CARY J. WILLIAMS
ARBITRATOR
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March 19, 2015

Mr. Aaron L. Martin, Esq.
The Martin Law Firm
P. O. Box 3597
Fayetteville, AR 72702

Re: FCI Aliceville and AFGE 573
FMCS No. 14-53198
Hearing date: December 17-18, 2014

Dear Mr. Martin:

Enclosed please find a copy of my Opinion and Award in the above case. I have also forwarded copies of the decision to Kylie Tisdale, Cynthia Blanks and Ray Coleman.

I appreciate the professional manner in which you presented your case and I look forward to working with you again in the future.

Very truly yours,

Cary J. Williams

CJW/tsd
Enclosure

In the arbitration matter between:	)	**OPINION AND AWARD**
	)	
FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION, ALICEVILLE, ALABAMA	)	**OF ARBITRATOR**
	)	
	)	**FMCS No. 14-53198**
	)	
	)	**GRIEVANT: AFGE, LOCAL 573, COUNCIL 33**
And	)	
	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 33, LOCAL 573	)	**MARCH 19, 2015**
	)	

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ARBITRATOR: Cary J. Williams, chosen by the parties under the terms of their Master Agreement dated March 9, 1998 (JX 1) and through the Federal Mediation and Conciliation Service.

APPEARANCES:

FOR THE UNION: Aaron L. Martin, Attorney, Fayetteville, Arkansas.

FOR THE AGENCY: Cynthia Blanks, Labor Relations Management Specialist, Washington, DC.

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This grievance was filed on January 13, 2014 on behalf of all affected bargaining unit employees at Federal Correctional Institution (FCI) Aliceville, Alabama including staff in Health Services Department and Unit Management Department that were roster adjusted instead of being offered overtime for previously scheduled bus movements at the facility on November 13, 2013, December 4, 2013, December 18, 2013, January 8, 2014 and January 29, 2014. (JX 2) When the matter was not resolved it was submitted to arbitration at a hearing held in Aliceville, Alabama on December 17 and 18, 2014. During the hearing the parties were afforded the

opportunity to present testimony and evidence and post hearing briefs were received by the arbitrator on February 21, 2015.

PERTINENT CONTRACT PROVISIONS

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:

....

2. In accordance with applicable laws:

   a. To hire, assign, direct and retain employees in the Agency, ...
   b. To assign work, ..., and to determine the personnel by which Agency operations shall be conducted.

ARTICLE 18 – HOURS OF WORK

....

Section h. Ordinarily, the minimum time off between shifts will be seven and one-half (7 ½) hours, ...

....

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 filled 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

Section r. Normally, nonprobationary employees, will remain on the shift/assignment designated by the quarterly roster for the entire roster period. When circumstances require a temporary (less than five (5) working days) change of shift or assignment, the Employer will make reasonable efforts to assure that the affected employee's days off remain as designated by the roster.

Section s. Notification of shift or assignment changes for employees not assigned to sick and annual relief will be confirmed in writing and signed by the Employer, with a copy to the employee.

....

Section u. Except as defined in Section d. of this article, the works ordinarily or reasonable efforts as used in this article shall mean; the presumption is for the procedure stated and shall not be implemented otherwise without good reason.

ARTICLE 31 – GRIEVANCE PROCEDURE

....

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

....

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. .... If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. ..... .

(JX 1)

BACKGROUND

FCI Aliceville began accepting inmates in July 2013 and has approximately 1500 inmates in FCI and 250 in the Camp facility. Beginning in October 2013 the facility began receiving additional inmates from other facilities around the country including FCI Danbury, Connecticut. FCI Aliceville was notified it would be receiving special bus runs from FCI Danbury and FCI Otisville, New York in November and December 2013 and January 2014. Unit Management (A Unit, B Unit and C Unit) and Health Services department employees were requested by Management to assist with the intake screening of these new inmates arriving on special buses carrying up to 80 inmates each.

The evidence showed that the buses in question arrived at FCI Aliceville at night and the Agency chose to adjust the schedules of the A, B and C Unit's staff and Health Services staff rather than assigning the intake work as overtime. The evidence showed A Unit was assigned to

perform intake on November 13, 2013, B Unit was assigned on December 4 and 18, 2013, and C Unit was assigned to intake on January 8 and 29, 2014. The affected employees had to generally change their normal work hours to 4:00 PM until 9:00 PM or 4:00 PM to 12:00 AM and remain until the intakes were completed. There was also evidence that employees in Receiving and Discharge (R & D) were paid overtime or given comp time for working the bus intakes in question.

There was testimony from various unit supervisors stating they gave all their employees the required 24 hour notice of the shift changes for the bus intakes in accordance with Article 18, Section s. There was, however, testimony from representative staff employees who had their rosters adjusted that the notices they received from supervision was sometimes written and other times verbal only and not always signed by supervision.

Several supervisors testified the roster adjustments to cover the bus intakes in question were completely voluntary by the affected employees. Most of the affected officers and other representative staff members who testified, however, stated they did not volunteer to have their rosters adjusted but were in effect told that they did not have a choice in the matter. They also testified that they generally did not file an overtime authorization forms for the time in question because they knew it would not be allowed based on past experiences.

There was also testimony from several representative employees who had their rosters adjusted that indicated they had to work beyond their shift on some of the bus intake nights in question and that as a result they had to report to work the next day without having the seven and one-half (7.5) hour break required by Article 18, Section h.

CONTENTIONS

The Union contends the grievance was timely since it was filed within forty (40) days of when it became aware the Agency was not going to properly remedy the violations that occurred. The Union contends that the grievance was properly filed because the Agency's violations are continuing in nature. The Union contends further that it attempted to informally resolve the grievance with the Warden and that the Agency thus had specific information giving it notice of the subject matter of the grievance. The Union contends the Agency violated Article 18 of the Master Agreement, the Memorandum of Understanding (MOU) (JX 5), 5 U.S.C.A. Sec. 6122, and past practice when it adjusted the rosters and schedules of the affected bargaining unit personnel to participate in the bus intakes on November 13, 2013, December 4 & 18, 2013, and January 8 & 29, 2014 rather than assigning the work as overtime. The Union contends the Agency failed to equitably distribute overtime among employees under Article 18. Section p.1. The Union contends the Agency's actions were unjustified or unwarranted personnel actions under the Back Pay Act and the grievants should be made whole including interest and attorney's fees.

The Agency contends the grievance was untimely under Article 31 because it was not filed within forty (40) days of October 20, 2013, the date of violation noted in the grievance itself. (JX 2) The Agency contends it did not violate the Master Agreement, the MOU, 5 U.S.C.A. §6122, or any past practice when it adjusted the rosters and schedules of grievants to work the bus intakes in question. The Agency contends it had the right under the Master Agreement to adjust the rosters of the employees in November and December 2013 and January 2014 rather than assign the work on overtime; that it provided sufficient notice to the employees

of the changes in schedule; and that the employees volunteered to the roster adjustments in question. The Agency contends the grievance should be denied.

ISSUES

1. Whether the grievance was timely filed?
2. Whether the Agency violated the Master Agreement, the MOU or other applicable law when it roster adjusted Unit Management and Health Services staff for special bus intakes of inmates on November 13, December 4, 18, 2013 and January 8, 29, 2014; and if so, what is the remedy?

OPINION

THRESHOLD PROCEDURAL ISSUES:

The Agency contends the grievance was untimely since it was filed on January 13, 2014 which was over the forty (40) calendar days required by Article 31, Section d. The Agency contends the Union alleges in the grievance that the grievable occurrence was on October 20, 2013 and that the grievance should have been filed on or before December 13, 2013. The first bus intake at issue occurred on November 13, 2013 and the Union made what appears to be a good faith effort to resolve the matter informally with the Agency in accordance with Article 31 of the Agreement. During these discussions the Union specifically identified the matter at issue regarding the bus intakes and Local President Ray Coleman testified he believed the Agency was going to compensate staff for the roster adjustments as evidenced by the notes of a LMR meeting in December 2013 (AX 1). The grievable occurrence was thus extended during these discussions. When the Union ultimately was notified the Agency was not going to compensate the staff for the roster adjustments the Union properly filed the formal grievance within the forty (40) days required. Thus the grievance was timely.

The grievance was also sufficiently specific for the Agency to identify the Union's complaint and the provisions of the Agreement involved. The Agency also had the opportunity to defend the grievance and suffered no prejudice from the language used by the Union. The evidence indicated that the Agency had reasonable notice that the Union was grieving the roster adjustments during the bus intakes and the fact that it did not assign this work on overtime. Thus the grievance will not be deemed procedurally defective for lack of specificity.

It also appears from the testimony that the Union made a good faith effort to informally resolve the grievance as suggested by Article 31, Section b. (See UX 1 & 2). Since there were five occurrences over a period of three months that led to the formal grievance filing, it appears the Union followed correct grievance procedure in the present case regarding its attempt to informally resolve the matter.

Accordingly, I find the grievance properly before the arbitrator for decision.

MERITS

The Agency has the right to determine assignments under Article 5 of the Master Agreement but it must do so in accordance with all other provisions therein. Having considered the testimony and evidence presented and the arguments of the parties, I am reasonably convinced that the Agency violated the Agreement, the MOU and other applicable law when it adjusted staff rosters to participate in the bus intakes on November 13, 2013, December 4, 18, 2013 and January 8, 29, 2014 rather than having the work staffed on an overtime basis.

Article 18, Section p.1. requires that overtime be equitably distributed among bargaining unit employees. The testimony proved that in the present case members of R & D who worked during the bus intakes at issue did so on an overtime basis while other roster adjusted staff did not. Except for testimony that R & D received funding for the intakes from an alternate source,

there was no other compelling reason given for why R & D worked on an overtime basis and the other employees did not. There was also some proof that other officers, counselors and case managers outside the R & D selectively received overtime for the intake work. This was not an equitable distribution of overtime under Section p.1. It appears from the evidence that the Agency had the need to perform the bus intakes on overtime but chose to save money by adjusting rosters of some employees while allowing others to work the same hours on an overtime basis. This should not have been done in this manner from the facts presented and violated this portion of the Agreement.

Paragraph 8 of the MOU (JX 5) states as follows:

Bus coverage shall be as follows: Bus coverage during regular hours will be covered by Units based on a monthly rotation during regular duty hours. Late night buses will be covered by those staff already assigned to work their late night. Should the coverage be insufficient due to annual/sick leave, etc.. staff schedules may be adjusted in accordance with the Master Agreement.

This agreement between the parties specifically addresses the question of late night buses in question and directs that schedules may be adjusted if coverage is insufficient due to annual/sick leave. In the present case there was no evidence that the cause for the roster adjustments for the bus intakes in question was due to annual or sick leave. In fact there was no definitive answer given to the question of why the Agency chose to adjust rosters rather than assigning the work on overtime. Regardless, there was no evidence or testimony that annual or sick leaves caused a shortage of available employees. Under this language of the MOU the late night buses should have been covered by staff already assigned to work their late night and supplemented by other staff members on overtime in the absence of any evidence that coverage was insufficient due to annual or sick leave.

Notification of shift or assignment changes under Article 18, Section s., "will be confirmed in writing and signed by the Employer, with a copy to the employee." (JX 1) The testimony indicated that most if not all of the notices given to staff of their roster adjustments were either verbal or by email and were not signed and in writing. The affected employees also did not always receive a copy of these notices. While there was evidence A Unit was properly notified by Unit Manager Lori Rigsby on November 13, 2013 (UX 8), there was insufficient other evidence to prove the Agency complied with the notice requirements of Section s. by providing written notices, signed by management with copies to affected staff. Instead, managers either verbally notified staff of the roster adjustments or provided no required signed documentation as noted in Article 18, Section s. This action by the Agency violated this portion of the Agreement and staff in Health Services, Unit Management and any other affected staff thus failed to receive sufficient notice of their roster adjustments.

The Union argues the Agency's decision to adjust staff schedules in lieu of overtime was also in violation of Article 18, Section r. and the parties' past practice. Section r. generally states that "normally" employees will remain in their shift/assignment designated by the quarterly roster. In the present case staff had their rosters adjusted during the roster period even though the circumstances surrounding the bus intakes was not unusual or abnormal. The buses came to the facility at least on five occasions at night and this was not terribly different than receiving inmates at other times. Regardless, the Agency did not present adequate proof to support it decision to adjust staff rosters rather than allow them to remain on their normal shifts in accordance with Section r.

Local President Coleman testified further that the Agency had previously received buses of inmates and the past practice therefore was to take volunteers to cover the bus intakes. Thus,

the Union contends the Agency changed a past practice of taking volunteers for the intakes and instead unilaterally decided to adjust rosters in lieu of paying overtime. The evidence and testimony does not support this Union argument. There is insufficient evidence that there was a long-standing binding past practice acknowledged by the parties that was violated by the Agency in this case.

Testimony revealed that many of the roster adjusted staff members who worked the bus intakes were not provided the required 7.5 hour break between shifts under Article 18, Section h. The testimony of at least four representative Union witnesses established that some staff had to work up to or after midnight completing the intakes and thus had to return to their normal shift the next morning without having the 7.5 hour break required. There was also testimony from C-Unit Manager Gentry that she did not check to see if her staff were receiving their 7.5 hour breaks between shifts during the intakes. While there is no remedy or sanction described in Section h. for this failure by the Agency, it is further evidence that it failed to properly follow the language of the Agreement during the roster adjustments in question.

The Agency contends that the grievants all volunteered to the roster adjustments necessitated by the bus intakes in November/December 2013 and January 2014. There was evidence that some of the staff may have consented to the roster adjustments to accomplish the intakes but the majority of the representative testimony indicated that staff members believed they had to volunteer since the Agency did not like to authorize overtime. One staff member testified she was "volun-told" that she needed to adjust her schedule to work the bus intakes and other witnesses stated they did not consider the roster adjustments to be voluntary. Several witnesses testified that the adjustments interfered with their personal and family schedules and were thus not voluntary as alleged by Agency witnesses. The weight of the evidence therefore

indicates that while the affected staff seemed in some instances to outwardly agree to the roster adjustments, in actuality they participated in the roster adjustments only because they believed they had no other choice. This was improper action by the Agency.

In further support of its case the Union contends the Agency violated 5 U.S.C.A. §1622 when it adjusted the rosters of employees working flexible schedules rather than paying overtime for the bus intakes in question. This provision allows the Agency to establish flexible schedules, ie. "designated hours and days during which an employee on such a schedule must be present for work" and set the employees' arrival and departure time from work. It goes on to direct that the employer should not, "restrict the employees' choice of arrival and departure time" except when the flexible schedule is substantially disrupting the Agency's ability to carry out its functions or is causing additional costs. Testimony from the warden indicated the facility was not having problems with the compressed schedules and they were not costing any additional money to operate. There is therefore no evidence that justified the Agency's action in changing the affected employees arrival and departure time under §1622 by adjusting their rosters. Instead, these employees should have been assigned to their normal schedule and paid overtime for the additional work performed on the bus intakes.

AWARD

The grievance is sustained. The Agency presented insufficient evidence to justify adjusting the rosters of the affected staff members rather than scheduling them to work their normal shifts and assigning the bus intake work on an overtime basis. The Agency shall cease adjusting rosters to cover night bus intakes and follow the provisions of the Agreement and MOU regarding shift assignments and overtime. All affected employees whose rosters were adjusted to work the bus intakes on November 13, 2013, December 4 and 18, 2013 and January 8

and 29, 2014, are awarded pay at their appropriate overtime rates for all hours they worked on the bus intakes. Grievants also are awarded reasonable pre-judgment interest on said back pay. The arbitrator retains jurisdiction in the event the parties are unable to identify the affected employees or their back pay.

Based on the evidence presented, there is no award of attorney's fees sought by the Union under §7701(g)(1) of the Back Pay Act. The Union contends attorney's fees are warranted here in the interest of justice if: (1) the agency engaged in a prohibited personnel practice; (2) the agency actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency; (3) the agency actions are taken in bad faith to harass or exert improper pressure on an employee; (4) the agency committed gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) the agency knew or should have known it would not prevail on the merits when it brought the proceeding. While the Agency did engage in a prohibited personnel practice, the Union did not prove the Agency committed any of the other elements listed above. Standing alone, that one element does not warrant an award of attorney's fees. Even though the Agency did not prevail there was some merit to its actions and there is no proof it adjusted the rosters in question as an act of bad faith or to harass employees. Likewise, the proof did not show any gross procedural error by the Agency which either prolonged the proceeding or prejudiced any employees. Finally, the proof did not establish the Agency knew or should have known it would not prevail in this case when it denied the grievance. Accordingly, there is no award of attorney's fees.

March 19, 2015
Date

Cary J. Williams, Arbitrator