

Federal Mediation & Conciliation Service

In the Matter of the Arbitration Between:

Council of Prison Locals (AFL-CIO))
AFGE, Local 919)
United States Penitentiary)
Leavenworth, Kansas) FMCS No. 16-50133-7
)
-and-) Arbitrator Cynthia Stanley
)
US Department of Justice) Contract Dispute: Augmentation
Federal Bureau of Prisons)
United States Penitentiary)
Leavenworth, Kansas)

ARBITRATOR'S AWARD

This arbitration is before the arbitrator on a grievance filed by AFGE Local 919 ("Union") on August 27, 2015 against the United States Penitentiary at Leavenworth, Kansas ("Agency"). The arbitrator received notice of her selection and appointment by letter dated October 19, 2015 from the Federal Mediation & Conciliation Service. Hearing was held on January 14, 2016, in Leavenworth. The Union was represented by James Thomasee, President. The Agency was represented by Mark Markiewicz, Agency Representative. A record was taken and transcript duly generated. The parties then timely filed briefs. The record is declared closed as of March 14, 2016. Under the terms of the Collective Bargaining Agreement, this decision must issue within thirty days, or no later than April 13, 2016.

Statement of the Issue

Whether the Agency violated the Collective Bargaining Agreement or the law by refusing to negotiate and assigning employees to augmentation after refusing to negotiate; if so, what shall the remedy be.

Relevant Language

Relevant Provisions of the Collective Bargaining Agreement

Article I - Recognition

Section a. The Union is recognized as the sole and exclusive representative for all bargaining unit employees...

Section b. ...The Union has the full authority...to meet and confer with the Agency for the purpose of entering into negotiated agreements, concerning changes in conditions of employment....

Article 3 -Governing Regulations

Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment...prior to implementation of any policies, practices, and/or procedures.

Article 4 - Relationship of This Agreement to Bureau Policies, Regulations, and Practices

Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 USC 7106, 7114, and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

Section b. On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the4 parties implementing this Agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties.

Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this 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:

Section b. Nothing in this section shall preclude any agency or any labor organization from negotiating:

2. procedures which Management officials of the Agency will observe in exercising any authority under this Agreement;
3. appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such Management officials.

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 provisions of the Collective Bargaining Agreement adhered to.

Article 7 - Rights of the Union

Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute and this Agreement....

Article 9 - Negotiations at the Local Level

The Employer and the Union agree that this Agreement will constitute the Master Collective Bargaining Agreement between the parties and will be applicable to all Bureau of Prisons managed facilities and employees included in the bargaining unit as defined in Article 1 - Recognition. This Master Agreement may be supplemented I local agreements in accordance with this article. In no case may local supplemental agreements conflict with, be inconsistent with, amend, modify, alter, paraphrase, detract from, or duplicate this Master Agreement except as expressly authorized herein.

Article 18 - Hours of Work

Section a. The basic workweek will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minutes non-paid, duty-free lunch break. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break.

Section d. Quarterly rosters for Correctional Services employees will be prepared in accordance with the below-listed procedures.

1. a roster committee will be formed which will consist of representative(s) of Management and the Union. The Union will be entitled to two (2) representatives. Management will determine its number of representatives.
2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally, there will be no changes to the blank roster after it is posted;
 - a. employees may submit preference requests for assignment, shift, days off, or any combination thereof, up to the day before the roster committee meets. Those who do not submit a preference request will be considered to have no preference....
 - b. ...In order to facilitate Union representation on the roster committee, the employee is also encouraged to submit a copy of this request to the local Union president or designee;...
 - d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that Management will not arbitrarily deny such requests. (Seniority is defined in Article 19.)
3. the roster committee will meet and formulate the roster assignments no later than five (5) weeks prior to the effective date of the quarter change;
4. the committee's roster will be posted and accessible to all Correctional Services

employees no later than the Friday following the roster committee meeting;

5. once the completed roster is posted, all Correctional Officers will have one (1) week to submit and complaints or concerns. Correctional officers will submit their complaints or concerns in writing to the Captain or designee. The employee may also submit a copy to the local President or designee. No later than the following Wednesday, Management and the Union will meet to discuss the complaints or concerns received, and make any adjustments as needed;

6. the roster will be forwarded to the Warden for final approval;

7. the completed roster will be posted three (3) weeks prior to the effective date of the quarter change. Changes of the roster will be given to the local President or designee at the time of posting; and

8. the Employer will make every reasonable effort, at the time of the quarter change, to ensure that no employee is required to work sixteen (16) consecutive hours against the employee's wishes.

Section f. Roster committees outside Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedures in Section d. be utilized. These rosters will be posted three (3) weeks prior to implementation. Copies will be given to the local President or designee at the time of posting.

Section g. Sick and annual relief procedures will be handled in accordance with the following:

1. when there are insufficient requests by employees for assignment to the sick and annual relief shift, the roster committee will assign employees to this shift by chronological order based upon the last quarter the employee worked the sick and annual relief shift;

2. assignment to the sick and annual roster satisfies the requirement for rotation through the three (3) primary shifts;

3. no employee will be assigned to sick and annual leave relief for subsequent quarters until all employees in the department have been assigned to sick and annual relief, unless an employee specifically requests subsequent assignments to sick and annual relief;

4. employees assigned to sick and annual relief will be notified at least eight (8) hours prior to any change in their shift;

5. reasonable efforts will be made to keep sick and annual relief officers assigned within a single shift during the quarter.

Section k. If a change in a job assignment involving a change from an inside position to an outside position or vice versa is necessary, and the employee has not been properly advised in advance, and adverse weather or conditions of the assignment warrant, the employee will be given an opportunity to obtain and change into appropriate clothing while on duty status. Other options may be explored, including the assigning of another employee to the position.

Section m. Employees may request to exchange work assignments, days off, and/or shift hours with one another. Supervisory decisions on such requests will take into account such factors as security and staffing requirements and will ensure that no overtime cost will be incurred.

Section n. The Employer agrees to consider circumstances surrounding an employee's request against reassignment when a reassignment is necessary.

Section o. Employees shall be given at least twenty-four (24) hours' notice when it is necessary to make shift changes, except for employees assigned to the sick and annual leave roster [as specified in Section g (4)], or when the requirement for prior notice would cause the vacating of a post. For the purpose of this Agreement, a shift change means a change in the starting and quitting time of more than two (2) hours. Work assignments on the same shift may be changed without advance notice.

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

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 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.

Section q. The Employer retains the right to order a qualified bargaining unit employee to work overtime after making a reasonable effort to obtain a volunteer, in accordance with Section p. above.

Section r. Normally, non-probationary employees, other than those assigned to work the sick and annual relief, 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 of 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 by the Employer, with a copy to the employee.

Section t. Ordinarily, scheduled sick and annual relief assignments will be posted at least two (2) weeks in advance.

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

Article 21 - Training

Section d. Mandatory training at the institutional level will be conducted while the employee is on duty, during the employee's duty hours....

Article 27 - Health and Safety

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and

...

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated. [Emphasis added.]

Article

Memorandum of Understanding of February 24, 2015, Procedures for Augmentation During Mandatory Training: During mandatory institutional training for Correctional Services, all augmented staff will be placed only on shifts between the hours of 6:00 am and 4:00 pm on their regular work day, Monday-Friday. Augmented staff may request to work an off shift. No non-custody staff will be augmented for any yearly scheduled custody annual leave. The number of staff augmented will not exceed the number of custody staff assigned to training. No non-custody staff will be assigned to any sick and annual roster of any kind; however, this does not prevent augmented staff from being placed on a special assignment post. The reverse seniority roster will be utilized to fill the vacancies. Notice to staff will be made at least the day prior to being augmented. If a staff member takes leave on a day they were designated to augment, the next person on the augmenting schedule will be contacted to fill in for the vacancy. The staff member taking the leave will be placed on the top of the augmenting schedule for the next assignment.

Statement of the Facts

The arbitrator finds the following facts:

Augmentation is the practice of utilizing staff from departments outside of Correctional Services ("CS") to fill vacancies within the CS departments.

The current Master Agreement or Collective Bargaining Agreement ("CBA") was executed on May 29, 2014. It provides for negotiation of changes in conditions of employment.

On February 24, 2015 the parties signed a Memorandum of Understanding ("MOU") titled "Procedures for Augmentation During Mandatory Training." Augmentation is used to cover vacancies created by trainings for COs including SORT, DCT, annual refresher, and fire arms trainings. These trainings occur frequently, monthly.

On July 20, 2015 Associate Warden and Labor Management Relations Chairperson Jon

Loftness sent out an email with attachment titled "Notice of Intent to Augment Bargaining Unit Staff." The body of the email read: "A schedule will be forthcoming for all affected staff, which will go into effect the week of August 2, 2015."

The document attached to the email was dated July 15, 2015, and was titled Memorandum for James Thomasee, Local 919 President, and was from Loftness. The memorandum stated that, "Management will be utilizing the procedures negotiated in the Master Agreement to change work assignments for bargaining unit staff from other departments to work in Correctional Services." The memorandum went on to state that the "procedures will be as follows, and are included in Article 18, Hours of Work." The memorandum identified sections o, r, and s as the provisions which allow for the intended agency actions.

The procedures were at variance from those set out in the CBA, MOU and also prior practice. Employees were augmented in order to avoid overtime, rather than to cover mandatory training. Employees were assigned to work on their scheduled days off. Employees were assigned to cover areas for which they had little or no skills or training to handle.

The issuance of the July 15, 2015 notice was motivated by finances.

On July 20, 2015 the Union submitted a memorandum to Loftness with subject line "Cease and Desist" indicating that "Impact and Implementation" negotiations needed to be conducted. The Agency did not comply.

On July 31, 2015 Thomasee for the Union sent an email to Loftness "invoking its right to bargain procedures and appropriate arrangements for affected staff." On August 3, 2015 Loftness responsively indicated that procedures "have already been negotiated in the Collective Bargaining Agreement."

On August 22, 2015 Thomasee filed a formal grievance with Warden Claude Maye, alleging that the Agency violated Articles 7b; 18 a, r and u; 6 b(2); 27 a; 5, USC 6101 (3)(B); 5 USC 7116 (b)(3). The 7116 was an error and should have read 7106.

On September 25, 2015 the Agency filed a response signed by the Warden, which response did not address the alleged violation of Article 27a.

On September 29, 2015, the Union invoked arbitration. The parties agreed upon an arbitrator. Hearing was held on January 14, 2016.

Employees were scheduled for augmentation on the basis of avoiding overtime. Circumstances which warrant deviation from the stated language of Article 18, section r include safety of the institution or security, but do not include avoidance of overtime.

Employees were assigned to work their scheduled days off, and employees were assigned to cover areas for which they had little or no skills or training.

The augmented employees were divided into groups of ten and assigned to Correctional Officer duties in rotation within those groups, thereby causing an unequal distribution of overtime.

All employees receive the same entry level and annual refresher training required to work for the Bureau of Prisons or, when necessary, work a correctional post. This minimal training does not qualify all employees to work the most difficult posts in the prison.

Analysis

The 7116 was an error and should have read 7106, an error that should have been obvious to anyone in management reading it.

The CBA calls for negotiation of changes in conditions of employment. The Loftness email of July 20, 2015 set out a change in the conditions of employment, specifically procedures.

Loftness did not give the Union an opportunity to negotiate concerning changes in conditions of employment. The MOU states the agreed upon procedures for augmentation. Unilaterally changing these procedures is not acceptable.

There is nothing in Article 18 that allows the use of non-Correctional Services employees for limiting overtime in Correctional Services.

The procedures of the Loftness email of July 20, 2015 were at variance from those set out in the CBA, the MOU, and also prior practice which has followed Article 18 or the MOU. Employees were augmented in order to avoid overtime, rather than to cover mandatory training.

Employees were assigned to work on their scheduled days off and had their scheduled days off separated rather than consecutive. 5 USC 6101 (3) (b) provides that federal employees be given two consecutive days off.

Employees were assigned to cover areas for which they had little or no skills or training, raising the inherent hazards to well beyond the lowest possible level. Custodial and non-custodial employees are not always interchangeable, especially in assignments such as special housing unit.

The augmented employees were divided into groups of ten and assigned to Correctional Officer duties in rotation within those groups, thereby causing an unequal distribution of overtime.

The Agency has failed to prove that circumstances existed that required a temporary change in assignments, as the augmentation was planned as far ahead as five weeks, with no relationship to any circumstance except avoidance of overtime.

The Union has set out a violation of the Collective Bargaining Agreement, the MOU, and the statute.

HOLDING

The grievance is upheld. USP Leavenworth is **ORDERED** to **CEASE** and **DESIST** from **Augmenting** outside of the existing Memorandum of Understanding negotiated on 02-04-15, until proper negotiations have been conducted and concluded, and to make whole any staff damaged, including pay for employees adversely affected under the Back Pay Act.

SO ORDERED this 12th day of April, 2016.


Cynthia Stanley
Arbitrator