing briefs, to be mailed on or before October 30, 2013. The record closed on November 1, 2013 with timely receipt of the parties' post-hearing briefs.

The issues before the Arbitrator are as follows.

[1] The parties agree that the Agency did not respond to the Grievance.

STATEMENTS OF ISSUE

Did the Union violate Article 31, Section d of the Master Agreement, and if so is the Grievance arbitrable? Did the Union violate Article 32, Section a of the Master Agreement, and if so is the Grievance arbitrable? Did the Union violate Article 32, Section f of the Master Agreement, and if so what is the remedy? Did the Agency violate a binding past practice by requiring bargaining unit employees in programs to take a day off in lieu of holiday pay on December 25, 2012, December 26, 2012, January 1, 2013 and continuously?

OPINION

The Agency contends that the Grievance is untimely, violating Article 31, Section d of the parties' Master Agreement, which states in pertinent part as follows:

> Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. [Joint Exhibit No. 1, p. 73.]

As the Agency maintains the record demonstrates that the alleged grievable occurrence was known to the Union in 2011, well over the 40 calendar days before the filing of the Grievance.

The Agency also contends that the Union violated Article 32, Section a, which states as follows:

> 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 involve, the allege 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.

The Union contends that it provided its submission to the Agency within the applicable time limits.

The Agency further contends that the Union failed to comply with Article 32, Section f, which states as follows:

> The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration. [Joint Exhibit No. 1, p. 78.]

The Union contends that it provided the witness list as soon as it knew of the hearing date. Mr. Bryant provided the Union's witness list as an attachment to an electronic message dated September 13, 2013. [Union Exhibit No. 4.] However, as the Agency points out, Mr. Bryant's electronic message dated September 11, 2013 (Union Exhibit No.2), which states in the subject line, "Arbitration for Thurs September 19, 2013," demonstrates that he knew the date of the hearing.

The Union relies on Article 31, Section g, which states: After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance. [Joint Exhibit No. 2, p. 74.] The Agency agreed at the hearing that it did not respond to the Grievance. The Union invoked its right to arbitration when it received no response to the Grievance. The record demonstrates that there are procedural violations on both sides, and the provisions relied on by the parties do not state the consequences for a violation. Although procedural errors may result in penalties imposed by an arbitrator, there is no reason to do so in this case. The Grievance alleges a continuing violation, and dismissing it as procedurally defective does not serve either party's interests in this case.

Although the earlier grievance on the same issue was not pursued to arbitration, it is revealing on the issue of "past practice." The earlier grievance complains that Ramona Rembert's rights were violated on December 26, 2011, January 2, 2012, January 16, 2012, February 20, 2012, May 28, 2012, and continuously.[2] [Joint Exhibit No. 4.] Although the October 2012 grievance states that in the past staff were given the option to take the holiday off pay or the additional day off in lieu of holiday pay," the grievance also states that since December 2011 Ms. Rembert was required to take a day off for her holiday on five occasions before she filed the grievance. It appears from the grievance description that Ms. Rembert did not complain about a reconstructed holiday until the Jail Administrator, Lori Harris, advised Ms. Rembert that "she could receive holiday pay for Labor Day." [Joint Exhibit No. 4.]

The October 2012 complaint continues:

> Ms. Harris informed the Programs staff in a meeting that she had the authorization to give 2 staff members holiday pay. This new procedure was implemented without informing the Local 1145 and giving us the opportunity to negotiate the change. Ms. Rembert was not afforded this opportunity for the previous holidays in which she was off. [Joint Exhibit No. 4.]

The October 2012 grievance demonstrates that there was not a consistent past practice of paying employees for the holiday that fell on non-scheduled days. If there had been, Ms. Rembert would have filed a Grievance when she was required to take the holiday in December 2011 as a reconstructed holiday or on any of the other holidays prior to Labor Day 2012. She filed the Grievance when Ms. Harris informed her that she could receive holiday pay for Labor Day.

[2] The Union filed the earlier grievance when Ms. Rembert complained in September 2012 that until December 2010 she had never been forced to select an alternate day in lieu of holiday pay. [Union Exhibit No. 6.]

The prior grievance also complains as follows:

> In a memorandum from Mr. Kinston in response to Ms. Rembert's informal resolution it was stated that all Unit Management is consistent with the same policy regarding holidays. This statement is untrue because we have several members of Unit Team who are bargaining unit employees who receive holiday pay and have not been required to take the additional day off. [Joint Exhibit No. 4.]

Again, the prior grievance points to an inconsistent practice, i.e., employees do not always receive holiday pay instead of a restructured holiday.

The earlier grievance also states:

> Ms. Rembert, along with counselor Onnie Baxter had a conversation with Mr. David Monds, Human Resources Manager, last year and he informed them that Programs staff were deemed as essential employees similar to those who work in Correctional Services. Correctional Services employees receive holiday pay when they are scheduled off on a holiday. Also it was discovered that Unit Team assigned to other Units are not being required to take the day off in lieu of holiday pay. They receive holiday pay for their scheduled off day. [Joint Exhibit No. 4.]

The prior grievance asks as requested remedy for, "Cease and Desist the practice of requiring staff to take the day [off] in lieu of holiday pay since the requirement is not consistent with all programs staff." [Joint Exhibit No. 4.] Again the earlier grievance speaks of an inconsistent practice, not as the Union alleges in the Grievance, a binding, consistent past practice.

Contrary to the Union's position, the record does not demonstrate a consistent past practice that rises to the level of a binding past practice. Although the Grievance is arbitrable as a class complaint and as an alleged continuing violation, the record demonstrates that management has exercised its discretion to reconstruct a holiday for employees whose non-scheduled day falls on the holiday or to deem the employee

essential and pay the employee, as the earlier grievance states Ms. Harris did in September 2012.

The earlier grievance complains of a difference between the way essential staff were treated prior to December 2010. But this too points to a practice of management discretion in deciding who is essential. If the Union is relying on a pre-December 2010 practice, then as the Agency contends it is time barred. The Union cannot wait more than two years and then prove that there was a binding practice that cannot be changed without negotiation with the Union.[3]

The record demonstrates discretion granted to management to decide if and when an employee is needed and should be paid for a holiday or should receive a reconstructed holiday. The prior grievance supports the Agency's position that management has the discretion to decide if and when the absence of an employee on a holiday would create an adverse impact and pay the employee for the holiday in lieu of a reconstructed holiday. When the decision is exercised fairly and equitably, there is no abuse of discretion. Granting every employee pay rather than a reconstructed holiday is not required for the practice to be exercised fairly and equitably.

The Union points to Article 6, Section b.2 which requires as a right of the employee, "to be treated fairly and equitably in all aspects of personnel management." [Joint Exhibit No. 1, p. 10.] Employees whose non-scheduled day falls on a holiday are provided a holiday. Although there are those who receive additional pay in lieu of a holiday, those who do not still get the holiday as a reconstructed holiday. If management

[3] There is also no reasonable explanation in the record for the Union withdrawing the earlier grievance if there was a binding past practice requiring the Agency to negotiate with the Union.

abused its discretion by favoring or penalizing selected employees, then there is a violation. However, there is no such allegation contained in the Grievance.

As the Agency contends, the record demonstrates that the determination as to who will work on the holiday is made in a monthly meeting that includes the Union and staff. Jail Administrator Lori Harris testified as follows:

> During monthly staff meetings we discuss staff coverage including holiday staffing. The Union is invited as well as the staff. . . . We determine late night coverage and use seniority to determine who works a holiday. . . . Staff are designated to work the holiday – they are here and the rest of the staff who has the day off for the holiday, their holiday is reconstructed. . . . We determine who the one person is based on seniority. Everyone else is non-essential. [Arbitrator's Notes.]

The record demonstrates that the practice is not consistent and cannot be consistent because management must make a determination prior to each holiday and based on the circumstances whether or not an employee is essential.

Union witness Destiny Brooks, who has been a Case Manager in the Detention Center for approximately seven years, testified that management can only require staff to take a reconstructed holiday if it is going to cause harm, not as cost saving. However, the Union submitted no contractual or regulatory language supporting such an understanding. On the contrary, the record demonstrates that the holiday is reconstructed unless it is determined that such action would have an adverse Agency impact.

Even if, as the Union complains, the decision is based to some degree on a cost saving measure, there is no violation of a binding past practice. The practice of permitting employees to choose, as the testimony demonstrates has occurred, is also not binding on the parties unless it is clear that management gave up its discretion to decide if the employee is essential, to reconstruct the holiday if not, and to decide fairly and equitably

who should be paid and who should receive a reconstructed holiday. The evidence fails to demonstrate that management gave up its discretion and mutually agreed to a practice where the employee decides his/her preference or to a practice where everyone is paid and there is no reconstructed holiday. The record also fails to demonstrate that management is exercising its discretion unfairly or inequitably.

As the Union contends, its witnesses testified credibly concerning their understanding of the practice. However, the record demonstrates a practice of managerial discretion to decide whether to grant a reconstructed holiday or to pay the employee. A binding past practice that rises to the level of contracl language requires proof that the understanding was mutual. The record fails to support a mutual understanding that regardless of the circumstances the employee will be paid twice for the holiday that occurs on a non-scheduled day or that the employee may choose the option he/she prefers.

In addition to the Union's argument that there is a binding past practice requiring employees to be paid for the holiday falling on a scheduled off-day rather than reconstructing the holiday, the Grievance also contends that Ms. Brooks worked the day that the Agency claims was her reconstructed holiday, December 26, 2012, and is due payment. The Agency submits, "It is noted that Ms. Brooks is claiming she failed to follow the instructions of her supervisor and now expects to be paid." [Agency's Post-hearing Brief, p. 6.] However, the Grievance states, "Mrs. Brooks was not notified verbally or in writing of management's intentions of requiring her to take this additional day off." [Joint Exhibit No. 3.] As the Union contends, the record demonstrates that Destiny Brooks worked on the day the Agency contends was her reconstructed holiday, December 26, 2012. There is no credible rebuttal in the record to refute Ms. Brooks

claim in the Grievance that she received no verbal or written instruction to take off Wednesday, December 26, 2012. At arbitration, Ms. Brooks testified, "I was not informed not to come in and that was the issue." The Agency's reliance on a statement in the Grievance, which implies Ms. Brooks knew she should take December 26, 2012 as a reconstructed holiday is insufficient to demonstrate that she failed to follow the instruction of her supervisor. Therefore, Ms. Brooks is due to be paid for the hours she worked on December 26, 2012.

AWARD

The Grievance is arbitrable. The Grievance is sustained in part. Destiny Brooks shall be paid for the hours she worked on December 26, 2012. The remainder of the Grievance is denied.

_____ DATE: November 21, 2013

Arbitrator