

**IN THE MATTER OF ARBITRATION BETWEEN**

**Counsel of Prisons Locals (AFL-CIO)  
American Federation of Government  
Employees Local 801, Waseca, Minnesota**

**And**

**United States Department of Justice,  
Federal Bureau of Prisons, Federal  
Correctional Institution, Waseca, Minnesota**

**Opinion and Award  
FMCS Case No. 07-52743**

---

**ARBITRATOR**

Joseph L. Daly

**APPEARANCES**

On behalf of AFGE, Local 801  
Aaron L. Martin, Esq.  
Martin & Kieklak  
Fayetteville, Arkansas

On behalf of United States Department of Justice,  
Federal Bureau of Prisons  
William E. Branch, Labor Management Relations Specialist

**JURISDICTION**

In accordance with the Master Agreement between Federal Bureau of Prisons and Counsel of Prison Locals, American Federation of Government Employees; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, D.C., the above grievance arbitration was submitted to Joseph L. Daly, arbitrator, on July 15 and July 16, 2009, in Waseca, Minnesota. Post Hearing Briefs were filed by the parties on September 10, 2009, and received by the arbitrator on September 14, 2009. The decision was rendered by the arbitrator on November 12, 2009.

**ISSUES AT IMPASSE**

The issue on the **merits** is:

Did the agency violate 5 USC §§5542 and 7116(a)(5)(8) and the Master Agreement articles 3, 4(a)(b) and 18, section P by selecting UNICOR Bargaining Unit employees to work UNICOR overtime rather than a non-UNICOR bargaining unit employee? If so, what shall be the remedy?

Prior to dealing with the merit issue, the agency also raised **two threshold/jurisdictional issues**. They are:

1. Was the grievance timely filed with in 40 calendar days of the alleged grievable occurrence in accordance with Article 31, Section d of the Master Agreement? If not, the grievance should be dismissed, if so;
2. Is the Union's pleading defective since it lacks sufficient notice regarding the names of the effected bargaining unit members and dates of the alleged violations? If so, the grievance should be dismissed. If not, then the issue should be dealt with on the merits. [Post-hearing Brief of Agency at 1].

**The Potentially Relevant Statutory and Contractual Provisions include:**

(1) 5 USC §5542 Overtime rates; Computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates:

(1) For an employee whose basic pay is at a rate which does not exceed the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to one and one-half times the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) For an employee whose basic pay is at a rate which exceeds the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law), the overtime hourly rate of pay is an amount equal to

the greater of one and one-half times the hourly rate of the minimum rate of basic pay for GS-10 (including any applicable locality-based comparability payment under section 5304 or similar provision of law and any applicable special rate of pay under section 5305 or similar provision of law) or the hourly rate of basic pay of the employee, and all that amount is premium pay.

(2) 5 USC § 7116(a)(5) & (8)

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(3) Master Agreement 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, where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

(4) Master Agreement 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 the parties implementing this Agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties.

(5) Master Agreement Article 7 – Right 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. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

(6) Master Agreement 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 member of the unit. Records will be retained by the Employer for two (2) years from the date of said record.

(7) Article 31 – Grievance Procedure

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

## **FINDINGS OF FACT**

1. On November 9, 2006, the Union filed a grievance alleging that the Superintendent of Industries (SOI) Michael Abbott bypassed all bargaining unit members other than those assigned to UNICOR when hiring overtime at the Federal Correctional Institute in Waseca, MN. The Union also alleged in its grievance that non-UNICOR bargaining unit staff were denied the option to sign up for UNICOR overtime and that this changed an established past practice. [Joint exhibit #2].

On December 8, 2006, the Agency responded by rejecting the Union's grievance for both "lack of specificity" and "timeliness" and advised the Union that the grievance also "lacked merit." [Joint exhibit #3]. On January 5, 2007, the Union requested arbitration. On March 7, 2007, the parties signed a Memorandum of Understanding on the UNICOR Overtime Procedures at the Federal Correctional Institute in Waseca, MN. [Agency exhibit #1].

2. Basically, the Union alleges that the Agency breached the terms of the Master Agreement, specifically Articles 3(c) and 7(b) by failing to provide the Union an opportunity to bargain before implementing a change in employment conditions [Post-hearing brief of Union at 1]. Superintendent Michael Abbott, alleges the Union, changed an established past practice before providing the Union an opportunity to bargain on the implemented changes in employment conditions. Also, the Union alleges, the Agency Article 18(p)(1) by not equally distributing overtime to all qualified bargaining staff. The Union contends that non-UNICOR officers are more than capable of assisting UNICOR staff with inmate supervision.

The Union also contends that the Agency “attempted to divert these violations with two threshold issues that are simply without merit.” The Union contends that the Agency’s breach of the Master Agreement resulted in a loss of earning potential for some non-UNICOR members of the bargaining staff. The Union is seeking the appropriate award of back-pay for the lost earning potential. [Id.].

The Agency contends that the Union’s grievance is defective “because their pleading fails to meet the minimum standards of sufficiency both procedurally and substantively.” [Post-hearing brief of Agency at 3]. The Agency contends that the Union failed to provide the Agency notice of how the laws, rules and regulations were violated, when they were violated and which staff members were affected. [Id.]. The Agency also contends that the grievance was filed in an untimely manner. The Agency highlights that the Union alleges the dates of violation as “April 2, 2005-present (this is an on-going violation).” [Joint exhibit #2]. The Agency contends that since the Union did not file the grievance until November 9, 2006, and because the Union has forty calendar days under the contract to file a grievance, therefore the grievance was untimely and should be dismissed in its entirety. [Post-hearing brief of Agency at 4].

The Union counters the threshold issues by noting that the purpose of a grievance is to provide notice to the other party of an allegation with sufficient information for the party to issue a response. There is no requirement that a grievance be detailed. [Post-hearing brief of Union at 2]. The grievance is not a legal pleading and only requires sufficient information for the Agency to respond. The Union grievance properly identifies the articles of the agreement being violated and identifies the nature of the violations. [Joint exhibit #2]. The Agency had enough information to issue a response. With regard to the forty day requirement, the Union highlights testimony from both the Union and the Agency that confirmed that the Agency’s violations did

not begin until October 2006. Superintendent Michael Abbott testified that the first alleged violation did not occur until October of 2006, and that the Union first contacted him about these violations in October 2006. [Transcript at 39]. Thus the grievance was timely filed within forty days of the alleged grievable occurrence and within forty days from the time the Union was aware of the occurrences.

3. UNICOR at the Waseca Federal Correctional Institution is the business name of the Federal Prison Industries. Prisoners who work in the UNICOR Factory at the Federal Correctional Institution in Waseca make athletic shorts for the Army, Air Force, and Marines. The prisoners can earn a salary. Michael Abbott, Superintendent of Industries and Education and supervisor of the UNICOR factory testified that it is a business and there are strict specifications and expectations for the product the factory produces and delivers. UNICOR Bargaining Unit members are trained in the specifications of the factory, know how to change needles, know how to get in to the computer and essentially know how to maintain the production. Non-UNICOR Bargaining members do not know how to fix machines which are “acting up,” do not know how to use the needles, do not know how to adjust the thread tension and do not know how to lower the number of stitches per inch to speed or lower the production rate. Basically, the non-UNICOR Bargaining Unit members when they worked overtime shifts in the factory were used essentially for guarding the prisoners.

4. Mr. Abbott became the Superintendent of Industries in April 2006. Prior to April 2006, Mr. Bill Joenks, Union President, testified that in 2004 he and Debbie Swates, the prior Superintendent of Industries, negotiated and orally agreed to terms when assigning overtime in the UNICOR Department. Mr. Joenks testified that the oral agreement was that if management needed two officers to work an overtime shift in the UNICOR Department, one of the officers would be a UNICOR staff member and the other officer would be a non-UNICOR staff member.

On October 13, 2006, Mr. Joenks and Mr. Abbott met in response to Mr. Joenks request that they discuss why non-UNICOR staff members were not being offered overtime in the UNICOR Factory. Mr. Abbott sent a memo to Mr. Joenks dated October 19, 2006, stating in applicable part:

On Friday, October 13, 2006, we discussed the UNICOR factory’s assignment of overtime. I have researched the factory’s past practice and have learned that assignments to UNICOR factory overtime has been made

from periodic timeframes that both UNICOR staff and non-UNICOR staff would sign up for a minimum of one UNICOR employee present.

This practice does not efficiently serve the needs of the factory in meeting production quotas and in resolving issues related to the manufacturing process during non-regular hours. Review of the Master Agreement, Article 18, section p1 states “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...” While the ability to supervise inmates is one of the qualifications of a UNICOR factory worker, there are many other qualifications, i.e., knowledge of production techniques, interpretation and management of quality and production standards, knowledge and training of all production equipment, etc. [Joint exhibit #5].

5. “The Agency believes the relevant time frame for this grievance is from October 10, 2006, until October 20, 2006. Mr. Abbott arrived at FCI Waseca in April 2006 and did not hire overtime in UNICOR until October 10, 2006 [Testimony of Michael Abbott] the only time period that UNICOR hired more than two staff to work overtime was from October 10 to October 20, 2006. [Id.]. The Agency contends that the hiring was in accordance with article 18, section p in that “qualified members of the bargaining unit” received first consideration for the overtime assignments. The Agency contends that only UNICOR staff are qualified to work overtime in the UNICOR factory.

The Union contends that both past practice and article 18, section p1 allow for non-UNICOR staff to be considered as “qualified” in that “inmates were already well trained in production and did not require much instruction from the UNICOR staff.” [Post-hearing brief of Union at 9]; UNICOR staff were “just sitting there watching the floor” [Id. at 9] “non-UNICOR employees are qualified to work overtime in the UNICOR factory when there is another UNICOR staff present.” [Id. at 8].

6. Factory manager Jorge Diaz testified regarding non-UNICOR staff working overtime, “It does nothing for the product or for-it-it just creates more work for the UNICOR person, because the non-UNICOR staff is not able to actually help out on the production, where- where the need is, where we are investing all that time and we’re investing that dollar in order to get that productions out...I mean the non-UNICOR staff doesn’t have the knowledge of the contracts, the specifications, the tolerances and what can be worked, what cannot be worked or what needs to be scrapped or what-what, you need to save. So it’s difficult.”

7. The Union alleged that non-UNICOR bargaining unit staff were not allowed to sign up for overtime in UNICOR. Factory manager Jorge Diaz testified he sent out emails to all bargaining unit staff advising them there would be overtime in UNICOR. Additionally the Union also put out emails to bargaining unit members regarding UNICOR overtime. [Agency exhibit #2].

8. Since March 6, 2007, AFG Local 801 and Federal Correctional Institute, Waseca, MN, have signed a Memorandum of Understanding involving UNICOR overtime procedures. There is now a specific procedure designated in writing for when management determines it is necessary to hire overtime for UNICOR. "Overtime will be made available to qualified bargaining unit staff as outlined in the Master Agreement." [Agency exhibit #1].

## **Decision and Rationale**

### **Threshold issues**

**A. Was the grievance timely filed within forty calendar days?** Testimony from both the Union and the Agency confirmed that the alleged violations did not begin until October, 2006. Superintendent Michael Abbott testified that the first alleged violation did not occur until 2006 and that the Union first contacted him about these violations in October 2006. Union president Bill Joenks confirmed that he was first notified of a violation in October 2006. The grievance [Joint exhibit #2] was filed on November 9, 2006, within the forty days of the alleged grievable occurrence. Therefore, the grievance was timely filed in accordance with Article 31-Grievance Procedure section d of the Master Agreement.

**B. Did the grievance lack specificity?** The grievance filed on November 9, 2006 is a two page document describing sufficient information for the Agency to respond. A grievance is not a legal pleading and simply requires sufficient notice and information to allow the employer to respond. The Union's grievance properly identifies the articles of the agreement being violated and identifies the basic nature of the violations. [Joint exhibit #2]. There is no requirement in the contract that the grievance be detailed with a high degree of specificity. "A general presumption exists that favors arbitration over dismissal of grievances on technical grounds." [Elkouri & Elkouri, *How Arbitration Works Sixth Edition* at 206 (Bureau of National Affairs 2003) citing *Rodeway Inn*, 102 LA 1003, 1013 (Arbitrator Goldberg 1994). If "the parties collective bargaining agreements contain specific language and requirements regarding the filing of

grievances, arbitrators will deny a grievance where the procedure is not followed.” [Id.] But the Master Agreement does not require exact, specific nor precise language for filing a grievance. The Agency was given fair notice of the facts and the alleged contractual violations. Therefore, the grievance will not be dismissed for lack of specificity.

### Merits

**C. Did the Agency violate the Master Agreement?** The Union contends that past practice and an oral agreement between Union president Bill Joenks and former Superintendent of Industries Debbie Swates was that if management needed two officers to work an overtime shift in UNICOR department, one of the officers would be UNICOR staff and the other officer would be non-UNICOR staff. Mr. Abbott in his October 19, 2006, memo to Mr. Joenks stated “I have researched the factory’s past practice and have learned that assignments to UNICOR factory overtime has been made from periodic time frames that both UNICOR and non-UNICOR staff could sign up for with a minimum of UNICOR employee present.” [Joint exhibit #5] But Mr. Abbott testified that even if this was “past practice” it changed when he became Superintendent of Industries in April 2006. Why? Mr. Abbott testified that the Master Agreement Article 18, section p contains the relevant language: “qualified members of the bargaining unit will receive first consideration for these overtime assignments.” Mr. Abbott testified that non-UNICOR members were actually “non-qualified staff”. “They don’t know how to adjust the strength-the thread tensions, replace needles, that kind of thing. They –they don’t know what the specs are per the contracts for what this is, how is this product supposed to be made, what are the tolerances, and what do we have to meet in order to make a quality product going out. Additionally, they don’t have access into our computer system to be able to log in the information as to this material moved from point A to point B. They can’t look up whether there is additional materials that need to come in because you might be running out of stock. There’s just a plethora of things that the production foreman needs to do while he is doing –during the day, and its even magnified on the overtime, because overtime is premium pay for the inmates. Average production is not an expectation; high –higher levels of production is expectation on overtime.” [Testimony of Mr. Abbott].

The only time this grievance applies is between October 10-October 20, 2006. During that time, Mr. Abbott did not violate Article 18 of the contract. He chose “qualified” staff

members to work the overtime positions. The fact that the previous Superintendent of Industries allowed non-qualified people to work overtime in UNICOR does not set a past practice.

The Union's grievance is denied. The Agency did not violate the Master Agreement and followed proper overtime procedures. The Union's grievance and the requested remedies are denied. The Agency did not violate the Master Agreement.

November 12, 2009  
Date

Joseph L. Daly  
Arbitrator