

IN THE MATTER OF THE ARBITRATION BETWEEN

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
LA TUNA, TEXAS,

Agency,

and

FMCS Case No: 11-51303-3

COUNCIL OF PRISON LOCALS,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 83, FCI LA TUNA, TEXAS

Union.

Before: AlmaLee P. Guttshall, Arbitrator

Appearances:

For the Union: Joseph D. Ybarra

For the Agency: Daniel R. Ritchey

Attendees

Union: Grievants, Ricardo Rubio, Tim Thomas, Ruben Borrego; Union President, Isaac Ortiz

Agency: Witness: Abraham Fernandez, HR Specialist, Barbara Pena

Place of Hearing: La Tuna Training Center, 8500 Doniphan Road, Anthony, Texas 79821

Dates of Hearing: March 7, March 8 and April 19, 2012

Date of Award: July 20, 2012

Relevant Contract Provision(s) and Statutes: Master Agreement: Articles 9 & 18, § p. Statutes: Backpay Act; 5 USC § 7114 - Representation Rights and Duties; 5 USC § 7116 - Unfair Labor Practices

AWARD

The grievance is sustained.

The Agency shall prepare a list of bargaining unit employees who worked overtime during the period from October 5, 2007 to the present.¹ To that list, it will add Ricardo Rubio, Ruben Borrego and Tim Thomas and organize the list in order of seniority, most senior first. Then it shall create a spreadsheet showing each day on which any employee, bargaining unit, management or other worked an overtime opportunity in the Commissary and the hours worked on that day. Then it shall place each employee from the list into the spreadsheet of overtime opportunities in seniority order. Then it will add the hours for each of Rubio, Thomas and Borrego and multiply the total for each by the applicable overtime rate for each. If any of them received raises during the period, the calculation for each may be sub-totaled for the applicable rate and summed at the end of that process. The Agency shall provide the documents and calculations to the Union with any backup documentation the Union requests. If the Union agrees with the calculations or the parties agree with the necessary calculations, the Agency shall pay to each grievant either the amount specified or comp time at each grievant's election within 30 days of the date of this award.

Concerning the failure to provide information, the Union shall prepare a spreadsheet showing the name of each representative except attorneys who performed work after November 17, 2010 on the first or second data request to the FCI or the FOIA request in this matter. The individuals will be listed down the left side of the sheet. Across the top will be shown each date after November 17, 2010 on which any of them performed work on those requests. In the appropriate box, the hours spent by the individual will be listed. For all of the hours listed, the Union will indicate which of the hours were paid by the Agency, which were paid by the Union and which were on the representative's personal time. Then the hours for each individual will be summed separating Agency-paid hours, Union-paid hours and personal time.

The Union will also provide to the Agency a list of postage, copying and other similar costs for activities on the data requests after November 17, 2010.

The Union will provide these documents to the Agency for its determination of the reasonableness of the hours claimed and the payor attribution. Then the parties will meet to

¹ The Parties agreed to this date.

discuss any disagreements and endeavor to reach agreement. The Agency will pay to the Union or the individual for Union paid time or personal time respectively for hours in those categories at the employee's Agency rate or if employed by the Union, the Union rate. The Agency will pay postage, etc. to the entity that incurred the expense.

Finally, the Agency shall be responsible for paying the Arbitrator's fee for the additional unneeded scheduled hearing day.

I retain jurisdiction in this matter for any disputes concerning the remedies including any application by the Union for attorney fees.

This 27th day of July, 2012

AlmaLee P. Guttshall

I. ISSUES

- A. Did the Agency violate Article 18 §p of the Master Agreement when it offered selected employees overtime opportunities in the Commissary without offering the opportunities to the Grievants? If so what is the remedy?
- B. Did the Agency violate Article 18 §p of the Master Agreement when it failed to maintain records of sign-up lists, offers made by the Employer for overtime, and overtime assignments for two years? If so, what is the remedy?
- C. Did the Agency violate the Master Agreement and/or applicable law by failing to provide data requested by the Union in a timely manner? If so, what is the remedy?

II. PROCEDURAL HISTORY

The parties jointly selected the arbitrator. Neither party challenged the procedural or substantive arbitrability of the case. The hearing was held on March 7, March 8 and April 19, 2012. Over the Union's objection, Management had requested scheduling both April 19 and 20, 2012. However, Management only used three hours on the 19th and the 20th was not used at all. The witnesses were sequestered. During the hearing, the parties had a full and complete opportunity to offer argument, examine the witnesses and present documentary evidence. The witnesses were sworn before testifying. A court reporter took down the proceedings, and submitted a transcript. The parties agreed that briefs were to be mailed on June 8, 2012. The briefs were timely filed.

III. RELEVANT CONTRACT AND STATUTORY PROVISIONS

Article 9.

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, § 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;**

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.**

5 USC § 7114 - REPRESENTATION RIGHTS AND DUTIES

* * *

- b. The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

* * *

- 4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
 - a) which is normally maintained by the agency in the regular course of business;
 - b) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - c) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining...

5 USC § 7116 - UNFAIR LABOR PRACTICES

- d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121 (e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, **issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.**

5 USC § 5596 – THE BACK PAY ACT

- (b)(1) An employee...on the basis of a...grievance is found...to have been affected by an unjustified...personnel action which...resulted in...[a] reduction of...pay, allowances or differentials of the employee –
 - (A) is entitled...to receive for the period for which the personal action was in effect –
 - (i) an amount equal to all...of the pay, allowances, or differentials...the employee...would have earned or received during the period...; and

(ii) reasonable attorney fees related to the personnel action....

Emphasis supplied.

IV. FACTS

The FCI La Tuna facility (FCI) is a medium security prison operated by the United States Bureau of Prisons (“BOP”). During the hearing, the parties referred to two other facilities at which the Union represents employees: the Camp that is co-located with FCI La Tuna (Camp) and the Federal Satellite Low (FSL), a facility thirty-two miles from the FCI. All bargaining unit employees are trained to be qualified Correctional Officers. However, their assignments may change over their careers. The individuals in this case did not work as Correctional Officers and were not on the overtime-desired list maintained for Correctional Officers.

The Union filed this grievance on behalf of employees report to the Trust Fund Department. The Trust Fund Department oversees a number of different activities for the prison. Among them are Laundry, Clothing, Warehouse and Commissary. The grievance is about the assignment of overtime in the Commissary. Commissaries are retail stores where prisoners may make purchases of food, clothing and other items. Operation of the Commissary at FCI requires the presence of two employees. During the period relevant to this grievance, Material Handler Supervisors, Warehouse Supervisors and one Trust Fund Program Specialist operated the FCI, Camp and FSL commissaries. No Trust Fund Department personnel from Laundry or Clothing performed Commissary duties.

Until January 2012, the FCI commissary was open from 2:30 pm to 8:00 pm.² Two employees were scheduled on this shift, but if either were absent, warehouse employees from FCI and/or one Trust Fund Program Specialist from FSL were offered the opportunity to holdover from their morning shift to cover the absence. No absence-covering overtime was offered to any of the Laundry or Clothing represented Trust Fund Department employees. The Trust Fund maintained no record of sign-up lists, offers made by the Agency for overtime or overtime assignments for the Commissary. Unlike this Trust Fund operation, Custody, i.e., the reporting division for Correctional Officers who supervise inmates, provides a sign-up for overtime opportunities. Tr 236.

² In January 2012, the shift hours and the hours of commissary operations were changed so that overtime was no longer necessary for commissary business.

On October 4, 2010, the Union requested by letter a list of all Trust Fund employees who were paid overtime or comp time for the past 3 years. Jt-10.³ On November 5, the Associate Warden denied the request citing a Federal statute requiring that the Union demonstrate a particularized need for the information by showing:

1. why the Union needs the requested information including the scope of the information;
2. how the Union will use the requested information; and
3. how the articulated use of the information relates to the Union's representational responsibilities under the Statute.

Jt-11.

On November 17, 2010, the Union submitted a second request for information complying with the additional requirements of the Assistant Warden's November 5 response. U-1. No one from the Agency responded to the second request. The Agency did not explain this failure before or during the hearing in this matter.

Receiving no response, the Union made a Freedom of Information Act (FOIA) Request for similar information on February 2, 2011. U-2. On April 8, 2011, Jason Sickler, Regional Counsel, Federal Bureau of Prisons, South Central Regional Office, responded requesting assurance that the Union would pay a fee of \$236 for the cost of the record search and copying. U-4. The Union provided that assurance by letter dated April 15, 2011. U-5. The Union inquired about the status of the request by letter delivered on October 21, 2011. U-6&7. It again checked by phone and confirmed by e-mail on January 26, 2012. U-9. The explanation given by phone was that it had been lost on Mr. Collins's desk. *Id.* As of the first day of hearing, there was still no response. In response to my order of March 9, 2012, the Agency provided a response under the FOIA request redacting material according to its interpretation of the FOIA. The information that was redacted, primarily the names of the individuals receiving overtime, was and is necessary to: 1. identify employees who received overtime and those who did not; and 2. to determine individual awards, if any.

³ The reference, "Jt" followed by a number refers to the number of a Joint Exhibit. In the same manner, numbers preceded by "U" refer to Union Exhibits and those preceded by "A" to Agency Exhibits. Numbers preceded by "Tr" refer to pages of the transcript.

In conflict with the Agency's position concerning the availability of unredacted records, Daniel Richey, the Agency advocate, produced unredacted records in the first day of hearing that he said "[were] just run today..." These records showed the overtime worked by Ricardo Rubio, a grievant, witness and Union Representative, in the FCI Commissary in years 2000, 2001, 2002 and 2003. Tr. 171-2; A-1, 2, 3&4. Richey's production of the unredacted records evidenced the Agency's ability to produce the data in less than a week. It also established that the Agency understood the reason for the Union request because it offered similar data in its own case.

On October 5, 2010,⁴ the Union filed a grievance on behalf of all Trust Fund bargaining employees asserting that FCI violated the CBA by failing to notify them of overtime opportunities, failing to post a sign-up sheet for those opportunities and limiting offering overtime to a selected group of Trust Fund employees. During the hearing, the Union identified three individuals it believed had lost overtime opportunities because of the Agency's alleged violations: Ricardo Rubio, Ruben Borrego and Tim Thomas.

Rubio is currently a Trust Fund Specialist. He began work at FCI in 1992 as a Correction Officer. In 1995, he moved to Material Handler Supervisor working in the Warehouse and Commissary. His training for the Trust Fund Department, which included the Commissary, took a week in Aurora, Colorado. In 2000, he was promoted to Warehouse Trust Fund Supervisor, a management position. He worked overtime as a fill-in for absent employees during that period and knew that overtime was available then. There was no sign-up for overtime opportunities then or since. In 2003, he returned to the bargaining unit as an ITS Trust Fund Technician. All of his positions over the years included commissary sales in their responsibilities.

Thomas began work at FCI approximately 22 years ago. After two years, he transferred to Clothing Issue Officer and has continued in that position since. During that period, he knew that Trust Fund employees worked overtime in the Commissary. He asked a previous supervisor for training so that he could take overtime opportunities, but it was never arranged. In approximately April 2010, he and Borrego talked with their supervisor, Mr. Viera, about working overtime. He told them that he would be out a long time for surgery, that there would be overtime available in the Commissary and that they should train for it to be eligible. Thomas

⁴ An informal was sent on September 24, 2010, asserting the same concerns.

took training but received no overtime opportunities. Viera never told Thomas that his training was complete.

Borrego began with the Bureau of Prisons in 1985 and transferred to Laundry in 1989 where he remained up to the date of the hearing. Like Thomas, Borrego was aware that certain Trust Fund employees worked overtime in the Commissary. Borrego did not file a grievance about overtime in the past because there was not enough overtime available. In the same conversations described by Thomas, Viera told them that Commissary people (Messers Duran, Fernandez and Lopez) would train them at the Camp: Borrego never received training. However, Borrego owns a laundromat/gift shop/restaurant that he manages on weekends and runs the cash register, and Viera knew that.

Abraham Fernandez, Warehouse Supervisor, began at the FCI on January 28, 2001 as a Material Handler Supervisor. In his opinion, Rubio is qualified to perform the Commissary sales function but Thomas needs “a little bit more” training and Borrego is not qualified at all. Fernandez began his career in the Commissary Sales function as did a female that started with him and received on-the-job training without any training before beginning to operate the cash register. If he had questions, the other experienced Material Handler Supervisor was “right next to us.”

V. POSITION OF THE PARTIES

A. The Union

1. The Agency violated Article 18 §p of the Master Agreement when it offered selected employees overtime opportunities in the Commissary without offering the opportunities to the Grievants.
2. The Agency violated Article 18 §p of the Master Agreement when it failed to maintain sign-up lists, offers made by the Employer for overtime, and overtime assignments for two years.
3. The Agency violated the Master Agreement and applicable law by failing to provide data requested by the Union in a timely manner.

B. The Agency

1. Selecting Material Handler Supervisors from the warehouse and a Trust Fund Program Specialist from FSL for FCI Commissary work without posting a sign-up list accessible to all Trust Fund employees is a past practice binding on the parties.

2. The negotiated local agreement in the Corrections Department giving a preference for Correctional Officers supports the right of the Agency to create a past practice giving certain individuals a preference for overtime.
3. Grievants Thomas and Borrego were not qualified to perform the Commissary overtime.
4. Failure to request overtime forfeits an employee's right receive backpay for an otherwise improper denial of overtime opportunities.

VI. FINDINGS AND CONCLUSIONS

Failure to Create and Maintain Sign-Up Lists...

At the heart of every issue in this case is the Agency's undisputed failure to create and maintain "sign-up lists, offers made by the Employer for overtime, and overtime assignments for two years" as required by Article 18 §p. Fernandez claimed that he did not prepare sign-up sheets because it was a small unit and therefore unnecessary. The Agency said that it did not prepare sign-up sheets because a past practice excused it from the Master Agreement provisions. There is no "small unit" exception in the Master Agreement and well-established precedent forbids past practices that conflict with an existing collective bargaining agreement. In this case, the alleged past practice of allowing management to select a privileged few without posting a sign-up list, without making a record of offers of overtime and without making a record of overtime assignments conflicts with the plain meaning of those requirements. It also conflicts with one of the expressed purposes of the requirements: "to...ensure equitable distribution of overtime to members of the unit." The past practice argument cannot withstand the plain meaning of Article 18 §p.

Analogizing to the Custody supplemental agreement, the Agency contended that the past practice resembled a permitted local agreement and was, therefore, acceptable. However, the Master Agreement specifically forbids agreements such as would have appeared if the practice were accepted as an agreement between the local parties. Article 9 provides:

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.

Jt 1 at 22.

As is discussed above, the alleged past practice clearly "conflicts with" the Master Agreement. The past practice argument cannot withstand the plain meaning of Article 9.

Qualifications of the Grievants

The Agency contends that even if the Union proved that its overtime selection process violated the Master Agreement, neither Thomas nor Borrego are entitled to a remedy because neither was qualified to perform Commissary sales. There are several difficulties with that argument. First, the Agency's failure to post a sign-up sheet prevented all three from knowing of the opportunity that would have triggered a request for training. There is no reason to ask for training if there is no benefit to obtaining it. Second, both Borrego and Thomas asked for training. Borrego never got a response and Thomas started, but never completed the training. It would be one thing if the training was expensive creating budgetary reasons to limit training availability, but as Fernandez indicated, he and a female employee started performing the job with no training at all simply relying on the individual working with them to help if either ran into a problem. That leads to the third difficulty: if on-the-job-training was acceptable for Fernandez and his co-worker, why was it not acceptable for Borrego and Thomas? The Agency did not explain this difference in treatment. For that reason, I find that Borrego and Thomas had the necessary qualifications to be eligible for overtime opportunities.

Failure to Request Overtime

The Agency also contended that the Grievants' failure to request overtime forfeited their right to backpay. However, the Master Agreement specifies how one is to request overtime: on a sign-up sheet created and maintained by the Agency. Jt. 1, Article 18 §p. When the Agency prevents the required action, it, rather than the Grievants, bears the responsibility.

But for the Agency's violation of the Master Agreement, the Grievants would have received an equitable distribution of overtime.

The Duty to Provide Relevant Documents on Request

Long-standing arbitral precedent and the applicable statute make clear an Agency's duty to respond to data requests:

5 USC § 7114 - REPRESENTATION RIGHTS AND DUTIES

* * *

- c. The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

* * *

- 5) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
 - e) which is normally maintained by the agency in the regular course of business;
 - f) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
 - g) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining...

As is noted above, the Agency's only response denied the request based on the Union's failure to state in the statutorily prescribed formula "a particularized need." I need not reach the issue of whether this was an appropriate response⁵ because the Union provided all of the requested information in its second request for data on November 17, 2010. Even then, the Agency failed to respond, and the Union was forced at significant time and expense to try the FOIA approach with all its additional requirements and limitations. Apparently, that office of the Agency shares the same attitude toward information requests – they received the request in February of 2011 and with the exception of requesting assurances that \$236 would be paid, produced nothing through March of 2012. Only after being ordered to produce the data following the second hearing day, did the Agency provide any documents and those produced were useless for the purpose because the names of those receiving overtime offers were redacted. What is worse, the Agency revealed at the second hearing that the FCI could produce the requested information on less than a week's notice by requesting it from the FCI HR office as the Agency Advocate did to obtain A-1, 2, 3 & 4

Conclusions

The failure to create sign up lists for all persons desiring to work overtime in the Commissary is a clear violation of Article 18§p. The Agency presented no evidence justifying its failure to comply with the CBA. Its failure to create and post overtime sign up lists resulted in losses of pay or differentials to the grievants, as did its limiting offers for overtime to a selected group.

⁵ The information requested was obviously expressed or implied based on the Informal filed before or the grievance filed the day after. Such a parsimonious reading of the Union's letter seems to contradict the Preamble of the Master Agreement: "The Bureau of Prisons will develop and maintain constructive and cooperative relationships with its employees through their exclusive representative." There are many similar expressions throughout the agreement.

All of the grievants indicated an ability and a willingness to work overtime. But for this failure, the grievants would and should have been assigned their fair share of the overtime worked in the Commissary. Therefore, the grievance is sustained.

Under the Back Pay Act, awards in grievances of this kind are not subject to time limitations. However, the Union requested back pay awards for the individuals denied overtime opportunities from October 5, 2007 to the present.

In addition, the Agency violated its statutory duty to provide data in response to the Union's second request, and caused the Union the loss of time and expense and infringed on its ability to prepare and present its case without excuse or explanation.⁶ Consequently, the Union is entitled to damages and reimbursement for the Agency's failure to provide the requested documents as required by law.

AWARD

The grievance is sustained.

The Agency shall prepare a list of bargaining unit employees who worked overtime during the period from October 5, 2007 to the present.⁷ To that list, it will add Rubio, Thomas and Borrego and organize the list in order of seniority, most senior first. Then it shall create a spreadsheet showing each day on which any employee, bargaining unit, management or other worked an overtime opportunity in the Commissary and the hours worked on that day. Then it shall place each employee from the list into the spreadsheet of overtime opportunities in seniority order. Then it will add the hours for each of Rubio, Thomas and Borrego and multiply the total for each by the applicable overtime rate for each. If any of them received raises during the period, the calculation for each may be sub-totaled for the applicable rate and summed at the end of that process. The Agency shall provide the documents and calculations to the Union with any backup documentation the Union requests. If the Union agrees with the calculations or the parties agree with the necessary calculations, the Agency shall pay to each grievant either the amount specified or comp time at each grievant's election within 30 days of the date of this award.

⁶ The Agency also wasted significant time and expense by forcing involvement of the FOIA office, the cost estimates for the FOIA request, the transmission of documents to that office, the redaction efforts and the re-transmission to FCI.

⁷ The Parties agreed to this date.

Concerning the failure to provide information, the Union shall prepare a spreadsheet showing the name of each representative except attorneys who performed work after November 17, 2010 on the first or second data request to the FCI or the FOIA request in this matter. The individuals will be listed down the left side of the sheet. Across the top will be shown each date after November 17, 2010 on which any of them performed work on those requests. In the appropriate box, the hours spent by the individual will be listed. For all of the hours listed, the Union will indicate which of the hours were paid by the Agency, which were paid by the Union and which were on the representative's personal time. Then the hours for each individual will be summed separating Agency-paid hours, Union-paid hours and personal time.

The Union will also provide to the Agency a list of postage, copying and other similar costs for activities on the data requests after November 17, 2010.

The Union will provide these documents to the Agency for its determination of the reasonableness of the hours claimed and the payor attribution. Then the parties will meet to discuss any disagreements and endeavor to reach agreement. The Agency will pay to the Union or the individual for Union paid time or personal time respectively for hours in those categories at the employee's Agency rate or if employed by the Union, the Union rate. The Agency will pay postage, etc. to the entity that incurred the expense.

Finally, the Agency shall be responsible for paying the Arbitrator's fee for the additional unneeded scheduled hearing day.

I retain jurisdiction in this matter for any disputes concerning the remedies including any application by the Union for attorney fees.

This 27th day of July, 2012

AlmaLee P. Guttshall