

THE MATTER OF ARBITRATION BETWEEN :  
AMERICAN FEDERATION OF GOVERNMENT :  
EMPLOYEES, LOCAL NO. 506 :  
AND :  
DEPARTMENT OF JUSTICE, FEDERAL :  
BUREAU OF PRISONS, FEDERAL :  
CORRECTIONAL COMPLEX, :  
COLEMAN, FLORIDA :

DECISION IN GRIEVANCE:

FMCS NO. 12-53907

HEARING: February 27, 2013

GRIEVANCE: The grievance alleges that the Agency violated the CBA and Program Statement 3000.03 as it regards the immediate supervisor having the authority to approve annual and sick leaves, specifically unscheduled annual leave which will cause overtime.

AWARD: The grievance is procedurally arbitrable and is sustained on the merits as is set forth herein.

ARBITRATOR: Elliot Newman

APPEARANCES

FOR THE UNION

FOR THE EMPLOYER

Kenneth Pike, Executive Vice President

Whitney A. Coleman, Labor Relations Specialist

## Procedural History

By letter from the Federal Mediation and Conciliation Service dated April 3, 2012, the undersigned was notified of his selection by the Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (Agency or FCC Coleman) and the American Federation of Government Employees, Local No. 506 (AFGE or Union) to hear and decide a matter then in dispute. Pursuant to due notice, a hearing was held on February 27, 2013 at which time both parties were afforded a full opportunity to present testimony, examine and cross-examine witnesses and introduce documentary evidence in support of their respective positions. The parties summed up their positions in writing after the conclusion of the hearing. The matter is now ready for final disposition.

## Background

FCC Coleman is a part of the Bureau of Prisons (BOP), which is part of the United States Department of Justice. FCC Coleman is a complex with four separate components, including a Medium Security facility, a Low Security facility, a satellite Camp, and two Penitentiaries. Local 506 is a local bargaining unit of the American Federation of Government Employees which represents Correctional Officers at FCC Coleman.

The parties are subject to a collective bargaining agreement (CBA or Master Agreement) effective March 9, 1998 through March 8, 2001. The Master Agreement was still in effect as of the date of the arbitration hearing on February 27, 2013 by mutual agreement of the parties.

At FCC Coleman, Lieutenants provide the direct, day-to-day supervision of the Correctional Officers (NT 33). The next step in the chain of command are the Captains, who supervise the Lieutenants (NT 33).

The Lieutenants are the supervisors who have the authority to grant annual and sick leaves for Correctional Officers. This is pursuant to Program Statement 3003.03, Section 7 which states in pertinent part: "The immediate supervisor has authority to approve annual leave and sick leave."

Robert Edge is a Correctional Officer and at all pertinent times was the Chief Steward for the Medium Security facility (NT 15, 23). On some date about ten to twelve days after July 7, 2011, Mr. Edge filed a grievance stating that on June 29, 2011, the Agency violated the Master Agreement and Program Statement P3003.03 when Correctional Officers were allegedly unable to request unscheduled annual leave from the Lieutenants as their immediate supervisors (NT 15-16, 21-22, 25, Union Exhibit 1). Mr. Edge received no response from the Agency to the grievance (NT 16).<sup>1</sup> Thereafter, the Union met with Associate Warden Cheatham and discussed the grievance (NT 17, 18). Mr. Edge testified:

"A. We discussed the policy, what was occurring in the institutions with the lieutenants placing people on AWOL and referring them to the captain for approval for annual leave. It was agreed that the lieutenants did have the authority to grant that unscheduled annual leave. And that they would agree

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<sup>1</sup> On July 7, 2011, Mr. Edge authored and submitted to Complex Captain Clinton Smith an "Informal Resolution", but received no response from Captain Smith (NT 16-17, Union Exhibit 2).

to resolve the issue and notify the captains to advise their lieutenants that they did have the authority to grant that annual leave and as a result I would withdraw the grievance (NT 18).

Mr. Edge then withdraw the grievance, believing the issue was resolved (NT 18). However, on January 15, 2012, Mr. Edge received an email from Correctional Officer William Jackson at the Low Security facility containing an question Mr. Jackson had posted in July 2001 in the staff feedback section of the public "sallyport" forum, which is a feedback forum for all employees (NT 18-19, 22, 26, Union Exhibit 4). Mr. Jackson wrote: "If a staff member exhaust all of their sick leave for medical reasons and need to call in for an illness, the lieutenants refuse to allow them to utilize their accumulated annual leave in lieu of sick leave. The officers are being told at the low that it has to be approved by the captain even though it is our right to utilize our own accrued annual leave. The lieutenants have been directed to write the officers up on AWOL charges even though the officers still have their Annual Leave. Why is this action occurring when the Master Agreement says otherwise? How do you write up an officer up for 'Absent Without Leave' and charge them with the SIS Office when they still have Annual Leave?" (Union Exhibit 3).

On or about July 13, 2011, Mr. Jackson received the following response from the Agency: "The current procedure for staff requesting unscheduled annual leave which will require the use of overtime is the employee must request the leave from the Captain." (NT 30, Union Exhibit 3).

Mr. Edge testified that he has read the staff feedback section of the sallyport two or three times since it was created twelve years ago (NT 19, 22, 23-24). Mr. Edge explained: "Because of the number of issues that I do deal with there is not enough time in the day nor do I get approved enough official time to dedicate that kind of stuff to simply going through that part of sallyport and reviewing each and every question and response from the entire complex." (NT 23).

Mr. Edge further explained: "During 2011 I filed and researched about 200 grievances personally that I filed alone. That takes a lot of time to do as well as going and doing informal resolutions, roster committees, annual leave committees, all the various other things. There is just not enough time for it. I strictly rely on the bargaining unit presenting me with, hey; this is an issue I am having a problem with. Has this been addressed before? Is there something we can do about it?" (NT 27)

Mr. Edge testified that when he received the email from Mr. Jackson on January 15, 2012, this was the first time after he withdrew the July 2011 grievance that it came to his attention that the Agency's position once more was that unscheduled annual leave which would require the use of overtime had to be approved by a Captain, rather than a Lieutenant (NT 19, 25-28). Mr. Edge then decided to file another grievance "...because this indicated that after the resolution with the original grievance -- this came out after that. So I re-filed the grievance as a repeat violation of the previous grievance." (NT 19).

On January 26, 2012, the Union filed a written grievance asserting a repeat of a violation on July 13, 2011, which grievance states: "On January 15, 2012, the Union, R. Edge, Chief Steward Medium Local 506 became aware that some of the Correctional Services staff at FCC Coleman Complex, specifically Correctional Officer, cannot request unscheduled Annual Leave from their immediate supervisors. They are told by their immediate supervisors (Lieutenants) that they can no longer grant unscheduled

annual leave for any reason. Only the Captain can grant it because they are no longer allowed to do this. Program Statement 3000.03 Human Resource Manual Chapter 2B(7) states 'Leave. The immediate supervisor has authority to approve annual leave and sick leave.' This practice is not being applied to all staff assigned to 'Correctional Service' nor is it applied to any department other than the Correctional Officers within the Correctional Services Department. Furthermore this issue was previously raised however the posting on the FCC Coleman Feedback area of FCC Coleman's Sally Port dated July 13, 2011 states 'The current procedure for staff requesting unscheduled annual leave which will require the use of overtime, is the employee must request leave from the Captain.' This practice is not fair and equitable treatment of Correctional Officers at FCC Coleman Complex and constitutes an arbitrary denial of Annual Leave. Furthermore this is contradictive of policy and a violation of the previous settlement." (Joint Exhibit 2).

Mr. Edge testified that he became aware of the violation in January of 2012, and he put July 13, 2011 as the date of the violation because that was the date listed in the feedback section of the sallyport (NT 19-20).

By letter dated February 6, 2012, Complex Warden D. B. Drew denied the grievance, stating in pertinent part:

"This letter is in response to your grievance received on January 26, 2012. In your grievance, you allege that Lieutenants are not authorized to approve unscheduled annual leave.

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In block 7, of your grievance, you list the date of violation as July 13, 2011. Article 31, section d, states, '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.' The grievance was not filed until January 26, 2012. Therefore, your grievance is untimely based on the date of the alleged violation.

Based on the above, your grievance is procedurally rejected.

As to the merits of your claim, the Lieutenants have the authority to approve unscheduled annual leave. Based on the above, your grievance is denied." (Joint Exhibit 3).

Mr. Edge further testified that in some instances, the Lieutenants were approving unscheduled annual leave, and in other instances they placed the Correctional Officers on unpaid Absence without Leave (AWOL) status, and told the Correctional Officers that they had to submit a memo to the Captain (NT 20, 21, 28-29, 47). Mr. Edge testified that the Captain can and would typically in a sick leave case convert it to annual leave (NT 24, 29). If a Correctional Officer is placed on AWOL, he/she may suffer a disciplinary action (NT 20, 44-45, 54).

Mr. Edge also testified that to the best of his knowledge, in all other departments except Correctional Services, the approval or denial of unscheduled leave is handled by the immediate supervisors, rather than by the Captain (NT 30-31)

Mr. Edge testified that he knew of no exceptions to Program Statement 3000 regarding who can approve unscheduled leaves, and that there was no policy, rule or regulation which carved out any exceptions that require the approval of overtime by a Captain (NT 31-32).

Andrew Skinner has been a Lieutenant for ten years (NT 34). During that time, when an employee calls in sick but does not have any available sick leave, he does not normally approve the unscheduled annual leave because the employee asked for sick leave (NT 36, 37, 39-40). Lieutenant Skinner places the employee on AWOL status even if the employee has annual leave available which he/she would like to utilize for the absence (NT 34, 35, 40). He also advises the employee to speak with the Captain to determine if the leave can be converted to annual leave (NT 35, 38). Lieutenant Skinner also testified that the AWOL status is a temporary status until the Captain makes a permanent decision (NT 39). Lieutenant Skinner further testified that he would not approve unscheduled annual leave if it would result in overtime and he cannot authorize nonemergency overtime (NT 39).

William Jackson is a Senior Correctional Officer at the Coleman Medium facility (NT 43). Mr. Jackson testified that he has called in sick to the Lieutenant when he had no sick time, and he would request annual leave in lieu of sick leave (NT 44). Mr. Jackson stated that the Lieutenant told him that he could not approve annual leave and had to put him on AWOL status (NT 44, 45-46). This caused Mr. Jackson to send the January 15, 2012 email to Mr. Edge (NT 44, Union Exhibit 3). In the end, the Captain converted the AWOL to annual leave and Mr. Jackson was not disciplined (NT 46).

Clinton Smith is presently the Associate Warden at FCC Forest City (NT 48). Warden Smith testified that the Captain is generally the supervisor over the Lieutenants (NT 48-49). He further stated that immediate supervisors have the authority to approve sick leave, and also have the authority to approve unscheduled annual leave on a case-by-case basis (NT 49). However, Warden Smith also testified that Lieutenants do not approve overtime, and that Captains have the authority to approve overtime (NT 49). Warden Smith elaborated: "It has been that way my whole career. The whole time I have been in corrections the lieutenant -- even when I was a lieutenant I did not have the authority to hire overtime. I always had to call the captain and say, hey, I had someone call in sick. I need to fill this slot. And he would turn around and authorize whatever we paid the overtime or not...." (NT 59). Warden Smith further testified that there was no policy that specifically stated that overtime cannot be approved by a Lieutenant (NT 50).

When he was a Captain, Warden Smith stated that he was held accountable for his overtime expenditures and he was required to explain why there was an excess of overtime expenditures that directly correlated to unscheduled annual leave (NT 50).

Warden Smith testified that there was not a policy that specifically stated that overtime could not be approved by a Lieutenant, and he explained: "The issue with that is when you have a roster and you are granting annual leave on last minute stuff it is going to create time-and-a-half. It is going to create overtime. So we stopped that and made it up to the -- I went to the captain because when you are in there explaining to the Warden why you got all these people on annual leave but you have got all these people that you are paying overtime on it was tough to explain without the captain putting their eyes and ears on that roster. When a person has no sick leave at all and they are calling in sick and say I want to convert it to annual leave it is going to -- it is

going to come to an overtime issue. Where annual leave you can schedule it to where you are not paying out overtime." (NT 50-51, 58). Accordingly Warden Smith stated that a Lieutenant cannot make a decision about overtime "when you have 50 percent of your staff that have less than probably 20 hours of sick leave and it is going to create some overtime issues." (NT 51).

### Position of the Union

The Union contends that traditionally, and as a past practice, Lieutenants have always had the authority to approve overtime. It has always been commonplace for them to fill overtime when needed. It has only been in recent history that overtime could only be filled upon approval of the Captain. There is nothing in any policy, rule or regulation that stipulates a Lieutenant cannot approve overtime, nor that it must be reviewed and approved by the Captain prior to final approval. There are no other departments, outside of Correctional Services, where someone higher than the direct supervisor must approve unscheduled annual leave. It's only in Correctional Services that the Captain must make that approval based on whether there will be overtime incurred.

The Union also notes that since the time when the past practice of Lieutenants' approving overtime was changed, there has been an increase in employees being placed on AWOL status. This continues to happen even when an employee, who may not have sufficient sick leave to cover an illness, does have the annual leave available and requests to use it in lieu of sick leave. If any overtime is going to be incurred because of the employee being unable to report to duty, he/she is automatically placed in an AWOL status and told to go to the Captain to have it changed. It makes no difference if he/she has annual leave available to cover the time.

The Union concludes that it is clear from the testimony that employees in the Correctional Services department are being treated differently than all other employees in other departments, regarding the use of unscheduled annual leave. Further, nothing in any policy, rule or regulation supports the Agency's assertion that Lieutenants cannot approve overtime. Employees are arbitrarily and capriciously placed on AWOL when they call to report they will not be able to make their shift, even when they have and request annual leave. They are then forced to jump through the hoops to have the AWOL converted to annual leave by having to submit a memorandum to the Captain. If they don't, they face possible investigation and potential discipline. Therefore, the grievance should be sustained and the Agency directed to: (1) immediately cease the practice of placing employees on AWOL status when they have sufficient annual leave to cover their absence; and (2) follow its own policy regarding the authority of immediate supervisors to schedule annual leave, to include when such approval may incur overtime.

### Position of the Agency

The Agency first contends that the grievance was not timely filed within the forty day timeframe in accordance with Article 31, section d of the Master Agreement. The grievance indicated the date of the violation was July 13, 2011, yet the grievance was not filed until January 26, 2012.

If the merits are reached, the Agency's position is that while policy states that first line supervisors, in the instant case, lieutenants, can approve annual leave, nowhere in policy does it state that they must be allowed to approve annual leave. The Master

Agreement states leave must not be denied for arbitrary or capricious reasons and denial should be based on work-related reasons. When an employee, whose correctional post must be covered to ensure the safe and orderly running of the facility, request annual leave, the granting of annual leave would result in that work not being done, that is, that post not being covered unless there is either an extra officer on duty who can cover the post or overtime is incurred for the purpose of providing the coverage thus ensuring the safety and security of the facility. Incurring non-emergency overtime is a management decision that falls directly into the category of determining budget.

The Agency concludes that the Union failed to articulate how any law, policy or agreement between the parties was violated. It further failed to show any way in which any employee was harmed by the procedures. For these reasons, the grievance should be denied.

### Cited Portions of the Master Agreement

#### **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:

2. to be treated fairly and equitably in all aspects of personnel management;
6. to have all the provisions of the Collective Bargaining Agreement adhered to.

#### **ARTICLE 19 - ANNUAL LEAVE**

Section g. Leave must not be denied for arbitrary or capricious reasons. Denial or cancellation should be based on work-related reasons.

When cancellation appears to be necessary, the Employer agrees to notify the employee in advance as possible that his/her approved scheduled annual leave is to be canceled. The employee will be allowed to express any personal concerns. In making the decision, the Employer will consider potential disruption to the employee's family or personal financial loss.

#### **ARTICLE 31 - GRIEVANCE PROCEDURE**

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. 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. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

1. If a matter is informally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

Section e. If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if

raised as threshold issue.

Cited Portion of Program Statement Number 3000.03 (Human Resource Management Manual, Chapter 2

(7) Leave. The immediate supervisor has authority to approve annual leave and sick leave. For advanced annual leave, advanced sick leave and periods of leave without pay (LWOP) less than 52 weeks, the Warden (for institution employees), Regional Director (for regional office employees) and appropriate branch chief (for Central Office employees) retains approval authority.

All LWOP requests for attorneys require approval from the Regional Counsel or Associate General Counsel, as appropriate, after consultation with OGC or designee.

The Director retains approval authority for consecutive periods of LWOP of 52 calendar weeks or more.

Cited Portion of DOJ 1630.1B (Leave Administration)

**16. SUBSTITUTION OF ANNUAL LEAVE FOR SICK LEAVE**

a. Generally, an absence which would otherwise be chargeable to sick leave may be charged to annual leave if requested by the employee and approved by the appropriate official. However, annual leave may not be substituted, retroactively, for sick leave previously granted and documented where the substitution is solely for the purpose of avoiding the forfeiture of annual leave by the employee.

Discussion

The issue on the merits is whether the Agency violated the Master Agreement and Program Statement 3000.03 when it required that a Captain, rather than a Lieutenant who is the immediate supervisor of the Correctional Officers, approve unscheduled annual leave which will cause overtime, and if so, what shall the remedy be?

Prior to a resolution of this issue, the Agency raises a procedural arbitrability issue, asserting that the grievance filed by the Union on January 26, 2012 was untimely. In order to determine whether the grievance was timely filed, a brief review of the circumstances underlying the filing of the January 2012 grievance is required. In July 2011, the Union filed a grievance concerning the same basic issue as this case: that the Agency violated the Master Agreement and Program Statement P3003.03 when Correctional Officers were unable to request unscheduled annual leave from the Lieutenants as their immediate supervisors. After a meeting with Associate Warden Cheatham, Chief Steward Edge believed that the issue had been resolved in the Union's favor, and that the Agency agreed: (1) the lieutenants had the authority to grant unscheduled annual leave; and (2) the Agency agreed to notify the captains to advise their lieutenants that they did have the authority to grant that annual leave. Accordingly, Mr. Edge withdraw the grievance.

However, on January 15, 2012, Mr. Edge received an email from Correctional Officer Jackson concerning a response he had received from the Agency to the same issue which Mr. Edge believed has been previously resolved. Specifically, in July 2001, Mr. Jackson had written in the staff feedback section of the sallyport forum: "If a staff member exhaust all of their sick leave for medical reasons and need to call in for an illness, the lieutenants refuse to allow them to utilize their accumulated annual leave in lieu



of sick leave. The officers are being told at the low that it has to be approved by the captain even though it is our right to utilize our own accrued annual leave. The lieutenants have been directed to write the officers up on AWOL charges even though the officers still have their Annual Leave." On or about July 13, 2011, the Agency responded to Mr. Jackson's inquiry stating: "The current procedure for staff requesting unscheduled annual leave which will require the use of overtime is the employee must request the leave from the Captain."

Mr. Edge credibly testified that January 15, 2012, when he received the email from Mr. Jackson, was the first time after he withdrew the July 2011 grievance that it came to his attention that the Agency's position once again was that unscheduled annual leave which would require the use of overtime had to be approved by a Captain, rather than a Lieutenant. Mr. Edge then decided to file the instant grievance on January 26, 2012 as a repeat violation of the July 2011 grievance.

Pursuant to Article 31, Section D of the Master Agreement: "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...."

In this case, Mr. Edge became aware of a repeat of the July 2011 violation on January 15, 2012 and he filed the instant grievance on January 26, 2012. This is within the forty calendar day window prescribed in Article 31(D), and the grievance was timely filed. The Agency's procedural arbitrability objection based on timeliness will therefore be denied.

On the merits, Program Statement Number 3003.03, Chapter 2, Section 7 is clear, unambiguous and speaks for itself: "The immediate supervisor has authority to approve annual leave and sick leave." There are no caveats or exceptions to the authority of the immediate supervisor, which means he/she is empowered to approve scheduled and unscheduled annual leave requests even if they will require the use of overtime. I further note what Section 3003.03(7) does not say: "The immediate supervisor has authority to approve annual leave except where it will require the use of overtime and sick leave." It also does not say: "The immediate supervisor does not have the authority to approve unscheduled annual leave which will require the use of overtime and sick leave."

There is no dispute that the Lieutenants are the immediate supervisors of the Correctional Officers. There is also no dispute that the Lieutenants have the authority to approve unscheduled annual leave. This is specifically set forth in Warden Drew's February 6, 2012 grievance response wherein he stated: "As to the merits of your claim, the Lieutenants have the authority to approve unscheduled annual leave." Further, Warden Smith, who was a Complex Captain at the time of the instant grievance, testified that there is no policy that specifically states that overtime cannot be approved by a Lieutenant. Finally reading Program Statement 3003.03 and DOJ 1630.1B together as one coherent whole, the Lieutenant would be an "appropriate official" who could approve the change of an absence which would otherwise be chargeable to sick leave to annual leave if requested by the Correctional Officer.

I find that if a Correctional Officer requests unscheduled annual leave in lieu of sick

leave, a Lieutenant has the authority to approve the leave request even if it will require the use of overtime. More specifically, if a Correctional Officer requests unscheduled annual leave in lieu of sick leave and the Lieutenant reviews the roster and finds that if he/she grants the annual leave request it will result in overtime, the Lieutenant has the authority to approve the annual leave request. Pursuant to Article 19, Section g, annual leave is not to be denied by the Lieutenants for arbitrary or capricious reasons, and denial of an annual leave request should be based on work-related reasons. Finally, it is inappropriate for the Agency to place a Correctional Officer on AWOL status after he/she requests unscheduled annual leave in lieu of sick leave.

#### Award

The grievance was timely filed and is procedurally arbitrable. On the merits, the grievance is sustained. The Agency is to follow Program Statement Number 3003.03, Chapter 2, Section 7 that Lieutenants have the authority to approve annual and sick leaves. If a Correctional Officer requests unscheduled annual leave in lieu of sick leave, a Lieutenant has the authority to approve the leave request even if it will require the use of overtime. Further, the Agency is to cease and desist from placing a Correctional Officer on AWOL status when they are unable to report for duty and when they request annual leave in lieu of sick leave.



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Elliot Newman, Arbitrator

April 29, 2013