

DECISION OF ARBITRATOR

In re U.S DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL DETENTION CENTER, MIAMI, FLORIDA and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, COUNCIL OF PRISON LOCALS 33 AND 501, Federal Mediation and Conciliation Service Case Number 07-58896.

The Federation's grievance on overtime violations is sustained.

AFFIRMATION

STATE OF FLORIDA)
) ss.:
COUNTY OF PALM BEACH)

I, Philip Harris, do hereby affirm upon my oath as Arbitrator that I am the individual described in who executed this instrument, which is my award.

RECEIVED
Employment Law & Ethics
JUN 25 2012
Office of General Counsel
Federal Bureau of Prisons

Philip Harris
Philip Harris, Ph.D.
Boca Raton, FL
June 20, 2012

APPEARANCES

FOR THE AGENCY

Gail L. Elkins, Esq., Counsel for DOJ/BOP/FCI, Miami, Assistant General Counsel.

FOR THE ASSOCIATION

Lillian Mendoza-Toro, Counsel for the Union, New San Juan, Puerto Rico.

UNION ISSUES

1. Did the Agency fail to follow the Correctional Service mandatory/overtime procedure?
2. If, so, does the Back Pay Act provide for a remedy for such failure, and what should it be?

AGENCY ISSUES

1. Did the Union attempt informal resolution?
2. Whether the Agency violated any rule, regulation, law or statute in its assignment of overtime and, if so, what is the remedy?

FACTS

The grievance has been troublesome for the five years! The Parties have attempted resolution but could not achieve a meeting of the minds, hence this award.

ASSOCIATION POSITION

The Back Pay Act provides that wrongful nonpayment of wages be made whole, plus reasonable attorney fees and interest, but not "beginning more than 6 years before the date of the filing of a timely appeal..."

The Master Agreement provides that overtime will be distributed and rotated equitably to qualified employees. Also, overtime records and sign-up lists "will be retained by the Employer for two (2) years from the date of said record." In addition, the Employer can order an employee to work overtime after making a reasonable effort to obtain a volunteer... but not implemented otherwise without good reason.

The Agreement also specifies the filing times for grievances in Article 31, and the Arbitration aspects in Article 32.

FACTS SUPPORTED BY DOCUMENTARY EVIDENCE are contained in Union Exhibits 11 to 31 covering Issue matters from 2001 to 2010.

Union's exh 11 - August 12 and 13, 2007 – Mr. Young's requesting additional information and Ms. Moss' response that there was no additional information for the information request.

Union's exh 12 - June 8, 2007 – Memorandum from Officer Howard to Captain Felz regarding denial of split shift

Union's exh 13 - June 11, 2007 – Email from Officer Chikalla to Mr. Young notifying random selection for overtime when other officers were ahead of him in the list

Union's exh 14 - June 14, 2007 – Mr. Young forwarded overtime procedures to Associate Warden Gregg.

Union's exh 15 – October 18, 2005 – Email from Wonbacher, Associate Warden to Captain Carr regarding late reliefs.

Union's exh 16 – June 13, 2007 – email from officer Martinez to Mr. Young notifying violation of overtime when he is on the list and has not been called.

Union's exh 17 – November 15, 2004 – email regarding computerized Roster Program.

Union's exh 18

- a. March 29, 2001 – LMR meeting minutes signed by Associate Warden Robert Thompson and Eric Young as President of Local 501. At page 2 the new overtime procedures were tabled until the next LMR meeting.
- b. May 1, 2001 – LMR meeting minutes signed by Associate Warden Thompson and Mr. Eric Young where the new sign-up sheets were going to be implemented at midnight.
- c. July 11, 2001 – Monthly LMR/Partnership meeting.
- d. August 1, 2001 – Mandatory Overtime Procedures from Mr. Young to Capt. Lee
- e. May 31, 2001 – Monthly LMR/Partnership meeting – overtime procedures violations notified.
- f. August 1, 2001 – Mandatory Overtime Procedures. Attachments include the Supervisor's Remarks page.
- g. February 10, 2001 – Memorandum from Cpt. Gregory to all Lieutenants regarding overtime procedures.
- h. August 28, 2001 – LMR Meeting minutes signed by Associate Warden Thompson and Mr. Young where mandatory overtime procedures are in effect and as agreed.
- i. March 26, 2002 – Email from Cpt. Lee to all lieutenants requesting that they ensure that the overtime procedures, as negotiated with the Union, are followed.

Union's exh 19 – May 28, 2003 – LMR meeting minutes. Discussion of overtime problems.

Union's exh 20 – May 30, 2007 – LMR minutes

Union's exh 21 – October 12, 2005 – Email from Lopez to management regarding overtime violation.

Union's exh 22 – August 8, 2007 – Memorandum from Mr. Young to Ms. Thomas regarding Overtime Program.

Union's exh 23 –

- a. June 3, 2010 – Memorandum from A. Holmes regarding request official time.
- b. August 8, 2010 - Memorandum from A. Holmes to Warden discussing issues of official time.

Union's exh 24 – Daily assignments B. Torres

Union's exh 25 – Overtime log including assignments of List Exempt

Union's exh 26 – Summary of overtime violations week of May 29, 2005 thru June 4, 2005

Union's exh 27 – Summary of overtime violations week of June 12, 2005 thru June 18, 2005.

Union's exh 28 – Summary of overtime violations week of June 19, 2005 thru June 25, 2005.

Union's exh 29 – Summary of overtime violations week of July 10, 2005 thru July 16, 2005.

Union's exh 30 – Summary of overtime violations week of January 6, 2006 thru January 14, 2006

Union's exh 31 – Summary of overtime violations week of May 27 through June 2, 2007.

FACTS SUPPORTED BY TESTIMONY

commence with witness Eric Young stating that when he was Chief Steward in 1998, overtime was not distributed equitably. He then was President from 2000 to 2007 and kept trying to correct the ongoing inequity. He testified that overtime opportunities depended on whether the Lieutenant liked or disliked you, and that some people were given back-to-back overtime, though others received none. Sign-up sheets were developed but the procedures were not followed. Mr. Young also stated that these sheets disappeared when he tried to determine if they complied with. Furthermore, he requested documents that were required to be maintained by management but "he never received the supervisor's remarks – page, and ... management never informed him that the split shift option was not working and they were going to change it". He was never given the records for two years back that he was entitled to. Management's attention both individually and at LMR meetings, to no avail. On November 15, 2005 Glen Clark, Administrative Lieutenant, sent the following email . it was to every Lieutenant:

"The Union has brought to my attention that the overtime sign-up sheet is not being properly followed. A review of the sign-up sheet showed the Union is correct. There are staff already scheduled for overtime on Thursday, Friday and Saturday before anyone else had a chance to get any overtime at all. Some staff is already scheduled for three or four overtime and others haven't worked. This is blatantly wrong. It is wrong and it is the fault of the Lieutenants. It's difficult to defend our actions when it's right there on the sign-up sheets. Scheduling overtime has to be fair and equitable. That's not only the grievance with the Local, but it's in the master agreement and national policy. And if they file grievance, they'll win. Please refrain from giving people overtime the week and stick to scheduling it in order according to the sign-up sheets. I know last week was difficult with five, six inmates out to the hospital. We had to take any volunteers we could, but there are only three inmates out now and there is no excuse for giving certain people overtime, but not offering it to everyone. We can't defend our actions when we're wrong."

Concerning Tab 21, the email shows how the Lieutenants never followed the overtime procedures. Had they complied, they would have known who was supposed to relieve the officer.

Re Tab 15, finding volunteers was an ongoing problem because officers were relieved almost two hours late.

Tab 6 contains a reason why a Captain did not call people in the overtime list: He did not want to wake up the person and Mr. Young said in May of 2007 that he would file an additional grievance if another violation occurred.

Tab 4: Mr. Young said the overtime violation was his last attempt to solve the problem. (May 16, 2007).

Tab 5: An employee was told by a Lieutenant that child issues was not a reason to get out of mandated overtime.

Tab 6: Overtime procedures were to be audited by the Union to ensure compliance.

Tab 8 and 20: In May, 2007 Mr. Young prepared an agenda for a LMR meeting to advice management of violations which continue to occur. Furthermore, he claimed "that management ignored his request to discipline the lieutenants".

AS TO TESIMONY ABOUT THE SCOPE, the Agency states the grievance is limited to the three dates contained in the document. The Fair Labor Standards Act procedures were violated. One employee worked 16 hours a day almost every day of the month because the call-back procedure was intentionally violated. This was because some employees are very good friends of Lieutenants.

Remarks pages were not provided because it was difficult to determine what happened with overtime. Non-bargaining unit signup sheets were also not given to the Association because then it would be known that supervisors were doing bargaining-unit overtime that should have been given to the Association unit.

Tab 3: Federation President Young wrote to Acting Warden Pastrana stating that the Agency failed to comply with the Master Agreement's applicable time frames. The Union did specify which contractual articles were being violated.

Tab 16: Officer Martinez never got overtime though he was around the top of the overtime list.

TESTIMONY OF A-TOYA HOLMES: She analyzed certain rosters to determine who was on the overtime list versus who received overtime but were not in the list. Initially she was granted official time to do her analysis, but then the additional time she required was denied. One observation of hers was that "there's no way this particular person received overtime back-to-back if management went through the whole list and asked the 60 or 70 persons who had signed up to overtime they wanted."

There came the time when a new program was introduced but "no negotiation between Management and the Union to exclude the Supervisor's remarks page from the overtime procedures that were mutually negotiated".

Ms. Holmes said it was the Agency's policy to hold documents for 270 days, a contractual violation that specifies for at least two years.

"Ms. Holmes said that on 925 occasions, Management gave overtime to Employees when it was not their turn to receive it." (Emphasis provided.)

Violations continue to this day. All the Lieutenants, 10 of them, have abused the exempt list. All this was shared with the Warden. " Each Lieutenant does something different, they don't stick to the agreed upon procedure of writing down the steps that were taken in assignment overtime on another cover sheet, so as to be able to track it" .

"...there was nothing set in stone as to what the procedure were for Lieutenant to follow once that sign-in sheet was missing."

"Ms. Holmes explained that list exempt is when a Lieutenant determines that a staff member can work overtime without going to the list or moving him to the bottom of the list. Originally, that's not what it was for". It became a method to bypass the system.

The only time back-to-back overtime is authorized is when all on the list are asked and said no.

Eric Young introduced some procedures from Fort Dix, and introduced a separate Supervisor's remark page to accompany the overtime sign-up sheet. Agreement was achieved on mandatory overtime. Early in 2000 an automated program was implemented. He felt that those who were skipped should have back pay, and split shifts are only for mandatory overtime. Mr. Young said "... The Union is again trying for the third time to reach an agreement with the Agency to solve the overtime violations that have been taking place since 2001."

Lieutenant Jeremy Longo granted overtime to list-exempt individuals 169 occasions during five time periods. He acknowledged that if there is no emergency it is required to first exhaust the sign-up sheet, and "said that he uses the list exempt because there was other way to hire than to do that".

Lieutenant Ross testified that the overtime procedures had numerous violations occurring and cited many specific examples. She "admitted that she was speculating how new employees received the overtime."

Ms. Ross stated that she has never seen a separate page for Lieutenants to make comments on about overtime assignments that were adjacent to the handwritten sign-up sheet. Ms. Ross stated that for as long as she had been Lieutenant in the process of hiring for overtime she had the notations within the box for the day of each employee they had tried to hire." Furthermore she said "that if the training she received was contrary to the negotiated overtime procedures, then her training would be incorrect" and she was not given the form to be used when assigning overtime.

APPLICATION OF THE LAW

THRESHOLD ISSUES

- 1. PURSUANT TO THE BACK PAY ACT THE SCOPE OF THE GRIEVANCE IS SIX (6) YEARS PRIOR TO THE FILING OF THE GRIEVANCE UNTIL THE AUGUST 25, 2011, THE DATE OF THE NEW LOCALLY NEGOTIATED OVERTIME PROCEDURES FLRA CASES SUPPORT THE CASE AT BAR.**

"In the captioned case the Union entered into a locally agreed overtime procedures in May 2001. The grievance was filed in May 2007. The evidence presented in the case demonstrates that for the entire six years prior to the filing of grievance, the Union made countless attempts to procure the Agency's compliance with the locally negotiated overtime procedures. Over and over again, Mr. Young as Union President, contacted management officials to notify that the lieutenants were not following the procedures and that they were unlawfully assigning overtime. Also, the evidence presented demonstrates that management officials, supervising the lieutenants, continuously recognized that the lieutenants were not following the procedures. There were numerous emails introduced into evidence where Captains or the Associate

Wardens warned the lieutenants that the continuing violations of the overtime procedures would result in the Union filing a grievance and that if that was the case, the Union would prevail.

On August 25, 2011 the Parties entered into a new locally negotiated overtime procedure. See Agency's exhibit F. Thus, the Union's position in regards to the scope of the grievance is that pursuant to the Back Pay Act the remedy should extend from May 2001 until August 24, 2011, that is, 6 years before the filing of the grievance and 4 years after the filing of the grievance until the new agreement was signed".

2. THE GRIEVANCE SHOULD BE GRANTED GIVEN THAT THE AGENCY FAILED TO RESPOND TO THE GRIEVANCE WITHIN THE THIRTY (30) DAYS PROVIDED IN THE MASTER AGREEMENT.

The grievance was submitted on June 1, 2007. The Agency response was July 2, 2007, more than the contractual allowance.

3. SPECIFICITY

The Agency sought to limit the remedy request to only the three dates stated in the grievance. But Management failed to submit the Associations requested documents which could have been examined for additional violations of overtime practices. June 1, 2007 was the first request for the paperwork, the same date of grievance. Then on July 29 the Association made its second request, and confirmed "through a request for a subpoena with this Honorable Arbitrator. All these efforts were fruitless". Then there was Management's denying official time to present violations. Hence, it would be a frustration of justice to grant the Agency's threshold issue concerning specificity because it "does not have clean hands in that it was the Agency who did not provide the adequate documents for the Union to its job."

In the Dublin case, the Union was able to submit complete and accurate data, except for destroyed records for 2002. In the present case there were no Supervisors remarks pages.

In the Butler case the Arbitrator stated that the Union "failed to provide specific ways in which violations occurred, and furthermore the Union appeared to have stopped its efforts to resolve the issue. Both did not comply with article 31.

4. THE BOP'S VIOLATION OF THE COLLECTIVE BARGAINING AGREEMENT RECORD KEEPING

- a. 270 days versus two years. This is a clear demonstration of the Agency's violation of the contract.
- b. Employee sign-up sheets. These were not produced, and Lieutenant Ross "testified that since 2003, when she became a Lieutenant at FDC Miami she has never seen or filled out supervisor's remarks page."

"Even though the Agency implied that the parties did not enter into an agreement regarding the locally negotiated overtime procedures, the overwhelming documentary evidence destroys the Agency's arguments. The LMR minutes signed by both parties clearly show that the overtime procedures were negotiated and implemented. In addition, the attachments to the LMR meetings minutes identify the documents that the Agency was obligated to keep pursuant to the newly negotiated procedures.

The emails sent by the Captains and the Associate Wardens acknowledge the existence of locally negotiated overtime procedures and consistently recognized and admitted that the lieutenants were not following the procedures and provided specific examples of violations incurred by the lieutenants."

- c. Skipping employees and list exempt employees "were consistently and constantly being skipped in the overtime assignments... and there were specific employees who had not signed for overtime and nevertheless had worked the overtime." It was preposterous the numbers of times Lieutenant Longo used list exempt. The August 2001 negotiation address the "violation of the liberal and abusive use of the list exempt had in the past".

5. REQUEST OF PAYMENT OF INTERESTS AND ATTORNEY'S FEES UNDER THE BACK PAY ACT.

- a. The statutory requirements for Attorney fees are warranted by law for this unjustified or unwarranted personnel action. The standards for payment are met. Grievant had reduction of pay, allowance or differentials.

- b. Interest of Justice.

" The factors used to determine whether attorney's fees are warranted in the interest of justice are: 1) whether a prohibited personnel practice was committed; 2) whether the agency's action was clearly without merit or totally unfounded, or whether the employee was substantially innocent of charges; 3) whether the agency acted in bad faith; 4) whether the agency committed gross procedural error that

prejudiced the employee or 5) whether the agency knew or should have known it could not prevail on the merits. Allen c. USPS, 80 FMSR 7015, 2MSPR 420 (MSPB 1980).

- c. The Union is Entitled to Attorney Fees. In the captioned case it is the Union's contention that in this grievance the Union has satisfied all five of the Allen factors" [above].

There were locally negotiated overtime procedures, absence of required records, and denial of Union's request for official time to prepare its case. The Agency had bad faith and caused the association time and costs.

- d. INTERESTS

Interest is nondiscretionary.

In addition to the above, all derived from the Union's Closing Brief, citations were included; two of the most relevant ones are set forth. They are the Dublin, CA, F.M.C.S case N.04-04-611; and Atwater, CA, F.M.C.S. N.09-03294. They contain significant parallels to the case at bar, and the Union prevailed. One such commonality is the adverse inference against the Agency for destroying documents rendering the Union unable to assess OT back pay damages. (Dublin p.13); The Agency failed to offer OT consistent with conditions of the CBA and the local agreement. (Ibid p.17). The Agency kept records for only 270 days. (Atwater p.6); and OT was assigned as "mandatory" or "list exempt" without first exhausting the overtime sign up list or referencing any emergency (Ibid p.6)

CONCLUSION

For the reasons set forth hereinbefore stated, the Union respectfully requests that the Agency's decision be reversed, that the Union be made whole for each employee who was skipped overtime, for each and every instance each employee was illegally skipped overtime, that the Arbitrator orders the Agency to determine pursuant to its records all the violations incurred and then submit these to the Union for the Union's review and approval; be made whole under the Back Pay Act including the payment of interest and attorneys fees and any other relief deemed appropriate.

1. **AGENCY POSITION**

The Union made a final attempt in LMR on May 30, 2007 but the grievance remained unresolved. Lieutenants were not violating overtime procedures, nor manipulating overtime forms.

The Union grieved "May 7, 13, 14 and continuing" and seeks employees to be made whole plus related charges.

"The evidence of record demonstrates and the Agency has shown that informal resolution was not attempted. Additionally, the claim for overtime is not covered by the Fair Labor Standards Act of 1938, as amended, 29 USC § 201, et seq. ("FLSA").

Therefore, the 2 year filing requirement – or 3 year filing requirement for willful violations – of FLSA is not applicable to this grievance. Accordingly, the grievance period begins on the date of the first grievable offense identified in the grievance which is May 7, 2007.

For the reasons that follow, the Agency contends the grievance must be denied. Alternatively, should the grievance be granted, the Agency contends the recovery period is limited as discussed herein below."

2. **BACKGROUND AND PROCEDURAL HISTORY.**

Lieutenants had made notations on sign-up lists. The system became automated December 2008, with space for Lieutenant notations. The Union alleged violations on June 1, 2007, and simultaneously sought sign-up sheets for the past two years.

"On June 21, 2007 the Agency provided the Union with all of the documents it had relative to the information requested." The grievance was denied because relevant specifics were lacking. The Union sent a second request for information including non-bargaining unit employees. Arbitration was scheduled for November 12 and 18, 2009. The Union had filed under Unfair Labor Practice, which was denied by the Federal Labor Relations Authority, because the Union did not articulate its needs. This and other legal procedures took place, but then at the November hearings the Parties tried but failed to agree. The legal difference continued.

They then convened on December 14, 15 and 16 of 2011 with written closings to be provided.

3. ISSUES

- a. Did the Union attempt informal resolution?
- b. Whether the Agency violated any rule, regulation, law or statute in its assignment of overtime and, if so, what is the remedy?

4. ARGUMENT

"... The Union failed to attempt informal resolution in any meaningful, concerted and reasonable way ... and did not meet its burden of proof."

- a. The Union's grievance should be denied because the Union failed to attempt informal resolution as required by The Master Agreement.

The Contract in Article 31, sections B. and D. requires both Parties to diligently seek settlements and observe a forty day calendar to grieve, and up to ten days within the forty to negotiate settlements.

The Union wanted Lieutenants to be disciplined, but the grievance was insufficiently specific within the response phase.

"The Union did not initially produce documents proving Agency violations, but then submitted Union exhibits, their only evidence of improperly denied overtime. The Union President claims he saw sign-up sheets, but two Lieutenants testified that no separate comment pages existed.

In another arbitration the Union grievance was denied for lack of specific information, and in the case at bar, the Union did not meaningfully attempt informal resolution.

"The Agency contends that through the testimony of two Lieutenants, it demonstrated that no Lieutenant's comment pages existed and that Lieutenants wrote their comments about overtime directly in the overtime assignment sheet."

The FLRA denied a ULP, and the Union did not filed subsequently.

- b. The Fair Labor Standards Act Does Not Apply To this Grievance.

The Act governs only employees who worked and not paid for it. This was not alleged to have happened.

c. The Grievance period begins no earlier than May 7, 2007.

The grievance cites May 7, 13 and 14, 2007, and continuing. But the FLSA filing period of 2 or 3 years does not apply to this grievance. Also, the 40 days for filing applies as per the Master Agreement unless a statute controls. Furthermore, the Back Pay Act does not set a filing period for negotiated grievance procedures.

d. Grievants In This Matter Are Limited To Those Associated With The May 7, May 13 and May 14, 2007 Dates And Continues Up To And Including June 2, 2007 Based On The Evidence The Union Submitted And The Arbitrator Accepted Into The Record At The Hearing.

Only three people are named in the grievance. There were no complains after My 14, 2007. Whoever worked was paid, but the complaints of being skipped continued. "UE 26-31 are the only exhibits admitted into evidence that identify any bargaining unit member and dates of alleged violation."

The grievance period is May 7, 2007 to June 2, 2007 as per UE 31. The burden of proof is on the Union. No overtime cards or mandatory overtime sign-up lists were presented to meet the burden.

Four FLRA were included with the Agency's Closing Arguments:

National Association of Independent Labor, Local 11 and U.S Department of the Army, U.S Transportation Center, Fort Eustis, Virginia, 64 FLRA 709 (2010).

AFGE Council of Prison Locals 3977 and U.S DOJ/FBOP, FPC Seymour Johnson, North Carolina, 62 FLRA 41 (2007)

AFGE Local 933 and U.S Department of Veteran's Affairs, Detroit, Michigan, 58 FLRA 480 (2003)

AFGE Local 916 and U.S Department of the Air Force Logistics Command Tinker Air Force Base, Oklahoma, 47 FLRA 165 (1993)

In the first one, the Agency is supported in that employees are not claiming nonpayment for work actually performed in exchange for salary allowances, differentials, etc.

The Seymour Johnson matter concerned a Union holding "that the arbitrator showed bias when he ruled that the grievance was not procedurally arbitrable because the Union did not try to informally resolve the grievance. The FLRA did not find the arbitrator ruling deficient. It would have been otherwise if he were biased or exceeded his authority.

The Detroit dispute involved the Arbitrator dismissing the grievance because it was untimely filed. Procedural arbitrability determination was not at the core. The FLRA found that the award was not contrary to law, hence the arbitrator exception was denied.

In the fourth matter the Arbitrator denied the grievance for a non-promotion and back pay because it was not timely filed. The FLRA denied the Union's exception.

5. CONCLUSION

"...The grievance must be denied because the Union failed to attempt informal resolution" in violation of the contract. If granted, the FLSA does not apply; the 6 year period is not a filing period; the dates of May 7 to June 2, 2007 are the period limited to the period for which the Union presented evidence; the only employees alleging violation are in UE 4-6 and 31; and the Union presented evidence only for those UE 31.

"Should the Arbitrator determine that the Agency committed overtime violations regarding the employees identified in UE 31, the Agency contends that the process described by Lieutenant Ross during her testimony should be used to determine whether any of those employees were actually "skipped" for overtime. If any of the employees in UE 31 were skipped, then the Union's recovery should be limited by the number of overtime opportunities that were available per day and shift, because only that number of bargaining unit members could have been assigned overtime. As for employees identified in UE 4-6, should a determination be made that they were mandated overtime improperly, the only remedy available to them since they already worked and were paid for that overtime is to make sure the mandatory procedure is being followed."

OPINION

It is as frank, explicit forthright, honest and accusatory a statement that could, or would, be made by a member of his own team against his colleagues! Lieutenant Glen Clark, the Administrative Lieutenant at the Miami FDC, sent to every Lieutenant the following email dated November 15, 2005:

"The Union has brought to my attention that the overtime sign-up sheet is not being properly followed. A review of the sign-up sheet showed the Union is correct. There are staff already scheduled for overtime on Thursday, Friday and Saturday before anyone else had a chance to get any overtime at all. Some staff is already scheduled for three or four overtime and others haven't worked. This is blatantly wrong. It is wrong and it is the fault of the Lieutenants. It's difficult to defend our actions when it's right there on the sign-up sheets. Scheduling overtime has to be fair and equitable. That's not only the grievance with the Local, but it's in the master agreement and national policy. And if they file grievance, they'll win. Please refrain from giving people overtime for the week and stick to scheduling it in order according to the sign-up sheets. I know last week was difficult with five, six inmates out to the hospital. We had to take any volunteers we could, but there are only three inmates out now and there is no excuse for giving certain people overtime, but not offering it to everyone. We can't defend our actions when we're wrong."

This probably tarnished some friendships, to say the least!

In conflict with the Union grievance is a Lieutenant's testimony: "Ms. Ross stated that she has never seen a separate page for Lieutenant to make comments on about overtime assignments that were adjacent to the handwritten sign-up sheet. Ms. Ross stated that for as long as she had been Lieutenant in the process of hiring for overtime she had the notations within the box for the day of each employee they had tried to hire."

However on July 9, 2007 a Union steward wrote to Ms. Ross, HRM, a second request for information: **"The Union needs to know who authorized a change in the negotiated overtime sign-up sheet in the Lieutenant's office that extracted the split shift option from both bargaining and non-bargaining unit overtime sign-up sheets."** (Emphasis provided.)

On August 13, 2007 the response was: "There is no additional information for your information request". The Human Resources Manager could have responded, "What are you talking about if the negotiated overtime sign-up sheet was non-existent.?"

And on July 20, 2007 a letter to Acting Warden Pastrana from Union president Young read:

"A formal grievance was delivered and received in the Warden's office on June 1, 2007. Article 31, section G., states, **"The party receiving the grievance will have thirty (30) days to respond to the grievance"**. The Warden's office failed to adhere to the applicable time frames to respond to a

formal grievance. Prior to that, the Union attempted every effort to informally resolve the issues at the lowest possible level. (The issues involved the Lieutenants not following the overtime and mandatory overtime procedures in the Correctional Services Department).

The Captain was notified, including Associate Warden of programs. The Warden failed to show up for the planned monthly Labor Management Relations meeting. The Union presented the issues in the form of an agenda item to be discussed thoroughly with Management representatives present. In the meeting, the Captain denied ever receiving any specific complaints from affected employees although written e-mails presented by the Union provided the contrary, and even the acting LMR spokesperson Mr. Craig Snyder failed to initiate any corrective action, although he had binding authority to do so. Every effort by the Union to resolve the problem at the lowest possible level before a formal grievance was filed – to no avail. Therefore the Local is left no other alternative but to invoke the assistance of a third party – to have all matters addressed and resolved by an arbitrator. Please read issues listed below: “

Human Resources Manager Moss hit the nail in the head. She was telling the truth, not knowing what was going on behind the scene!

Then dating a little earlier on June 14, 2007 Associate Warden Gregg wrote to Eric Young:

FROM: Robin Gregg

TO: Young, Eric

Date: 6/14/2007 12:56:21 PM

Subject: Re: Fwd: Officers being mandated

Thanks Mr. Young!!

R.L. Gregg

Associate Warden

FDC Miami

33NE 4th Street

Miami, Florida 33128

305-577-0100

rlgregg@bop.gov

>>>>“Eric Young – 6/13/2007 – 3:07pm >>>>>

As requested.

>>>>Eric Young 5/2/2007 – 12/27pm>>>>

Attached, you will find summary of the overtime and mandatory overtime procedures placed out by two Captains before you. Both their memorandums are consistent with the negotiated O/T procedures. The only thing left out of their memorandums is regularly scheduled overtime must be filled out 48 hours in advance. This is your outside hospital trips and inmates in the outside hospital. In order to maintain overtime being filled 48 hours in advance, it must be achieved on each shift by each Lieutenant.

Lastly I have also included the negotiated sign-up sheet which include all descriptors (E.G., split shift, etc.) for sign-up as well. Please cease the rogue modified sign-up sheet generated by the lieutenants.

I respectfully ask you to place a copy of these procedures and the template of the sign-up sheet in the overtime sign-up binder for regeneration, so the Lieutenants will have absolutely no excuse not to follow the procedures.

Again, I ask you to make regular checks – to reassure they are following the overtime sign-up as negotiated, definitely to ensure the regularly scheduled overtime is filled up 48 hours in advance. This should cease any further problems if you routinely monitor it. Lastly, I will delegate my Chief Steward Mr. Ortega and Ms. Holmes to assist you with monitoring of the overtime sign-up - to ensure it is routinely followed. They will be tasked to report to me any violation they discover.

>>>>Edward Felz 5/1/2007 : 3:12PM>>>>

Eric please send me a copy of the locally agreed upon overtime and mandatory overtime procedures so I can train the new lieutenants. (Emphasis provided.)

And then there is a 2001 memo:

Date: May 1st, 2001.

To: Monica S. Wetzel, Warden.

From: Robert Thompson, Associate Warden, custody

And: E. Young, Local 501 president

Subject: LMR Meeting Minutes

The April labor management committee met on May 1st, 2001. The committee consisted of:

Robert Thompson, LMR chairmen

Kenneth Lee, Chief, Correctional Supervisor

Anne Owczarsky, Human Resources Manager

E. Young, Local 501 President

C. Laugh, Local 501 Vice-President

The Local stated there were no agenda items submitted, however, there were several tabled items that needed to be discussed.

Old Business:

Overtime procedures: The Local submitted overtime sign-up sheets at the last LMR meeting. Management and the Local made some modifications. Both parties approved the modified sign-up sheets. Management requested that Local provide a copy of the original agreement between the Local and Management at the time they were negotiated. The sign-up sheets were found satisfactory by both Management and Local. The new sign-up sheets will be implemented midnight, tonight. (Emphasis provided.)

So blatant were the Lieutenants in assigning overtime, that their trashing of the Master Agreement is self-evident gross injustice towards those deserving the overtime. An extreme example is Benjamin Torres who worked two shifts almost every day in one month and earned \$70,000 overtime that year! This deprived officers on the overtime wanted list! Mr. Torres owes his Lieutenant Jeremy Longo a few good dinners at Ruth Chris Steak House as thanks immensely.

Another glaring violation in a portion of the portion the Association was able to research, is a finding that on 925 occasions Management handed overtime to Employees out of turn. They were supposed to go to bottom of the list and not given back-to-back overtime. Instead, they stayed at the top. The agreed-to rule was decimated!

THERE WAS A NEGOTIATED AGREEMENT IN EXISTENCE, ALIVE BUT NOT WELL.

Another issue concerns timeliness. The Agency asserts that the grievance was filed beyond the forty days specified in the Master Agreement. The Union disagrees. However, there is no dispute about Management not following the Contract requirements to maintain overtime records for two years.

Instead, they did so for 270 days. What happened to the aphorism "What's sauce for the goose is sauce for the gander"?

As to the Federal Labor Relations Authority correspondence with the Union, resolution of the grievance is apparently not within its scope because everyone who worked was paid.

A major issue involves the Contract requirement to attempt informal resolution. The Agency required very specific data that would justify compensation. This put the Union "between a rock and a hard place" .

The Agency denied the Union sufficient time to do an analysis of the records available to prove its case. It was a mission impossible for the Association to enter aggressive informal resolution in only this small portion of the overtime violations. It would be to ignore/withdraw the bulk of the violations, abandoning its members. The Union kept pursuing all data to no avail, and therefore was unable to earnestly seek the informal resolution. Its flood of search efforts is dramatized earlier in the ASSOCIATION POSITION listing of thirty different communications intensely looking for resolution of the ongoing overtime violations. The other major factor about the "rock and a hard place" concerns missing documents, obviously impacting a sizeable portion of the violations. The Union did not opt to desert the employees involved by resolving the grievance without the records focusing on their claim. Concerning the Union Issues, the Agency did not follow the overtime procedures, and the Back Pay Act is the remedy.

As to the Agency Issues, it raised mountainous, insurmountable obstacles to producing the required specifics. Full cooperation from the Agency is essential to derive a just resolution of the dispute. Furthermore, the negotiated overtime procedures obviously must no longer be violated.

The arbitrator is convinced of the Union's merits and the justification for the award based on its proposal.

AWARD

The Agency is directed to make whole under the Back Pay Act the Employees who were wrongfully skipped for overtime, determining from its records all the violations incurred, and submit these records to the Union for its review and approval. Payments shall include interest and attorney fees.

The Arbitrator retains jurisdiction for sixty (60) days.