106 FLRR-2 26

105 LRP 34256

U.S. Department of Justice, Federal Bureau of Prisons, Metropolitan Detection Center Guaynabo, Puerto Rico and American Federation of Government Employees Council of Prison Locals, Local 4052

Federal Arbitration

04-05888

May 8, 2005

Related Index Numbers

13.042 Overtime

Judge / Administrative Officer

William H. Holley

Ruling

Arbitrator William Holley ordered an agency to give back pay with interest to a worker who was refused overtime assignments by his superiors. A supervisor's e-mail ordering no overtime for the worker was an unwarranted personnel action.

Meaning

Agencies that are subject to a labor agreement provision requiring the equitable distribution of overtime assignments may have a hard time using such assignments as a form of discipline. An arbitrator may consider the denial of overtime for past transgressions to be excessive, especially when not preceded by warning.

Case Summary

A supervisor issued an e-mail stating that a subordinate couldn't receive overtime assignments. The union claimed that this refusal to grant overtime was a violation of the master agreement. It sought back pay and interest. The agency contended that the denial of overtime was appropriate because the grievant had failed in the past to complete his assigned 40-hour week during periods when he was AWOL and on leave without pay. The arbitrator stated that attendance problems are normally dealt with using progressive discipline, with a warning first. Additionally, the agreement obligated the agency to "distribute overtime equitably." The arbitrator examined the overtime assignments and concluded that because the grievant did not receive a proportionate share, the agency violated its agreement obligations and committed an unwarranted personnel action. He ordered the agency to pay the grievant, with interest, for overtime he would've been assigned absent the offending e-mail.

Full Text

APPEARANCES:

For the Union: Fernando Blanco, President, Jorge Rivera, Arbitration Advocate

For the Agency: Michael A. Markiewicz, Agency Representative

Background

This matter of arbitration stems from the following Grievance:

On February 16, 2004, Capt. Michael Smith issued an e-mail to all Lieutenants informing them that Carlos Rivera, Maintenance Foreman, could not work overtime in the Correctional Services Department. Rivera is a qualified employee who has continuously volunteered and has worked custody overtime in the past. Rivera has been assigned to cover Correctional post(s) as a regular assignment but denied the opportunity to work custody overtime. Capt. Smith informed Rivera that the decision to deny him overtime came from "higher authority."

The Agency failed to respond to the informal resolution and refused to resolve the issue at the lowest possible level, therefore, the Union is drawing an adverse inference.

The remedy sought was:

AFGE Local 4052 seeks relief to the fullest extent available under the law for the Agency's refusal to grant overtime to Carlos Rivera, the employee will be made whole in every way to include but not limited to award back pay, to include interest,

pursuant and in accordance with the FLSA and/or Back Pay Act. The Agency cease and desist from this pernicious practice. AFGE Local 4052 seeks reimbursement of attorney fees and expenses incurred in pursuing the employee's rights under the Act. And any other remedy demand appropriate and necessary by the arbitrator.

The Grievance was denied, and the Union appealed the Grievance. In a letter dated April 19, 2004, Mr. Richard E. Chavez, Warden, wrote the following:

This responds to your formal grievance filed on March 24, 2004, in which the Union is seeking remedy under the 5 U.S.C. § 5596 (Back Pay Act) for the action taken by management on February 16, 2004. Specifically, management issued an e-mail to all shift supervisors in the Correctional Services Department informing them that the grievant, Carlos Rivera (Maintenance Foreman), could not work overtime in Correctional Services Department. The Union claims this action is in violation of Article 18 of the collective bargaining agreement. The Union contends the violation occurred each time the employee volunteered to work overtime beginning on February 17, 2004, but was denied by management.

Block 5 of your grievance is to identify Federal Prison System Directive, Executive Order, or Statute violated. Under this section you have outlined violations citing the following:

Master Agreement -- Article 18, and any other applicable government-wide rule, regulation or policy.

The violations you have cited lack specificity. You have failed to identify what specific provision of Article 18 of the collective bargaining agreement or government-wide rule, regulation or policy have been violated. The agency is not charged with the responsibility of going through each and every section of Article 18 or government-wide rule, regulation or policy to determine what you are claiming. It is your responsibility, as the grieving party, to point out clearly and precisely what is being claimed.

We are unable to determine what you have alleged the agency violated because the information in block 5 cites regulations, policy and Article 18 of the collective bargaining agreement which contains various provisions as well as block 6 of your grievance fails to state how the Master Agreement, and government-wide rule, regulation or policy were violated.

Based on the above, your grievance is procedurally rejected.

Although you have failed to provide specific information on the rule, regulation, policy or collective bargaining agreement, I have nevertheless address(ed) what I believe the merits of your grievance may be.

Your grievance fails to specify dates Carlos Rivera requested and was denied overtime. A review of the overtime records indicates that Carlos Rivera signed up for overtime on one occasion in which another employee was selected to work instead of Mr. Rivera.

Your requested remedy in this case is the employee be allowed to work overtime, back pay with interest for the overtime he was not granted and reimbursement of attorney fees and expenses.

Management recognizes its continuing responsibility to distribute and rotate overtime equitably. Carlos Rivera's future requests to work overtime will be handled in accordance with the Master Agreement, Article 18 Section P. With regard to your request for back pay and interest for missed overtime, 5 CFR Section 550.111, indicates overtime is paid for work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is performed by an employee. Carlos Rivera did not perform overtime work, therefore it would violate 5 CFR Section 550.111 to pay him.

The payment of attorney fees, covered in 5 CFR § 550.807, is warranted only if there is a specific finding by a third party setting forth the reasons such a payment is in the interest of justice. At this time, payment of attorney fees would be in violation of 5

CFR § 550.807 since there is no third party decision. Therefore, you (sic.) requested remedy is partially granted.

The Grievance was denied. In a letter dated May 14, 2004, Fernando Blanco, President, AFGE Local 4052, appealed the Grievance. He wrote:

I am in receipt of your response, dated April 19, 2004, to the grievance filed on March 24, 2004, concerning Carlos Rivera, Maintenance Foreman, denial of custody overtime. Local 4052 is hereby invoking arbitration on this matter.

In your response, you denied the grievance because it was not specific. The Union is not required to be specific in block 5 of the grievance form. The Union supplied the necessary information in block 6 as to the "who, what, where and how" of the violation. If the agency needed additional information, then it should have requested it in the time frame allotted for informal resolution, but instead the agency ignored it and refused to make a reasonable and concerted effort toward informal resolution.

Attached is FMCS form R-43, Request for Arbitration Panel, please complete the agency information in section 8, Payment Option, and return to me within 3 days so I can mail it to the FMCS.

Thank you for your attention in this matter.

The Grievance was denied. The Union appealed the Grievance to arbitration. A hearing was held on March 17, 2005. Both parties were afforded full opportunity to present evidence and to examine witnesses who testified under oath. Both parties submitted post-hearing briefs which were received by April 25, 2005. The Arbitrator exchanged the briefs upon receipt of both briefs, the record was closed.

Relevant Provisions of the Master Agreement

Article 5 -- Rights of the Employer

Section a. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and ...

b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted;

Article 6 -- Rights of the Employee

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

1. to bring any matters of personal concern to the attention of any Management official, any other officials of the executive branch of government, the Congress, and any other authorities. The parties endorse the concept that matters of personal concern should be addressed at the lowest possible level; however, this does not preclude the employee from exercising the above-stated rights;

2. to be treated fairly and equitably in all aspects of personnel management; ... .

6. to have all provisions of the Collective Bargaining Agreement adhered to.

Article 18 -- Hours of Work

Section p. Specific procedures regarding overtime assignments may be negotiated locally.

1. when Management determines that it is necessary to pay overtime for positions/assignments normally filed by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees; and

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 to determine the

effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be retained by the Employer for two (2) years from the date of said record.

Article 32 -- Arbitration

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

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or

2. published Federal Bureau of Prisons policies and regulations.

Article 36 -- Human Resource Management

The Union and the Employer endorse the philosophy that people are the most valuable resource of the Federal Bureau of Prisons. We believe that every reasonable consideration must be made by the Union and the Employer to fulfill the mission of the organization.

This will be achieved in a manner that fosters good communication among all staff, emphasizing concern and sensitivity in working relationships. Respect for the individual will be foremost, whether in the daily routine, or during extraordinary conditions. In a spirit of mutual cooperation, the Union and the Employer commit to these principles.

Back Pay Act -- 5 USC 5596, subsection b:

(1) an employee of an agency who, on the basis of a timely appeal or an administrative decision (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect --

(I) an amount equal to all or part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period;

Issue

The Union proposed as the issue:

Was the Grievant denied the opportunity to work overtime and if so, should be compensated under the Back Pay Act?

The Agency proposed:

Did management violate the Master Agreement, Article 18, when Captain Smith issued an e-mail on February 16, 2004, stating Carlos Rivera (grievant) could not work overtime until further notice?

If so, what is an appropriate remedy?

The Arbitrator accepts both issues since they are not substantively different in content.

Positions of the Parties

The Union:

The Union stated that Captain Smith issued the e-mail on February 16, 2004 which instructed all

lieutenants that Carlos Rivera, Facilities Foreman, could not work custodial overtime until further notice. The Union attempted an informal resolution with Captain Smith's supervisor on March 2, 2004, but the informal resolution went unanswered. The Union filed the Grievance on Mach 24, 2004 and the Agency responded to the Grievance on April 20, 2004. The Agency partially granted the Grievance; however, no monetary relief was granted to the affected employee and the Union invoked arbitration on May 14, 2004.

During the arbitration hearing, the Agency claimed that there was a legitimate reason for denying the Grievant the opportunity to work custodial overtime. However, the Grievant and the Union were unaware of these reasons until the day of the hearing. None of these "legitimate reasons" were presented or explained to the Grievant or the Union prior to the arbitration hearing. None of these reasons were manifested in the Agency's written response to the Grievance to justify the Agency's actions. The Union believes that the Agency representative simply made up excuses in an effort to invoke some type of damage control in response to the Agency's unjustified and unwarranted personnel action. During testimony, Warden Chavez acknowledged that he had concurred with the Agency's response and stated that it was the wrong approach on behalf of the Captain.

The Union claimed that the Agency partially granted the Grievance, as stated in its response -- "with regard to your request for back pay and interest for missed overtime, 5 CFR 550.111, indicates overtime is paid for work in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek that is performed by an employee. Carlos Rivera did not perform overtime work; therefore it would violate 5 CFR 550.111 to pay him."

The Union stated that the Agency further stated -- "Management recognized its continuing responsibility to distribute and rotate overtime equitably. Future requests will be handled in accordance with Master Agreement, Article 18, section p."

The Union argued that the Agency is misled by only focusing on this section of 5 CFR and intentionally overlooked and ignored the rest of the code in an effort to deny the payment of overtime. 5 CFR 550.803 states that the failure of an agency to pay employees monies to which they are entitled constitutes an unwarranted personnel action within the meaning of the Back Pay Act. The Back Pay Act defines "personnel action" as including "the omission or failure to take an action or confer a benefit." 5 USC 5596(b)(3). The regulations implementing the Back Pay Act states:

Unjustified or unwarranted personnel action means an act of commission or an act of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation or mandatory personnel policy established by an agency or through a collective bargaining agreement.

Based on the Guide to Federal Labor Relations Authority Law and Practice, Peter Broida, 1998 Dewey Publications, p. 2158, the Union also rejects the Agency's contention that the award ordering overtime not worked would be contrary to 5 USC 5542(a) and 5544(a). The Authority previously has found awards of overtime compensation to be warranted in cases where employees did not actually perform work. The fact that employees did not actually work overtime did not render a remedy of overtime compensation unlawful. Rather, the employees would have worked overtime if the agency had not engaged in improper conduct and, therefore, the employees suffered the loss of pay because of that conduct. Where it is established that employees are entitled to overtime under collective bargaining agreements and do not receive that overtime because of a violation of the agreement by the agency, those employees are entitled to compensation for the lost overtime.

The Union argued that another defense used by the Agency was that the Grievant was not qualified to perform the overtime work. The Authority has long

held that, if Management retains the right to determine the qualifications for assignment of certain work and whether individual employees possess such qualifications, then the procedures by which one of the qualified employees is assigned such work is negotiable under section 7106(b)(2) of the statute. *American Federation of Government Employees, AFL-CIO, Local 3172 and Department of Health and Human Services, Social Security Administration, Sacramento, CA,* 49 FLSA 845, 848 (1994). More specifically, "an agency can be required to select a candidate for a position on the basis of seniority where management is able to determine the source from which it will select and the qualifications needed for the position." *(quoting American Federation of Government Employees, Local 3295 and U.S. Department of the Treasury, Office of Thrift Supervision*, 47 FLSA 884, 906 (1993)).

The Union argued that the parties never negotiated a prerequisite that an employee had to have 40 hours worked prior to signing up and qualifying for overtime. The Union did extensive research and did not find any case law to substantiate the Agency's claim. If this "hypothetical" theory were correct, then an employee who works Monday through Friday would not qualify for overtime until he completed his 40 hours on Friday. The only case law concerning qualifications to work overtime pertains to ability to perform certain tasks. The Grievant in this case is qualified to perform the tasks and job assignments associated with working a custodial post. In addition, the Grievant is qualified in Basic Prisoner Transportation and is qualified to escort inmates on hospital trips.

The Union presented exhibits that indicated that the Grievant worked custodial overtime on one occasion, which as the Warden stated in its testimony was against his orders. The Agency also presented the Grievant's time and attendance records which confirmed that he worked overtime in the Facilities department and the one occasion in the hospital. The Union pointed out that the T&A records submitted by the Agency did not have the Grievant's initials on the bottom of the form. This confirms that the Grievant was qualified to work overtime, but was denied the opportunity to work overtime in correctional services.

The Union stated that it did not dispute the fact that the Grievant was investigated for being AWOL (absent without official leave); however, no disciplinary action was taken as a result of the investigation. On the contrary, the Union can only assert that the Agency sought to take reprisals against the Grievant. The Agency used this premise as a defense for denying the Grievant overtime and the Union has included the affidavit signed by the employee in connection with the investigation. In the affidavit, the employee stated -- "During the negotiation process of EEOC thru the Federal Judge and Central Office part of the agreement was to dismiss all the alleged AWOL's and I decline the offer due to the fact that they were false allegations because I was not AWOL, I was hospitalized or medically ill." The Union can only assume that, since the employee rejected the settlement offer proposed by the Agency, the Agency in turn sought to take reprisals against the employee by denying him the opportunity to work overtime.

The Union stated that Warden Chavez testified that his grass was not getting cut because Carlos Rivera was working custodial overtime. The Union can only assume that the Agency took reprisals against the employee for work not performed within the Facilities department.

The Union stated that the Agency claimed that there had been no harm done to the Grievant for the missed overtime and the missed overtime was a short-term postponement. The Union disagrees with the Agency's position and the Authority has found that missed overtime pay constitutes a withdrawal or reduction of an employee's pay, allowances, or differentials. *U.S. Department of the Treasury, U.S. Customs Service, Portland, Oregon and National Treasury Employees Union, Chapter 156,* 54 FLSA 764, 770-71 (1998).

The Union argued that credibility issues which plague this case are not unique. There was conflicting

testimony given and the Arbitrator is confronted with the difficult task of determining who is telling the truth. The Union would like to direct the Arbitrator to the credibility standards published by U.S. Merit Systems Protection Board (MSPB) in *Hillen v. Department of Army*, 35 MSPR 453 (1987). The so-called *Hillen* credibility factors originated in a MSPB decision involving the discipline of a Federal employee for sexual harassment. The MSPB concluded that a fact finder, in this case the Arbitrator, when making a credibility determination, should consider numerous factors within the federal employment context. The credibility factors spelled out in *Hillen v. Army* are the basic guideposts used in assessing witness credibility and an arbitrator may take careful measure of a witness by:

1. The extent to which the witness was able to recall the matter about which he testified;

2. The character of the testimony;

3. The existence of bias, interest, or other motive;

4. The extent to which the witness contradicted himself in the course of testimony or is contradicted by others -- particularly those testifying on his behalf;

5. The demeanor while testifying.

The Union claimed that its witnesses, Carlos Rivera, Antonio Lopez and Angel Adan, were clear, credible, and consistent in their testimony. In contradiction, Warden Chavez and Captain Smith were evasive, inconsistent and hostile to the Union and to the Grievant, and generally lacked credibility. Captain Smith became "extremely defensive, and upset" when asked straightforward questions by the Union representative.

In applying the *Hillen* factors to the testimony of the individuals who know what really happened, the Grievant's testimony must be credited over the Agency representatives' testimony where there is a conflict in evidence. Where there is conflict of testimony between Grievant and an Employer witness, the Grievant's testimony is clearly corroborated by other staff members whose testimony was clear, concise and credible.

The Union contended that testimony of Warden Chavez and Captain Smith was colored by interest or bias and often took the form of deliberate falsification or at least simply consisted of putting their "best foot forward" which is to say, coloring testimony in a way favorable to the result which their interest compelled them to seek.

The Union witnesses had nothing to gain by giving untruthful testimony. The number of witnesses who testified does not, per se, make the testimony more credible. When the number of witnesses who had no opportunity to discuss the events testified consistently, the credibility of their testimony is enhanced as opposed to the testimony given by the Agency witnesses who were marred with inconsistencies and contradictions.

The Union asks that the arbitrator not consider the testimony offered by Angel Morales, Employee Services Manager. His testimony was not relevant to the case at hand and was an attempt to confuse the arbitrator on the merits of the case by citing an article in the contract concerning over- and under-payments.

The testimony given by Warden Chavez conflicted with the testimony given by the other representatives of Management. There was substantial inconsistency in the testimony of the witnesses concerning the "mysterious" e-mail sent by Captain Smith which voided his initial order which prohibited Carlos Rivera from working custodial overtime. The Warden testified that Captain Smith sent the e-mail on the day that the Grievance was filed. Captain Smith later testified that he sent the order prior to that date and did not recall whether it was via e-mail or a verbal order to his lieutenants. None of the witnesses, both Union and Management witnesses, could recall seeing the second e-mail from Captain Smith. The "mysterious" e-mail was not mentioned in the Agency's response to the Grievance and was never produced at the hearing. It is the Union's position that the e-mail never existed.

In regard to the requested remedy, the Union

contended that the Agency will argue that the Arbitrator does not have the authority to impose the remedies requested by the Union. However, it is the Union's contention that the Arbitrator does indeed have such authority. The Union is equally confident that the Agency will contend that the requested remedies do not draw their essence from the parties' contract; in fact the parties' contract specifically states in Article 6 that bargaining unit employees have the right to have all provisions of the Collective Bargaining Agreement, including the fair distribution of overtime, adhered to. The Agency will also claim that the Code of Federal Regulations prohibits them from paying overtime when work was not performed.

The Union argued that the Federal Labor Relations Authority has ruled that a violation of the contract is an unjustified or unwarranted personnel action (UUPA) and the Back Pay Act allows employees to receive overtime pay when they have been the subject of the unjustified or unwarranted personnel action that resulted in the loss of pay. *Social Security Administration, Office of Hearings and Appeals, Paducah, KY and AFGE, Local 3627,* 102 LRP 24076. A violation of a labor agreement provision qualifies as an UUPA for the purpose of establishing a basis for back pay and an award of attorney's fees *Health Care Financing Administration,* 86 FLRR 1-1594.

The Union stated that, under the Back Pay Act, in order to establish the right to back pay as the result of an unwarranted personnel action, the Grievant must meet the requirements of the "but for" test. *AFGE, Local 1897 and Air Force Assistant Command, Eglin AFB, FL,* No. 81K10682 (Berkman, 1982).

The Federal Personnel Manual Supplement, 990-2, Book 550, Pay Administration (General), Subchapter 8, Paragraph S804b, sets forth the "but for" test as applied under Section 5596 of Title 5. This document states that it must be clearly established that, "but for" the unjustified or unwarranted personnel action, the employee would actually have been entitled to receive the pay, allowances or differentials which are in question.

The Authority has stated that the "but for" test does not require a "specific recitation of certain words and phrases"; rather it requires that a direct connection be found between an unwarranted or unjustified personnel action and an employee's loss of pay or differentials, *VA Clevand,* 41 FLSA at 518. A finding of a direct causal connection may be "implicit from the record and the award."

The Union argued that the Agency may propose that, if the Arbitrator does indeed find cause of the unjustified and unwarranted personnel action, that the only remedy available is the opportunity to make up the overtime and not receive back pay. The Agency will challenge the Arbitrator's authority in fashioning the remedy. However, when an employee is improperly denied overtime, the proper remedy is an award of back pay, not the opportunity to work the denied hours at some other time. "Offering an employee the opportunity to make up improperly lost hours at a later date is not an adequate remedy. He is entitled to work those hours at the time they are available, to know when he may expect his turn, and not be expected to work at some time more convenient to the employer, or at the personal whim of a foreman." *NTEU and U.S. Custom Service,* No. 81K15970, LAIRS 14012 (Jacks, 1982) *(quoting John Deere Dubuque Tractor Works,* 35 LA 495, 498 (Larkin, 1956)); *see also U.S. Customs Service and NTEU,Chapter 156,* ARBIHS08823 (Zigman, 1997).

The Union stated that the Authority has also ruled that, when it is determined through the grievance or arbitration process that grievants were denied the opportunity for overtime work, they shall be made whole in accordance with 5 USC 5596. *Tinker AFB,* 102 FLRR 1-1058.

The Union concluded:

The Union has presented beyond a preponderance of the evidence that the grievant, Carlos Rivera, was denied the opportunity to work overtime in the Correctional Services department and was the victim of an unjustified or unwarranted personnel action. The evidence and testimony presented at the hearing and entered into the record

speak for themselves.

For whatever reasons, MDC Guaynabo management issued the directive to prohibit Carlos Rivera from working overtime in the Correctional Services department. It is the Union's position that we proved that:

1. Carlos Rivera was qualified to work overtime in Correctional Services and that overtime was available everyday during that period with as many as 38 overtime slots available in one day.

2. The agency failed to distribute and rotate overtime equitably among bargaining unit employees, particularly to Carlos Rivera for the period of February 16 to March 24, 2004.

3. The agency engaged in a harmful practice of depriving the grievant the opportunity to work overtime.

4. The grievant was affected by an unjustified or unwarranted personnel action that resulted in the loss and withdrawal of pay, allowances and differentials.

5. The agency partially granted the grievance.

6. The grievant is entitled to overtime pay for work not performed per the Back Pay Act.

In view of these events, the Union kindly request that the Arbitrator uphold the grievance, award back pay for the missed overtime opportunities and grant the Union remedies.

The Union also request that the Honorable Arbitrator fashion his award to satisfy the two-prong test set forth in *U.S. Department of the Treasury, Bureau of Engraving and Printing,* Washington, D.C. and National Treasury Employees Union, Chapter 201, 53 FLSA 146, 151-54 (1997) *(BEP).* This is in the event that the agency files an exception to the award with the FLSA on the basis that it interfered with management's rights under section 7106 of the statute. The *BEP* case lays the foundation for the Authority's framework for resolving exceptions to arbitration awards alleging that the award violates management's rights under section 7106 of the statute. Under Prong I of this framework, the Authority examines whether the award provides a remedy for a violation of either applicable law, within the meaning of section 7106(a)(2) of the statute, or a contract provision that was negotiated pursuant to section 7106(b) of the statute. Under Prong II, the Authority considers whether the arbitrator's remedy reflects a reconstruction of what management would have done if management had not violated the law or contractual provision at issue. An award that fails to satisfy either Prong I or Prong II will be set aside or remanded to the parties as appropriate. Union Brief, pgs. 10-12.

The Agency:

The Agency stated that the Master Agreement is a nationwide collective bargaining agreement. On March 24, 2004, the Union filed a Grievance and claimed an overtime violation for the Grievant beginning on February 16, 2004. At the hearing, the Union stipulated that the Grievance time period covered February 16, 2004, through April 19, 2004.

The Agency stated that the Union brought forth the allegations in this case; therefore, the Union has to prove actual overtime violations. However, allegations or assertions are not proof; mere allegations unsupported by evidence are ordinarily given no weight by arbitrators.

The Agency argued that a very important factor to be considered when assigning overtime work assignments in a prison environment is the security factor. The fact that a prison is tasked with protecting the public from dangerous felons is a serious factor. Therefore, a prison work environment has to be given more latitude in assigning work than other work environments. The work environment of a correctional facility is very different from most places of employment. The Supreme Court has noted this fact by stating that there are many more different security concerns than in other work environments. Therefore, prison administrators are entitled to more deference on the issue of internal security. *Bell v. Wolfish,* 141 U.S. 520, 547 (1979) and *Rhodes v. Chapman,* 452 U.S. 337 (1981). The Federal Labor Relations Authority (FLSA) has also agreed with this

judgement stating, "a Federal correctional facility has special security concerns which may not be present at other locations." *AFGE, AFL-CIO, Local 683 and Department of Justice, Federal Correctional Institution Sandstone, Minnesota,* 30 FLSA 497, 500-01 (1987). The FLSA has further ruled that the judgment as to the degree or type of staffing to maintain the security of a facility is committed to Management under section 7106(a)(1). *Fraternal Order of Police Lodge 1F and Veterans Administration, Veterans Administration Medical Center Providence, Rhode Island,* 32 FLSA 994, 957-58 (1988).

The Agency argued that, when assigning overtime, Management determines the qualifications needed to perform work assignments. The FLSA has held that the right of an Agency to assign work under section 7106(a)(2)(B) of the Statute includes the authority to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *U.S. Department of Justice. Federal Bureau of Prisons, United States Penitentiary, Leavenworth, Kansas and AFGE, Local 919,* 53 FLSA 165, 168-69 (1997). The FLSA has stated that an Agency has the right to determine the qualification of employees assigned to jobs, and that right cannot be infringed through interpretation of a contract by an Arbitrator. In *VAMC, Togus and AFGE Local 2610,* 17 FLSA 963, 964 (1985), the FLSA reviewed an arbitration award whereby the arbitrator held that the Agency violated the contract for equitable distribution of overtime assignments. The Arbitrator found that the Agency had been detailing an employee to a job that provided some overtime and then the Agency stopped the detail because the employee was not qualified to perform the work. The FLSA set the award aside and stated that it is Management's right to determine the necessary qualifications for the job. In another case, the FLSA stated that an Arbitrator could not compel Management to fill positions with individual Grievants who contended that they met the Agency qualification requirements. The FLSA stated that this award prevented the Agency from applying its interpretation to qualification standards and thereby denied Management its right to make selections in filling positions under 5 USC. § 7106(a)(2)(c). *DODDS, Pac. Region and Overseas Educ. Ass'n.,* 31 FLSA 305, 312-13 (1988). The FLSA has stated that, if a parties' agreement does not specifically outline the qualifications needed for overtime eligibility, then Management has the right to determine the qualifications for overtime assignments. *Social Security Administration Office of Hearings and Appeals and National Treasury Employees Union Chapter 224,* 31 FLSA 1172 (1988).

The Master Agreement does not require or guarantee any amount of overtime to bargaining unit employees. Article 18, Section p. 1 specifically allows Management to determine qualifications of employees for overtime assignments. The Union's grievance pertained specifically to Captain Smith's e-mail issued on February 16, 2004, which stated the Grievant was not to work any custodial overtime until further notice. However, Captain Smith testified that he rescinded this directive prior to March 20, 2004.

The Agency stated that the first question is whether Management had a legitimate reason for temporarily denying the Grievant certain overtime. The Master Agreement does not prevent Management from denying bargaining unit employees overtime. Furthermore, there is no contract provision which requires Management to deny overtime based on non-arbitrary reasons; the only requirement is that bargaining unit employees be qualified.

The Agency stated that Ricardo Chavez, Warden, Michael Smith, Captain, and Angel Morales, Employee Services Manager, all testified that Management had questions about the Grievant's qualifications for overtime assignments. This qualification revolved around the Grievant's weekly work status. The Grievant who works in the Facilities Department is on a 40 hour a week schedule. Over the years, the Grievant has worked various overtime assignments; however, at a certain point, the Warden questioned the Grievant's ability to work overtime if

had not completed his regular 40 hour work week. The Warden testified that this was due to the Grievant's absent without leave (AWOL) and leave without pay (LWOP) status. The Grievant originally testified that he had never requested LWOP in the last couple of years. However, after being shown a leave request form from his time and attendance file, he admitted that he had, in fact, requested LWOP. In addition, the Grievant's time and attendance records for 2003 and 2004 show occasions where the Grievant was on LWOP and AWOL.

The Agency argued that the regulations are quite clear that unauthorized leave or LWOP must be substituted to regular work before overtime can be paid. Agency Exhibit No. 5 5 CFR § 550.112 (c) and (d). Therefore, Management had a legitimate reason to question the Grievant's qualifications to earn overtime. The Union failed to show that this reasoning violated any contract provision.

The Agency addressed the Union's requested remedy. It stated that as far as the Union's remedy on back pay for missed overtime opportunities, the Grievant would not be entitled to this because Management did not violate any provision in the Master Agreement. Therefore, the Grievant did not suffer an unjustified or unwarranted personnel action. Furthermore, the Union failed to show specific dates where the Grievant signed up for overtime, but was not selected and improperly bypassed. On the contrary, the Grievant was given an overtime assignment on March 20, 2004, even though he did not sign up on the overtime sign-up list. Agency Exhibit No. 1, p. 8 with Agency Exhibit No. 9. Although the Grievant alleged he was not given overtime assignments during the Union's stipulated time period of February 16, 2004, through April 19, 2004, various documents show otherwise. This is supported by the Grievant's time and attendance records which showed the Grievant worked 16 hours of overtime in pay period 3 (February 8, 2004-February 21, 2004); 14 hours of overtime in pay period 4 (February 22, 2004-March 6, 2004); 8 hours of overtime in pay period 5 (March 7, 2004-March 20, 2004); 16 hours of overtime in pay period (March 21, 2004-April 3, 2004); and 21.5 hours of overtime in pay period 7 (April 4, 2004-April 17, 2004). Agency Exhibit No. 6, pgs. 4-8. The Grievant would not have been eligible to receive overtime on April 18 or 19, 2005, as he was in an unauthorized leave status (AWOL). Agency Exhibit No. 6, p. 9.

The Agency argued that it was able to show that the Grievant's overtime hours in 2003 was comparable to his overtime in 2004. The total overtime hours earned by the Grievant in 2003 was 243 hours. Agency Exhibits Nos. 7 & 8. The total overtime hours earned by the Grievant in 2004 was 232 hours. Agency Exhibits No. 6 & 7. This was only an 11 hours difference. However, if you factor in the Grievant's AWOL, LWOP, and Injury Leave (time periods where overtime pay would not be applicable) for each of those years, the Grievant's percentage of overtime hours worked in 2004 was greater than 2003. Agency Exhibits Nos. 6 & 8.

In Elkouri and Elkouri, it states that a violation of overtime rights must be based upon a clearly established past practice or upon showing that the Grievant actually did suffer damages, rather than temporary postponement of an overtime work opportunity. All Management witnesses testified that overtime assignments vary from day to day. There are no set number of overtime assignments each day. Also, some overtime assignments would have occurred during the same time that the Grievant was working his regular duty assignments. Therefore, he would not have been able to work the overtime assignment. Also, due to an agreement between Union and Management, any last minute overtime is offered over the two-way radio system. If these opportunities occurred during off-shifts, the Grievant would not have been at work and, therefore, ready to work those particular overtime assignments. The Grievant also acknowledged that he has had a variety of medical issues over the last couple of years. Therefore, there may have been times when the Grievant was not ready, willing, or able to work an overtime assignment. Finally, with a large number of

employees, approximately 285, it is inconceivable that the Grievant would have worked as many times as the Union alleges.

The Agency claimed that the Union has failed to show that the Grievant actually suffered damages. On the other hand, the Agency was able to show that the Grievant did not suffer damages as his overtime hours were consistent for 2003 and 2004. Therefore, any monetary relief would be based purely on speculation and would be contrary to the Back Pay Act. 21 FLSA 410; 21 FLSA 307; & 35 FLSA 325.

The Agency concluded:

The agency believes the union failed to prove their allegations with a preponderant of the evidence. The agency respectfully requests that the arbitrator deny the grievance. Agency Brief, p. 6.

Analysis and Discussion

This matter of arbitration involves contract interpretation and application, evidence and testimony, application of federal rules, and arbitral principles. First, it must be mentioned that the affidavit submitted by the Union with its brief cannot and will not be considered. Second, it would be appropriate to indicate the limitation of the application of this decision. The Grievance is confined to the period from 2-16-04 to 4-19-04 with Mr. Carlos Rivera as the only Grievant. In other words, this decision does not involve the interpretation and application of Article 18 Section p. 1 with regard to equitable distribution of overtime of other bargaining unit employees.

Third, there are several items which should be mentioned and which are not a part of this decision.

1. Article 5 provides that Management has the right to determine the particular duties to be assigned and to make work assignments to employees.

2. Management has the right to determine the qualified employees in the bargaining unit who will receive consideration for overtime assignments.

3. Management has the right to determine the degree or type of staffing requirements at this correctional facility.

Fourth, the Arbitrator recognizes the following in his analysis and decision:

1. The burden of proof rests with the Union.

2. Mr. Ricardo Chavez, as the Warden, has the right as well as the responsibility to be concerned about an employee's AWOL and LWOP as he did with Mr. Rivera.

3. This Arbitrator understands and accepts the meaning and application of Article 32, Section h. which limits the arbitrator's authority.

4. The Arbitrator recognizes that the work environment of a correctional facility is very different from most other places of employment and that security is a vital element.

5. There is no guarantee or entitlement of overtime to any bargaining unit employee under the Master Agreement.

6. Overtime is not an entitlement; the parties have agreed to an equitable distribution.

Mr. Chavez testified that, prior to 2-16-04, he became concerned about Mr. Rivera's pattern of unscheduled leave, his AWOLs and LWOPs and whether Mr. Rivera was qualified to work OT. Overtime pay would be allowed for hours over 8 in a day or 40 in a week. However, if Mr. Rivera did not complete 40 hours during a work week, any overtime hours worked would convert back to the regular hours in the 40-hour work week. As such Mr. Chavez testified that he was concerned about whether Mr. Rivera was qualified to work overtime.

On 2-16-04, Captain Smith, Correctional Services, issued the following e-mail to "Lieutenants":

Carlos Rivera (Facilities) is not to work any custodial overtime until further notice. If he as (sic.) any questions or concerns regarding this issue, please direct him to me.

If you have any questions or concerns regarding this matter, call me anytime.

Up to 3-29-04, Mr. Rivera worked only one

8-hour period of overtime (one occurrence) in correctional services. However, he continued to work overtime in the Facilities Department.

Based on an analysis of the Agency's actions and reasoning, there appears to be an inconsistency. If the reason for denying Mr. Rivera overtime in corrections services was that he was not qualified due to his pattern of unscheduled absences, e.g., AWOL, LWOP, etc., it would logically apply to the Facilities Department for the same reason. However, Mr. Rivera continued to be assigned overtime in the Facilities Department between 2-16-04 and 3-29-04. Agency Exhibit No. 6 (T & A Reports) shows the following:

Pay Period Time Period in 2004 OT Hours worked in Facilities Other OT Hours worked Week 1-------- Week 2------- Week 1------ Week 2 -----3------ -----2/8 to 2/21----- 8 8 0 0 -----4------ -----2/22/ to 3/06--- 10 4 0 0 -----5------ -----3/07 to 3/20--- 0 0 0 8 (health services dept.) -----6------ -----3/21 to 4/3---- 0 16 0 0 -----7------ -----4/4 to 4/17---- 0 0 13.5 8 -----8------ -----4/18 to 5/1---- 0 0 0 0 -----9------ -----5/2 to 5/15---- 0 0 0 0 ----10----- -----5/16 to 5/29---- 0 0 0 24 (health services dept.)

Except on one occasion between 2-16-04 and 3-29-04, Captain Smith's e-mail was carried out.

The Union is correct that Agency response to the Grievance dated April 19, 2004 written during Mr. Chavez's absence from the correctional facility does not mention that Mr. Rivera was being denied overtime in correctional services as a result of his pattern of unscheduled absences and the question about his qualifications. Further, Captain Smith did not provide a reason for his e-mail which was in effect a blanket directive to his lieutenants that Mr. Rivera was "not to work any custodial overtime until further notice." Moreover, if the reason for denying Mr. Rivera the opportunity to work overtime was due to the question of whether he had worked 40 hours during any week, the answer to that question could be found by reviewing the Agency's records in a very short period of time. A delay for a period from 2-16-04 to 3-29-04 is not explained.

The Union submitted the Daily Assignment Roster, Union Exhibit No. 1, for the dates 2-16-04 to 4-19-04. In addition to the daily assignments, the overtime worked and the number of overtime occurrences are shown. For the period of 2-16-04 to 4-19-04, the following are shown:

Dates Number of Overtime Occurrences 2-16-04 9 2-17-04 24 2-18-04 16 2-19-04 10 2-20-04 13 2-21-04 18 2-22-04 16 2-23-04 18 2-24-04 16 2-25-04 19 2-26-04 18 2-27-04 15 2-28-04 20 2-29-04 14 3-1-04 12 3-2-04 6 3-3-04 7 3-4-04 22 3-5-04 8 3-6-04 12 3-7-04 17 3-8-04 14 3-9-04 14 3-10-04 12 3-11-04 23 3-12-04 27 3-13-04 31 3-14-04 27 3-15-04 23 3-16-04 33 3-17-04 29 3-18-04 23 3-19-04 29 3-20-04 38 3-21-04 28 3-22-04 22 3-23-04 16 3-24-04 18 3-25-04 17 3-26-04 11 3-27-04 13 3-28-04 14 3-29-04 15 3-30-04 14 3-31-04 16 4-1-04 14 4-2-04 15 4-3-04 17 4-4-04 16 4-5-04 10 4-6-04 19 4-7-04 18 4-8-04 12 4-9-04 12 4-10-04 18 4-11-04 11 4-12-04 12 4-13-04 15 4-14-04 15 4-15-04 14 4-17-04 16 4-18-04 29 4-19-04 18 Total 1078 occurrences

Comparing the overtime hours worked by Mr. Rivera (from the T&A Reports), Agency Exhibit No. 6, with number of overtime occurrences from the Daily Assignment Roster, Union Exhibit No. 1, there is no doubt that Mr. Rivera was adversely affected by Captain Smith's e-mail directive and the Agency's actions resulted in "an unjustified or unwarranted personnel action." For example, during pay period 5, from 3/07 to 3/20, Mr. Rivera worked 8 hours of overtime; however, there were 340 occurrences of overtime. Between 2-16-04 and 4-19-04 (the relevant period), there were 1078 occurrences of overtime; Mr. Rivera worked overtime in correctional facilities on 4 occasions, only once between 2-16-04 and 3-24-04. Therefore, the Agency violated Article 18, Section p. by failing to distribute overtime equitably for the period of 2-16-04 to 4-19-04, the relevant period.

Obviously, Mr. Rivera could only work at most one occurrence each day. On the other hand, "but for" Captain Smith's e-mail directive, Mr. Rivera was not allowed to work overtime which he could have worked.

The Agency was quite accurate that the overtime assignments vary. There may be an overtime occurrence when an employee is late for work and the employee to be replaced is held over on overtime. Or an employee may work an entire shift for an employee who reports being sick and request sick leave at the last minute. The reasons for differences in overtime occurrences are quite numerous. Therefore, Mr. Rivera should be paid for the overtime which he could have worked, "but for" Captain Smith's e-mail directive.

As stated above, Mr. Chavez has a right and a responsibility to be concerned about all employees' AWOLs and LWOPs as well as Mr. Rivera. Normally, attendance problems are dealt with by use of progressive discipline, e.g., oral warning, written warning, suspension, and finally removal if initial steps are not successful. Progressive discipline is a corrective approach to correct aberrant behavior and to offer an opportunity for the employee to recover and save the employee's employment. Instead, in the present matter, Captain Smith issued an e-mail which instructed the Lieutenants not to allow Mr. Rivera to work any custodial overtime until further notice. Then, when the Grievance was filed, Captain Smith rescinded his order. During this period, Mr. Rivera was able to work overtime in correctional services on only one occasion, which admittedly was a mistake by one of the Lieutenants. The Agency's actions must be considered an adverse "unjustified and unwarranted personnel action" under the Back Pay Act because it denied Mr. Rivera an opportunity to work overtime under Article 18, Section p. and gain additional compensation which is an employment matter.

The Agency showed that Mr. Rivera worked 243 hours of overtime in 2003 and he worked 232 hours of overtime in 2004 -- an 11 hour difference. This overhead hour comparison covers a period of time which is too extensive; the relevant time period is 2-16-04 to 4-19-04. No data for comparing the 2003 and 2004 within the relevant time period were presented.

Decision

Based on the Agreement and the evidence, the Agency violated Article 18, Section p. and committed an "unjustified and unwarranted personnel action." Therefore, the Grievance is sustained.

As remedy, the Agency is directed to pay Mr. Rivera for overtime which Mr. Rivera could have worked "but for" Captain Smith's e-mail directive. Such payment must also include interest.

The implementation procedure will be as follows:

1. Mr. Rivera must show evidence that he requested the overtime hours.

2. Mr. Rivera and/or the Union must show that Mr. Rivera would have worked the overtime for each day in question between 2-16-04 and 4-19-04. Days on which he was not available, days on which he did not make a request, or days on which he worked overtime would not be considered as overtime opportunities.

The Arbitrator will retain jurisdiction to decide any disputes between the parties in the execution of this decision.

There were no evidence of any attorney fees in this matter of arbitration.

Statutes Cited

5 USC 5596
5 USC 7106

Regulations Cited

5 CFR 550.807
5 CFR 550.111

