
In Re the Arbitration between:

FMCS No. 08-59642

U.S. Department of Justice
Federal Bureau of Prisons
Federal Prison Camp – Duluth,
Minnesota,

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

American Federation of Government
Employees, Local 3935
Council of Prison Locals, Council 33,

Union.

Cynthia Hathaway, Grievant.

The parties have submitted the above captioned matter to arbitration in accordance with **Article 32** of the Master Collective Bargaining Agreement.

The parties selected James A. Lundberg as their neutral Arbitrator from a Federal Mediation and Conciliation Service list of Arbitrators.

The grievance is properly before the Arbitrator for a final and binding determination.

The grievance was initiated on June 30, 2008.

The hearing was conducted on December 11, 2008.

Briefs were posted January 9, 2009 and the hearing was closed upon receipt of both briefs at the office of the Arbitrator on January 12, 2009.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION

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ISSUE AS FRAMED BY THE UNION:

In the reassignment of Federal Prison Camp Duluth employee, Cynthia Hathaway, did the agency, in the exercise of its rights, violate the rights of the union as well as multiple articles of the negotiated agreements? If this is found to be the case, what is the appropriate remedy?

ISSUE AS FRAMED BY THE EMPLOYER:

Did the agency violate the Master Agreement, Article 3 section c, Article 6 section b, Article 7 section b and Article 24, with regards to the reassignment of Cynthia Hathaway from Unit Secretary to Medical Secretary at the Federal Prison Camp Duluth? If so, what is the appropriate remedy?

FACTUAL BACKGROUND:

The grievant, Cynthia Hathaway, is employed as a Medical secretary by the Federal Bureau of Prisons, Federal Prison Camp in Duluth, Minnesota (Employer/Agency). Ms. Hathaway has worked as a Medical secretary, since her reassignment to the position on June 23, 2008. Prior to her reassignment to the position of Medical secretary, Ms. Hathaway worked as a Unit secretary for approximately one (1) year and three (3) months. Ms. Hathaway has a positive record as an employee and no history of discipline was presented at hearing.

During December of 2007, a position of Medical secretary became open at the Federal Prison Camp, when an employee chose to leave the position. The Medical secretary position was not filled until June 23, 2008. The position was posted by the Employer internally to existing employees at the institution, to employees nationally and to the general public. According to witnesses, there were qualified applicants but none were selected for the position. Thereafter, the Medical secretary position was converted to a Pharmacist position and filled by an employee, Mr. Byrd, at the Prison Camp until the employee transferred to a position at Terminal Island. The Medical secretary position was ultimately reopened to be filled by the transfer of employee Sherry Schappaugh on or about the 2nd of June 2008. The employment of Ms. Shappaugh in the Medical secretary position was viewed as in violation of **Article 24** of the collective bargaining agreement by the Regional Director and the Medical secretary position was then filled by the reassignment of Unit secretary Cynthia Hathaway effective June 22, 2008.

A new Health Services Administrator, Mr. Michael Schappaugh, transferred to the Duluth Prison Camp from Administrative Maximum (ADX) in Florence, Colorado. The position of Health Services Administrator was filled in April of 2008. Mr. Schappaugh is married and his wife was employed at United States Penitentiary (USP) in Florence, Colorado. Mrs. Schappaugh requested a transfer to the Federal Prison Camp in Duluth and the request was granted. In the process of accomplishing the transfer of Sherry Schappaugh, Mrs. Schappaugh was essentially allowed to “bump” the grievant, Cynthia Hathaway out of her position as Unit secretary and cause Ms. Hathaway to be reassigned as a Medical secretary at the Duluth Prison Camp. The Master Agreement between the parties does not address the issue of “bumping”. However, the Union

conceded that the Agency has the contractual right to reassign an employee and did not seek a remedy that would impact the assignment of either Ms. Hathaway or Sherry Schappaugh.

Mrs. Schappaugh had been employed as a Captain's Secretary at USP Florence, Colorado. Since the Medical secretary position was opening at the Duluth Federal Prison Camp, the plan was to transfer Mrs. Schappaugh into the open position of Medical secretary. The transfer of Sherry Schappaugh and placement in the position of Medical secretary was announced on June 2, 2008.

The transfer of Mrs. Schappaugh into the Medical secretary position was clearly in violation of **Article 24 Section a, 2**, which prohibits a situation in which one relative is in the supervisor chain of command over the other. Mr. Schappaugh was the Administrator who supervised the entire Medical department. Hence, he would be in the supervisory chain of command over Mrs. Schappaugh.

At some time in April, Mr. Schappaugh had a conversation with Michelle Lukken, who works as the Captain's secretary at the Duluth Federal Prison Camp. Mr. Schappaugh walked into Ms. Lukken's office and asked her if she would be interested in working as Medical secretary. Ms. Lukken said no and that was the end of the conversation.

Shortly after Mr. Schappaugh arrived at the Duluth Prison Camp in April 2008, he also approached Ms. Hathaway about working in the medical area. Ms. Hathaway told him that she was not interested in the position at that time.

The Warden submitted a form U-2 Waiver for Supervision Request on June 2, 2008 to the Regional Director. The Waiver of Supervision would have placed Sherry

Shappaugh out of the direct chain of command of Mr. Shappaugh. The Waiver of Supervision was denied by the Regional Director, who believed that even the appearance of Nepotism needed to be avoided.

On June 17, 2008 Ms. Hathaway was given a reassignment letter to the position of Medical secretary. The reassignment was based upon reverse seniority. She met with management to review the reassignment. The Union was not present at the initial meeting between Ms. Hathaway and management. The reassignment was effective June 22, 2008. Ms. Hathaway was given the opportunity to continue on her compressed work schedule, until bargaining over the work schedule could be completed.

Sherry Shappaugh was assigned to Ms. Hathaway's former position as Unit Secretary.

On June 17, 2008 the Union submitted a memorandum to management which said it was "invoking negotiations over management's proposal to reassign a Unit secretary to the Health Services Department.

On June 19, 2008 the reassignment meeting was re-held to include the Union at the insistence of the Union. Management notes indicate that at the meeting, which included two sessions, the Union was asked what impact and implementation issues they wished to negotiate.

On July 30, 2008 the Union filed a grievance which alleged the following:

Improper consideration, selection, and advocacy of a relative of a supervisor for employment; failure to give the Union a reasonable advance notice prior to the reassignment of employees, failure to negotiate changes in working conditions caused by reassignment of employees prior to implementation of the

reassignment, and failure to treat employees fairly and equitably by discriminating for the employment of one employee without regard to the reassignment of another employee.

Management responded to the grievance by saying that it was exercising its right to assign work in accordance with **5 U.S.C. Section 7106**. Management also responded that it had provided the Union with an opportunity to negotiate impact and implementation issues and the Union had failed to submit any issues to management.

On August 12, 2008 the Union invoked arbitration.

SUMMARY OF UNION'S POSITION:

Article 24 of the Master Agreement says:

Section a. There will be no prohibitions to the employment of a relative (including spouse) of an employee provided that:

1. there is no evidence of advocacy of employment, either orally or in writing, by the relative (including spouse) already employed; and
2. there is no situation created in which one relative is in the supervisory chain of command over the other.

The reassignment of Ms. Hathaway was a direct result of the advocacy of Mr. Schappaugh on behalf of his spouse in derogation of **Article 24, Section a, 1** of the Master Agreement. At the arbitration hearing Warden Cruz was asked the following question and made the following answer:

- Q. Okay. After Mr. Schappaugh had expressed interest in coming to work at FPC Duluth, was there any conversation about his wife possibly needing a reassignment also:

A. Yes.

The original proposal, whereby Mrs. Schappaugh was to be transferred to FPC Duluth, placed Sherry Schappaugh in a direct line of supervision by Mr. Schappaugh in derogation of **Article 24, Section a. 2**. In an effort to by-pass the collective bargaining agreement, management sought but was unable to obtain a Waiver of Supervision, which would have taken Sherry Schappaugh out of the line of command of Mr. Schappaugh. The response of management to the waiver denial was to exercise its **Article 5, Section a. 2, b.** right to reassign Ms. Hathaway. The reassignment was made for the sole purpose of making a position for Sherry Schappaugh at FPC Duluth in violation of **Article 6, Section b. 2**, which grants to employees the right “to be treated fairly and equitably in all aspects of personnel management.” In this instance, management failed to treat Ms. Hathaway equitably.

The Union argues that the Agency did not allow reasonable notice to the Union so that meaningful negotiations over impact and implementation could be conducted. Initially the Agency met with the employee without notifying the Union. The Union argues that the Agency violated **Article 7 Section 1.** of the Master Agreement. Upon discovery of the failure by the Agency to notify the Union, a demand to reschedule the meeting was made by the Union and honored by the Agency. The meeting took place within the required time frame. The rescheduled meeting was conducted on June 19, 2008 and the reassignment of Ms. Hathaway was to be effective on June 22, 2008. The Union contends that it was unable to enter into meaningful negotiations over impact and implementation because it was not informed of the actual reasons for and impacts of the

reassignment. The Union says that it informed the Agency that the issues were scheduling, work space, and general conditions of employment.

The Union made requests on June 25, 2008 and July 10, 2008 to negotiate ground rules for negotiation. It contends that the Agency was evasive and did not negotiate ground rules until December 8, 2008. The Union argues that the Agency's conduct violated **Article 3, Article 4** and **Article 7** of the Master Agreement and **5 U.S.C.**

The Agency also violated the Annual Leave provision of the Master Agreement found at **Article 19**. When Ms. Hathaway was reassigned, Ms. Hathaway's annual leave periods were never posted for bidding and Ms. Hathaway was discouraged from taking the annual leave she had reserved.

When the Agency unilaterally assigned Ms. Hathaway to a work schedule, which required work in excess of eight hours per day, it violated **Article 18** of the Master Agreement, **5 U.S.C. 6130** and **Supplemental Policy DTH3000.02B**. Ms. Hathaway was placed on a compressed work schedule in a position where a compressed work schedule had not been negotiated. The Union contends that it should have had thirty (30) days to negotiate impact and implementation issues prior to the reassignment, not following the reassignment. In by-passing the Union and negotiating directly with the employee, the Agency violated the Master Agreement. Because the work schedule was not negotiated the Agency should pay the grievant time and one half overtime for all hours worked in excess of eight hours. The Agency action violated the Fair Labor Standards Act.

The Agency gave preferential treatment to Sherry Schappaugh and failed to treat Cynthia Hathaway equitably. The reassignment of Cynthia Hathaway was only necessary in order to accommodate Sherry Schappaugh, whose transfer was approved based on the

mistaken belief that Mrs. Schapaugh would be able to work as a Medical secretary, but whose placement in the Medical secretary position was blocked by the Regional Director to avoid the appearance of Nepotism. Furthermore, the accelerated time frame for negotiations with the Union imposed by the Agency denied the grievant the benefit of fair negotiations on her behalf by the Union.

The Union asks for the following remedy:

1. That employee Cynthia Hathaway be treated fairly and equitably and not retaliated against because of her involvement in the grievance.

That grievant maintain her current work station as long as she is assigned to Medical secretary and will not be moved without a legitimate work related reason and prior notification to the Union;

That grievant will be allowed to receive training in cross development courses without any limitation due to her work assignment as Medical secretary.

That grievant will receive priority consideration for future secretary vacancies in her job series at FPC Duluth;

In addition, at any time a qualified secretary is willing to exchange job assignments with Cynthia Hathaway, the Agency will not arbitrarily deny such request.

2. Agency will be directed to negotiate to completion or impasse the issues that are listed in ground rules that were signed by the Agency and Union on December 8, 2008.

3. Grievant will be compensated for hours worked in excess of 8 hours a day from June 23, 2008 to date as well as liquidated damages under the FLSA statute, due to the Agency unilaterally assigning her to a non-negotiated compressed tour.

4. That the Agency will be required to post the following notice signed by the CEO for not less than 90 days on all staff bulletin boards, to all bargaining unit staff:

Notice to All Bargaining Unit Staff

Management at the Federal Prison Camp Duluth, Minnesota has violated the rights of the Union (Local 3935) and the rights of employees within the bargaining unit.

Management has violated the collective bargaining agreement and statutes when they reassigned an employee without regard to the rights of the exclusive representative AFGE Local 3933. In the future, management promises to adhere to the collective bargaining agreement and all applicable laws, rules and regulations as required by the statutes.

SUMMARY OF EMPLOYER'S POSITION:

The Employer had no duty to bargain over the reassignment of Ms. Hathaway to the Medical secretary position. The Master Agreement incorporates the fundamental rights of management found at **5 U.S.C 7106 (a)**, which include the right to assign work. Ms. Hathaway was reassigned to the Medical secretary position from the position of Unit secretary. Both positions are fundamentally alike and there is no evidence that Ms Hathaway was adversely affected by management's exercise of the right to assign. In fact, one benefit of the reassignment is the fact that the parking lot is closer to the

Medical Center than to the Units. During the Winter in Duluth, Minnesota, a shorter distance from the parking lot to a warm building is a benefit¹.

The burden is on the Union to demonstrate that the grievant was in any way treated unfairly or inequitably. In this instance, the grievant was reassigned to a position where the skills she possessed as a secretary transferred to the new position. She has not been disciplined in the new position and she was allowed to continue working her compressed work schedule.

The grievant was reassigned based upon reverse seniority. The other secretaries who testified indicated that they did not want to bid on the Medical secretary position and Ms. Hathaway was the least senior secretary at the facility. The Employer contends that the reassignment is the true subject of the Union's grievance but the reassignment was affected by management pursuant to statutory right incorporated into the Master Agreement.

The Employer fulfilled the obligation to notify the Union and Ms. Hathaway of the reassignment and afforded the Union an opportunity to bargain over any impact and implementation concerns it had. Prior to the arbitration conducted on December 11, 2008, management met with the Union and agreed to meet and discuss impact and implementation issues. Despite the efforts by management to keep the lines of communication open, the Union continues to claim that the failure to negotiate impact and implementation is at the heart of the grievance.

At the re-meeting conducted on June 19, 2008 the Agency asked the Union what impact and implementation issues it wished to discuss. The issues of schedule and work place were noted at the June 19, 2008 meeting. The Agency confirmed that the

¹ On the day of this arbitration the temperature in Duluth was zero degrees Fahrenheit.

employee's compressed schedule would continue and the new office location would be the Health Services Department. The Union raised no other impact and implementation issues.

The Union was given adequate notice under the circumstances of the reassignment. The representation that **Article 3** of the Master Agreement was violated is not supported by the facts. The notice provisions specifically apply to "national policy issuances" and "locally-proposed policy issuances". The reassignment of one secretary is neither a national nor a local policy issuance.

The Institutional Supplement requires the Agency to provide thirty (30) days notice prior to implementing a change in starting and stopping times, but the Union reliance on the provision is misplaced. Ms. Hathaway's schedule remained the same. Hence, there were no changes in starting time or stopping time.

The Union was given reasonable notice under the circumstances. The Union had ample opportunity to bargain over impact and implementation concerns and did not raise any issues beyond the work schedule and the place of work. In fact, management repeatedly requested that the Union identify impact and implementation issues and the Union did not respond to the requests.

The Agency does not have an obligation to bargain with the Union over impact and implementation issues that affect one employee, because they have a *de minimus* effect on conditions of employment. In this case the effect is particularly slight because in the course of the reassignment, the employee was allowed to keep her compressed work schedule and has not received any form of discipline as a result of lack of training.

The claim that the Agency engaged in Nepotism in violation of **Article 24** is wholly without merit. At no time did Sherry Schappaugh work under the supervision of her husband. The Agency asked for a waiver and modified the proposed chain of command so Sherry Schappaugh would not be in the chain of command of her husband in an attempt to avoid reassignment of secretaries at the Duluth Prison Camp and to avoid violation of **Article 24**. When the waiver was denied, local management notified the Union promptly and made the necessary reassignment based upon reverse seniority.

The Agency asks that the grievance be denied.

OPINION:

Article 24 Section a. of the Master Agreement says:

There will be no prohibitions to the employment of a relative (including spouse) of an employee provided that:

1. there is no evidence of advocacy of employment, either orally or in writing. By the relative (including spouse) already employed; and
2. there is no situation created in which one relative is in the supervisory chain of command over the other.

In this grievance the sequence of events is significant. By looking at the events as they occurred, it appears that basic tenants of the collective bargaining agreement cited by the Union were treated more as obstacles to the accomplishment of the goal of transferring Sherry Schappaugh from USP Florence, Colorado to the Duluth Prison Camp, rather than as a framework to be used by the parties to accomplish the goal collaboratively.

Mr. Schappaugh had conversations with the Warden of the Duluth Prison Camp and ,while Mr. Schappaugh was discussing a transfer from ADX Florence, Colorado to the Duluth Prison Camp, he raised the question of a transfer for his wife with the Warden.²

Mr. Schappaugh was transferred from ADX Florence, Colorado to the Duluth Prison Camp in April of 2008.

Shortly after he arrived at the Duluth Prison Camp, Mr. Schappaugh had conversations with the current Captain's secretary and Ms. Hathaway, wherein he asked whether they were willing to move to a Medical secretary position. It appears that Mr. Schappaugh's inquiry was made in order to open up a secretarial position outside of his chain of command and close the one under his chain of command. The conversations, while limited, were prohibited advocacy under **Article 24** of the Master Agreement.

The transfer of Sherry Schappaugh from a Federal institution to the Duluth Federal Prison Camp was approved,³ despite the fact that the proposed position into which Mrs. Schappaugh was to transfer fell directly under the command of her husband. Although Mrs. Schappaugh's transfer was an issue raised prior to Mr. Schappaugh's transfer in April, a waiver was not sought until June 2, 2008. When the waiver was denied, the reassignment of personnel became an urgent matter in the eyes of Prison management. Once again the need to accomplish the change in assignments was viewed as paramount and notice to the Union was at best incidental.

² The substance of the conversation between Mr. Schappaugh and the Warden was not disclosed at hearing.

³ The transfer approval system was not explained at length in hearing. Hence, the specific person or persons who approved the transfer were not identified. Also, the criteria used to screen the transfer was not discussed.

There is “evidence of advocacy of employment” on behalf of Sherry Schappaugh by Mr. Schappaugh in violation of **Article 24, Section a. 1** of the collective bargaining agreement. The Union did demonstrate some evidence of advocacy. The level of involvement by Mr. Schappaugh can not be determined from the testimony and documents produced at hearing. The Union has not asked that the transfer be invalidated or reversed as a remedy nor is it clear that such a remedy would be appropriate in this situation.

The Union also established by a preponderance of the credible evidence that it did not receive appropriate notice of the reassignment of Ms. Hathaway. The Employer does have the contractual right to reassign. However, the impact of the reassignment is a proper subject of bargaining. In this situation, management should have given the Union more time to evaluate what impact the change would have on Ms. Hathaway and the position of Medical secretary. Ms. Hathaway was reassigned and her role established in the Medical secretarial position without any negotiations with the Union. Furthermore, the employee was initially drawn into a bargaining position without a bargaining representative. The reassignment of Ms. Hathaway was by no means an institutional emergency. Mr. Schappaugh’s short conversations with the Captain’s secretary and with Ms. Hathaway in April, regarding the Medical secretary position, are evidence of management’s early knowledge of the potential violation of **Article 24**. The Employer had ample time to notify the Union of the possibility of a reassignment, if the waiver was denied, and to negotiate impact and implementation issues.

Management’s claim that it gave the Union many opportunities to negotiate impact and implementation issues between June of 2008 and December of 2008 is well

taken. Regardless of the initial failure to notify the Union of the reassignment, management did establish that it was willing to negotiate impact and implementation. According to the parties, ground rules have been negotiated and some progress has been made on negotiations over working conditions.

The reassignment of Ms. Hathaway did have some negative impact upon her and the manner in which the reassignment took place was inequitable in violation of **Article 6 Section b. 2** of the Master Agreement. When the decision to transfer Sherry Schappaugh to the Duluth Prison Camp was made, it should have been clear that she would not be able to work in the line of command of her husband. Significant efforts were made beginning in April of 2008 and ending in June 2008 to accommodate the needs of Mr. Schappaugh and Mrs. Schappaugh. In contrast Ms. Hathaway's job reassignment took place over a period of less than one week. Multiple options including a waiver of the normal command structure were considered by management in order to accommodate Mrs. Schappaugh. Ms. Hathaway was told on June 17, 2008 that she was reassigned to a job she did not want from a job she liked very much, effective June 22, 2008. Ms. Hathaway was allowed to keep her compressed schedule. Even the initial meeting regarding the reassignment had to be repeated, because the Union had not been given notice prior to the June 17, 2008 reassignment. In order to treat Ms. Hathaway equitably, management and the Union must be required to negotiate over those issues that have had a negative impact upon her.

When Ms. Hathaway was reassigned to the Medical secretary position, the scope of her duties was unclear. Ms. Hathaway testified that she believed she was regularly called upon to perform work that was properly the work of others in her Unit. Clarifying

the work load and boundaries of work to be performed by the Medical secretary is a matter that needs to be negotiated. Similarly, the issues of cross training, leave time and a compressed work schedule need to be negotiated.

While Ms. Hathaway's compressed work schedule was allowed to continue, when she was reassigned, the parties did not negotiate the schedule for the position. There remains work to be done with regard to the compressed work schedule. As a consequence of the unfinished negotiations over the compressed work schedule, the Union asks that over time be paid to the grievant for hours worked in each day in excess of eight hours. Since the Employer offered in good faith to allow the grievant to work the compressed work hours in consideration of her needs, requiring the Employer to pay overtime due to the delay in formal negotiation would not be remedial and should not be a part of this arbitration award.

There were a number of contractual violations that occurred as a result of the transfer of Sherry Schappaugh from USP Florence, Colorado to the Federal Prison Camp at Duluth, Minnesota and the reassignment of Ms. Hathaway. The Union correctly identified the violations and management accurately described some of the issues as *di minimus*. However, Ms. Hathaway rightly claimed that she was not treated equitably in the process. Furthermore, Ms. Hathaway is now in the direct chain of command of Mr. Schappaugh, who did violate **Article 24** of the Master Agreement, although the extent of Mr. Schappaugh's advocacy is not known.

To remediate the problem the parties will be required to promptly enter into negotiations over any outstanding issues. An order assuring that Ms. Hathaway may continue work at the Duluth Prison Camp without fear of retaliation and with the

expectation that she will be able to pursue career advancement on an equal footing with all other employees will also be part of the remedy.

AWARD:

The Arbitrator finds that management violated Article 24 and Article 6 of the collective bargaining agreement, when Sherry Schappaugh was transferred from USP Florence, Colorado to the Federal Prison Camp Duluth, Minnesota and Cynthia Hathaway was reassigned to the position of Medical secretary from the position of Unit secretary.

The Arbitrator hereby orders:

- 1. Agency and Union to immediately negotiate to completion or impasse the issues that are listed in ground rules that were signed by the Agency and Union on December 8, 2008.*
- 2. That grievant maintain her current work station as long as she is assigned to Medical secretary and not be moved without a legitimate work related reason and prior notification to the Union;*
- 3. That employee Cynthia Hathaway be treated fairly and equitably and not retaliated against because of her involvement in the grievance.*
- 4. Negotiations over the scope of the Medical secretary position shall be conducted by the parties for the purpose of clarifying the duties of the Medical secretary and establishing work expectations and boundaries.*
- 5. That grievant will be allowed to receive training in cross development courses without any limitation due to her work assignment as Medical secretary.*

6. *That grievant will receive priority consideration for future secretary vacancies in her job series at FPC Duluth;*
7. *In addition at any time a qualified secretary is willing to exchange job assignments with Cynthia Hathaway, the Agency will not arbitrarily deny such request.*
8. *The Arbitrator will retain jurisdiction over the remedy herein.*

Dated: February 9, 2009

James A. Lundberg, Arbitrator