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December 17, 2008

Jennifer Montgomery, Labor Relations Specialist
Federal Bureau of Prisons
230 N. First Ave., Suite 201
Phoenix, AZ 85003

Michael T. Pazder, Staff Attorney
AFGE, AFL-CIO
316 W. Mission Ave., Suite 108
Escondido, CA 92025

RE: ARBITRATION: Transmittal of Opinion & Award and Billing for Services: Federal Bureau of Prisons/AFGE Local 3584 (Food Services) Federal Mediation & Conciliation Service Case No. 08-02196

Dear Counsel:

Transmitted herewith are my Opinion & Award and Invoice in the above matter. Thank you very much. It was a real pleasure working with you.

Sincerely,



Philip Tamoush

Enclosures (Opinion & Award, Invoice)

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INVOICE

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RE: ARBITRATION: Transmittal of Opinion & Award and Billing for Services: Federal Bureau of Prisons/AFGE Local 3584 (Food Services) Federal Mediation & Conciliation Service Case No. 08-02196

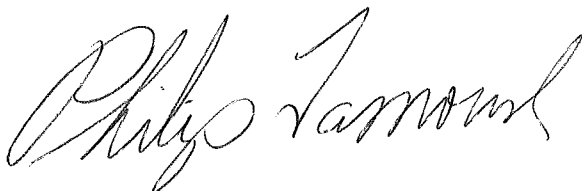
Conduct of Hearing: One Day @ \$1200.00

Review of Record, Exhibit, Deliberations, Writing of Opinion: 2.5 Days @ \$1200.00: \$3000.00

Total Due and Payable: \$4200.00

Due and Payable from Each Party (payable within 30 days): \$2100.00

Respectfully Submitted,



Philip Tamoush
Social Security Number: 548-48-5855

ISSUES

The parties could not agree on a single joint statement of the issues in this case. Accordingly, they provided separate statements, which are incorporated herein, to wit:

Union Statement

1. Did the Agency violate Article 18, Section p of the Master Agreement when it failed to ensure that overtime was distributed and rotated equitably amongst the Cook Foremen at FCI Dublin?
2. If the Agency did violate Article 18, Section p of the Master Agreement, are the grievants entitled to back pay under the Back Pay Act, 5 U.S.C. 5596, for the hours of work that the grievants were wrongfully denied overtime opportunities, for a period of time not exceeding six years?
3. Did the Agency violate the Master Agreement by vacating Cook Foremen posts at FCI Dublin?
4. If yes, what shall the remedies be?

Agency Statement

Did the Agency fail to equitably distribute overtime to the grievant, D. Duffy, on December 7, 2007, in accordance with the Master Agreement, Article 18, Section P? If so, what is the appropriate remedy? (Transcript pages 5-6)

The Agency also has raised certain procedural issues which will be dealt with in the body of this opinion. Both issue statements above are subsumed in this Opinion and Award.

RELEVANT CONTRACT LANGUAGE

ARTICLE 5 – RIGHTS OF THE EMPLOYER

This whole Article on the Employer's rights, relative to the Agency's mission, employee assignments, etc., is incorporated herein by reference.

ARTICLE 18 – HOURS OF WORK

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

1. when Management determines that it is necessary to pay overtime for positions/assignments normally 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 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 .

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.

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
2. the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees 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.

With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.

(Joint Exhibit 1, Master Agreement)

BACKGROUND AND SUMMARY OF FACTS

This case involves the appeal of the Union, on behalf of individual employee D. Duffy, then-Shop Steward of Local 3584, AFGE, relative to the assignment of overtime and staffing of post positions at the correctional facility in Dublin, California. The parties could not reach agreement over the grievance filed on or about December 7, 2007 (JX-2) and the matter proceeded to arbitration before the undersigned, jointly selected by the parties from a list provided by the Federal Mediation and Conciliation Service.

More specifically, the Union represents employees known by classification as Federal Correctional Officers, although their job titles include those such as Food Service Foremen, Food Service Supervisors, Cook Supervisors, and Cook Foremen. Basically all of them operate as Cook Forepersons, supervising other employees and prisoners in preparation of meals. The “inmate workers” consist often of some 25 to 30 persons, and are assigned duties of cooks, butchers, bakers, dining and dish workers, vegetable preparation workers, and pot and pan washers. Cook Supervisors/Foremen, provide training to the inmates, oversee their work, supervise food service, and are also responsible for security operations such as key control, knife and blade control, along with overall maintenance of the security such as custody and supervision of inmates.

As indicated above, Section p of Article 18 of the parties’ Agreement requires that overtime “... be distributed and rotated equitably among bargaining unit employees; and ... 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 ... ensure equitable distribution of overtime assignments to members of the unit.” The Union’s concern has been that Management has assigned overtime on a “first-come, first-served” system, rather than spread out over all employees. At some point, in 2005, Management did institute an overtime sign-up sheet so that it could determine which employees would volunteer to work overtime. However, the Union claims that overtime, even using the sign-up sheet,

was not assigned to employees equitably. Apparently the sign-up sheet, according to the Union, fell into disuse and Management continued to assign overtime inequitably. For example, it is alleged that overtime for any particular shift or day was offered to those employees on duty, regardless of the sign-up sheet or equitable distribution concepts.

It was only on or about December 7, 2007, when the Union obtained records from Management, that it determined that overtime was being assigned inequitably. Thus, the grievance was claimed from that date, although, consistent with the Federal Back Pay Act, and general arbitral principles, back pay is being requested going back to 2002, such Act permitting back pay for six years.

The second issue brought up by the Union deals with the fact that Management was vacating Posts which were supposed to be filled by additional or second Cook Foremen, thus forcing other Foremen to work by themselves, rather than the Agency filling that vacant post or offering and paying overtime to a Foreman to fill a vacant post. This created safety concerns for employees being required to work by themselves where post orders called for two Cook Foremen. A single Cook Foreman in such cases had to both supervise the inmate workers in the kitchen and in the dining area, an almost impossible responsibility. Also, a post in a smaller dining area was being left vacant to be serviced by a Foreman from another location.

The grievance in this matter was denied by the warden on February 7, 2008 (JX-3), both on procedural and substantive grounds. The warden claimed that the grievance lacked specificity in terms of overtime mis-assigned. On the merits of the matter, the warden essentially responded that it had the right, under Article 5, quoted above, allowing Management "... to vacate, abandon and to pay or not to pay overtime." The parties did discuss the grievance and Management's response without successful resolution, thus leading to this overtime arbitration.

CONTENTIONS OF THE PARTIES

The one-day hearing in this matter was transcribed and the transcript is incorporated herein by reference. In addition, counsel filed post-hearing briefs bearing on the issues which are also incorporated herein. Following is a short summary of the parties' contentions.

Contentions of the Union

The Union contends that the records and evidence produced at the hearing clearly show that management has failed in its duty to spread overtime out equitably among those available to work such time. Higher level managers often merely approach employees on duty and ask if they want to work overtime. Employees worked overtime based on their own desires, rather than there being some sort of rational rotation system.

By the Union's calculations, Union Exhibit 4, it is clear that employees are owed overtime not offered. Any sign-up sheets that finally have been put into effect don't comport with the master Agreement requirement to provide for equitable distribution. They have only been used in any reasonable way in the early part of 2008, after the instant grievance was filed. As explained by management, sign-up sheets helped to determine who would be assigned overtime in the event of illness of an employee. But offering the time to an already working Cook does not reflect any sort of balancing of overtime among all the employees.

Notwithstanding that Ms. Williams, then-Union president, met with management in attempting to resolve overtime and other issues (Agency Exhibit 2), no ongoing agreement was reached in fact. In summary, the Agency has clearly violated the requirements of the Agreement and must be compelled to pay for overtime opportunities missed.

Regarding the issue of vacant Posts, it is clear that that has occurred to the detriment of Supervisors/Foremen and overtime opportunities. Foremen have been forced to work alone in an area that has two established Posts, and to cover both Posts. The Agreement mandates concern over health

and safety issues inherent when Posts are not filled. Attempting to cover both a kitchen and a dining area is not possible and jeopardizes safety where inmates have access to knives, contraband, and otherwise should not be on their own. While there was a tacit agreement reached by some of the Foremen to work weekends and cover two posts, that action clearly did not amend the Agreement for the Union. Management has required coverage of two posts routinely.

Other relevant Arbitration awards have supported the notion that here Management has violated the Master Agreement. Management is permitted to vacate posts only for good reason, without jeopardizing safety. Another award has required Management to offer overtime to cover necessary posts.

Management has violated the clear requirements of the Agreement. The Agency should be ordered to 'cease and desist' in such violations, and back pay should be awarded. In order to be accurate and to create an equitable rotation system, the Agency and Union should be ordered to work together to determine the correct pay owed to the Foremen. The Arbitrator should retain jurisdiction to resolve any further questions which may arise consistent with his Award.

Contentions of Management

Management argues, with regard to the threshold Arbitrability issue, that the grievance from which this Arbitration emanates, refers only to one employee, the signed grievant and not to the 'class' of all Foremen. The Agency has not agreed to amend the grievance. Furthermore, the grievance only relates to alleged issues known within 40 days of its filing. Time limits are critical here, and are an important part of the Master Agreement.

The Union has been fully aware of overtime issues at Dublin stemming from its own grievance raised in 2004. The Union has essentially sat on its rights, by not enforcing what it perceived to be inequities in the distribution of overtime. The Union should have been monitoring overtime from long ago, rather than waiting until December, 2007, if it believed it had a righteous claim. The Union and

Management have, in fact, worked together over the years, as the record indicates, to resolve overtime issues as they have come up. Just because there are new Union officers, does not negate the good work done by past officers. As the record indicates, the Agency and the Union did meet in the fall of 2007 and resolve numerous overtime issues.

Employees don't receive overtime for numerous reasons. These include that employees are out on leave, or don't want to work overtime, or live too far away to be called in. The record is not clear on whether employees were available to work overtime when it was itself available.

Regarding Post vacancies, the Union never grieved article 27 dealing with 'safety' concerns. Regardless, Management has a right to assign work, and to vacate Posts when necessary. Additionally, even when necessary, the parties did negotiate provisions permitting Posts to be vacated, in 2000. The Union has not carried its burden in this regard. Management has not violated the Agreement.

DISCUSSIONS, FINDINGS & CONCLUSIONS

First, with regard to some of the threshold issues raised by the Agency, the undersigned determines the following:

1. The grievance is sufficiently specific, both with regard to the nonpayment of overtime and the question of Posts being vacated/abandoned by the Agency, thus obviating the opportunity for employees to work overtime. The function of the grievance form is really to “get the ball rolling.” That is why most grievance procedures, as in this case, have multiple steps of review where the Union and Management can sit down and “flesh out” the specifics of the issue being raised by the Grievant. That indeed did occur in some of the discussions held between Union representatives and Management representatives before the matter proceeded to the current arbitration.
2. The grievance is timely, since the issue being raised, that overtime not being assigned or paid, has been a continuing one. Thus, except for the fact that there may be an issue of remedy because of the date that the grievance was filed, the grievance being filed on or about January 7, 2008 is timely.
3. D. Duffy filed a grievance as “Shop Stewart” [*sic*]. That is sufficient to notify Management that Mr. Duffy is acting on behalf of the Union, and not solely in his capacity as a Cook Supervisor. The matter is indeed a group grievance of “class action” affecting all Cook Supervisors who were, in a sense, “ready, willing and able” to work overtime. For example, if a Cook Foreman were on vacation when overtime became available, even if he had indicated he would work overtime when requested or required, it would be an absurdity to assume the employee could be ordered to work such overtime. However, absent that lack of readiness, based on both Sections p and q of the Agreement, above quoted, employees could both volunteer and/or be required to work

overtime in order to meet the “equitable distribution” standard that the parties have negotiated.

4. The matter can, and should, proceed on its merits.

In this case, then, the issue statement proffered by the Union, covering both lack of equitable distribution of overtime and the vacating or abandoning of post positions are appropriate to be dealt with here. Notwithstanding the Management Rights section of the Master Agreement, the parties can, and have, negotiated limitations on such Agency prerogatives.

According to the Agreement, both the Management and the Union at Dublin are charged with the responsibility of “monitoring overtime” to both “...determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit.” While it would appear that the Union has not effectively monitored the overtime assignment systems developed by Management, that does not preclude any finding that the Agency, by its misuse or lack of use of effective systems, can’t violate the “equitable distribution” requirements of the Agreement. Again, perhaps the failure to monitor overtime by the Union, whether caused by sloppy records provided by the Agency or merely the Union ignoring its responsibility, remedy can certainly be effective here. At some point, the Union did begin monitoring the overtime assignment system and it found, from its point of view anyway, that equitable distribution was not occurring. The Agency is correct, as is shown in its Exhibit 3, the memorandum from the Union to the Agency, dated July 23, 2000, that it has agreed, essentially to an amendment of the Master Agreement by the changes noted there. Whether or not the employees who signed the memorandum affects the posting requirements is irrelevant. There is sufficient testimony and evidence that the Union itself agreed to the modifications permitting the changes and those should stand.

However, the above opinion also carries the essence of a “two-edged sword” if indeed, Management and the Union had to negotiate changes in post assignments and actually come to some

written agreement about them, then indeed Management has acknowledged its obligation to continue all other post assignments, without vacating or abandoning them by not filling them, without further agreement of the Union. Accordingly, with regard to the posting requirement, Management has violated the Agreement for the time period further discussed below when it left post positions vacant, without filling them either by regular staff or on voluntary/mandatory overtime assignments. The matter of which post assignments should have been filled, and for what period of time the violation occurred, will be further discussed below

With regard to “equitable distribution” the undersigned believes the matter to be resolved is not so much the systems being used and developed over the years by the Agency as it is the actual number of hours made available to, and actually worked by, employees. If it is more convenient for the Agency to assign overtime (either voluntarily or mandatorily) on a particular shift to employees already working on that shift, that is in fact an Agency right. It only makes sense that employees off-shift and at home would not be called in to work overtime if indeed employees on the shift were readily available for that assignment. The matter becomes an issue when over some reasonable period of time, be it a month, six months, or, more recently, a calendar year, one can see that employees who could have been assigned overtime, either voluntarily or mandatorily, did not indeed work overtime as much as other employees. The same would go with whether or not the Agency uses sign-up sheets, although it only makes sense that Management would want to know if there are employees who just do not want to work overtime on a voluntary basis, although they could of course be assigned on a mandatory basis pursuant to Section q of the Agreement. Thus, it is Management’s obligation, pursuant to its rights and responsibilities, to establish whatever procedures will guarantee the equitable distribution mandated by their Agreement.

As Management indicated in its post-hearing brief, “equitable” is defined as “just, fair, and right, in consideration of the facts and circumstances of the individual case.” And the Agency indeed

may be able to show that some employees “opted out” and indicated in some clear manner to Management that they did not want to work overtime on a voluntary basis. However, if an employee indicated that he/she would work overtime, then issues of vacation leave or sick leave would have no bearing on the overall situation (Individual cases can be dealt with on an individual basis of course. For example, if an employee is out on sick leave for an extended period, say six months to a year, it would be reasonable not to expect that they would participate in the “equitable distribution” requirements while they were absent).

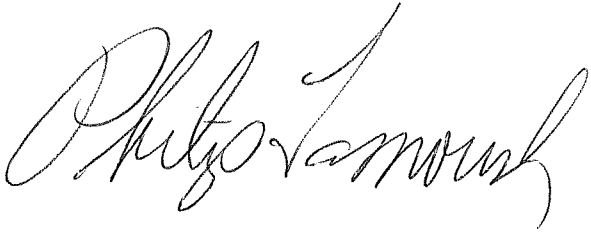
Employees here did suffer damages by not being assigned overtimes when opportunity existed. Union Exhibit 4, in detailed fashion, indicates the amount of hours that employees have worked overtime. This matter will have to be referred back to the parties for more specific delineation, i.e. whether a particular employee chose not to work voluntary overtime, etc., in order to determine the extent of any violation and back-pay issues.

In summary of his conclusions on this matter, the undersigned finds that Management had a clear obligation, absent contrary Agreement with the Union, and consistent with the two prior arbitration cases cited by the Union, to cover and fill Post positions. In addition, the undersigned concludes Management did violate the Agreement with regard to “equitable distribution” over calendar years. Finally, since the Agreement provides that overtime records need only be “...retained by the Employer for two years from the date of said record,” it would appear that back pay would only be required to be applied and paid for the two-year period back from December 7, 2007, the date indicated in the grievance that the “violation” occurred, or was discovered. This time limitation seems more appropriate, rational and reasonable than requiring the six-year timeline permitted by the Back Pay Act.

AWARD

1. The Agency violated Article 18, Section p (and q by reference) of the Master Agreement when it failed to ensure that overtime was distributed and rotated equitably among the Cook Foreman at FCI Dublin.
2. The grievants are entitled to back pay, for the hours of work the grievants were wrongfully denied overtime opportunities for a period of time to include two years prior to December 7, 2007, and continuing to the date of this award.
3. The Agency violated the Master Agreement by vacating Cook Foremen Posts at FCI Dublin.
4. The Agency is ordered to distribute overtime equitably on a calendar year basis prospectively.
5. The Agency is ordered to fill all vacant/abandoned posts by overtime or regular assignment forthwith.
6. The parties are ordered to meet and to give the Union acceptable release time (up to two employees for 60 days) to determine whatever records exist for the period covering two years prior to December 7, 2007, and forward to the date of this award. The parties shall meet to determine an acceptable financial remedy to be distributed among the employees who were working during the period covered. This matter may be returned to the undersigned for specific resolution.
7. The undersigned Arbitrator retains jurisdiction for either party to request clarification, interpretation, and more specific determination and implementation of an award. The parties are ordered to determine whether any issue in this award shall be returned to the Arbitrator no later than 90 days from the date of the award. This can include a specific order regarding funds to be paid to the Union and/or employees, Posts which have not otherwise been agreed to be vacated/abandoned, and any matter relative to attorney's fees permitted to be assessed by applicable laws.

Respectfully submitted,

A handwritten signature in cursive script, reading "Philip Tamoush". The signature is fluid and elegant, with the first name "Philip" written in a larger, more prominent hand than the last name "Tamoush".

Philip Tamoush

December 17, 2008
Torrance, California