American Federation of Government Employees, Local 1923 and Social Security Administration

101 FLRR 2-1033

August 31, 2000

Appealed (O-AR-3358)

The Arbitrator found the grievant was not given a chance to participate in an overtime project and ordered the agency to estimate the average overtime worked by others on the project and pay the grievant back pay in that amount.

The Agency had a shortage of Benefits Authorizers and offered BA work as overtime for higher level Claims Authorizers. The Union was not notified of the CABA overtime project and demanded to bargain. The Union and the Agency reached an agreement on the CABA overtime. The grievant filed a grievance that he had been improperly denied the opportunity to work CABA overtime. The Agency denied the grievance saying the grievant was not qualified for CABA overtime. The grievance went to arbitration. The Union argued that CABA overtime should have been offered and given in a fair and equitable manner under the agreement. The Agency stipulated that the grievant was qualified for CABA overtime, but the he did not volunteer for CABA overtime. The Arbitrator found the grievant was not given the chance to participate in the CABA overtime project. The Arbitrator ordered the parties to estimate the average time worked by other CABA overtime participants and to pay the grievant back pay of that averaged amount. The Arbitrator also granted reasonable attorney's fees to the Union.

Arbitrator: Hugh D. Jascourt

DECISION AND AWARD

This is an arbitration pursuant to Articles 24 and 25 of the National Agreement (Agreement) between American Federation of Government Employees, Local 1923, AFL-CIO (Union) and the Social Security Administration (Agency). Arbitrator Hugh D. Jascourt was selected by the parties from the panel maintained by them under Article 25 of the Agreement. A hearing was held on June 15, 2000 at the offices of the Agency. At the hearing each party was afforded an opportunity to present witnesses and evidence, and to examine and cross-examine witnesses. At the hearing the Union produced seven witnesses, including two rebuttal witnesses while the Agency relied on a single witness. The parties submitted three joint exhibits and the Union submitted seven exhibits

admitted into evidence while the Agency submitted none. A transcript of the proceedings was made, The parties agreed to submit post-hearing briefs to be postmarked by August 1. 2000. This was not recorded in the transcript. Due to a misunderstanding by the Agency it did not submit its post hearing brief until August 4. 2000 accompanied by an attestation that the Agency had not read the Union's August 1, 2000 submission prior to submitting its own brief The Agency brief was received by the Arbitrator on August 5. 2000. The first five pages of the brief were not received by the Arbitrator but were faxed to him on Saturday, August 5, 2000. Under the circumstances, the briefs are viewed as timely filed and an award in this matter is due no later than September 5, 2000.

Prior to the filing of the briefs, Agency's counsel contacted the Arbitrator and requested consent to file additional exhibits due to circumstances which impaired her ability to submit them at the hearing. The Arbitrator acknowledged the circumstances cited, but advised the Agency's counsel that he would accept the exhibits only upon a stipulation by the Union of their validity and the truth of their contents. The Arbitrator further advised her that if the Union would not so stipulate, he would consider a motion to reopen the hearing for the limited purpose of the admission of such exhibits, including allowing testimony relevant to both their admissibility and their contents.

The Agency post hearing brief contained three "attachments" which it cited and relied upon in its brief, but no stipulation accompanied them. The Union in its brief indicated its opposition to the authenticity of the attachments, their factual accuracy, "or any other matter regarding the documents" (Union Br. p.2) and cited a memo fTom the Union to the Agency - which was not submitted to the Arbitrator. The Agency made no motion to reopen the hearing.

Accordingly, the Arbitrator does not accept the admission of the three attachments. However, the Arbitrator would be remiss in not disclosing that the three attachments are not relevant to the final outcome. Two identify "proor'of Grievant's ineligibility to participate in the project in issue. As will be discussed more fully below, the Agency stipulated that the Grievant's eligibility was not a matter to be determined by the Arbitrator. The third "attachment" was an affidavit-like statement by Wanda Arrington, the Agency's sale witness, dated June 8, 2000 obviously prepared in anticipation of the hearing. Since Ms. Arrington testified at the hearing, the Arbitrator can not conceive of any basis for the admission of her written statement even if it had been submitted at the hearing. Moreover, the purpose of the statement purports to be testimony without being subject to cross-examination.

Preface

The Grievant became a Claims Authorizer (CA) in 1991 after having been a Benefits Authorizer (BA) or BA Technician since 1978 (Tr. p.75-76). Wanda (June) Arrington, a Deputy Division Director in the Office of Disability Operations

(ODO) came up with the concept of using the higher graded CAs to do BA work on overtime while there was a shortage of BAs during a period of extremely high BA workload (Tr.p.117). The work to be done was essentially data entry (Tr. p.33). This became known as the CABA project which began around April 1998 (Tr. p.61). However the Union was not given written notice of the announcement of the CABA project (Tr. P. 123). Berdina Chandler, Second Vice President of the Union and a member of the Office of Central Operations (OCO) Partnership Council made a demand to bargain on the Project (Tr.p.56). The OCO Partnership Council reached agreement (MOU) on September 18, 1998 (Tr. p.56, Union Ex. 1). Paragraph 5 provides in pertinent part:

> A CABA (A CA selected for the project) will be offered Overtime when BAs are offered overtime, even if CAs are not offered overtime during that period.

Article 10, Section E2 of the Agreement provides that overtime will be offered to employees on an equitable basis in accordance with a roster established under Paragraph I of Section E (Jt. Ex.1, Union Ex.7). Every one who asked to participate in the CABA project was allowed to do so

(Tr. p.40).

The Grievance

On February II, 1999 the Grievant filed a grievance that he had been improperly denied the opportunity to work BA overtime, citing among other provisions Article 10 of the Agreement. Among the relief requested was the immediate opportunity to work BA overtime. The Step 1 grievance was denied on the basis "the relief is outside my jurisdictional authority" and no reason was stated for denial at Step 2. At Step 3 the Agency denied the grievance on the basis that the OCO Partnership Council, in addition to the MOU reached, by consensus vote determined that only those CAs who held positions working BA workloads within the last five years, prior to the signing of the Agreement, would be eligible to participate in the project.

The denial concludes that since records show that Grievant had last held a position working a BA caseload on April 21, 1991, Grievant was not eligible to participate in the CABA project (Jt. Ex.2).

The Union invoked arbitration on June 17, 1999 Jt. Ex.3). There is no record of any allegation of untimeliness or any claim the grievance is not grievable or is not arbitrable.

The Issue

A. Agreement of the Parties

At the hearing the parties agreed that the issue before this Arbitrator is:

> Did the Agency not afford the Grievant the opportunity to work available overtime in the Claims Authorizer/ Benefits Authorizer (CABA) Project from September 28, 1998, to June 1999? If so what should the remedy be? (Tr. pp.9-15)

B. Stipulation

The Agency in its opening statement stated "the reason the Grievant was not part of this project was based on the Grievant's own request" (Tr. p.24). When the Arbitrator questioned whether the Agency was dropping its argument that the Grievant was denied participation because he was ineligible for the CABA project, the Agency stipulated that had Grievant volunteered for the CABA project he would have been allowed to have worked overtime (Tr. p.25-27). Because this stipulation was put together in fragments, that Arbitrator advised the Union it did not need to get into the Grievant's prior qualifications because the issue was narrowed down to what the Grievant did or needed to do to make himself available or what the Agency did or failed to do (Tr. pp.27-28). The Arbitrator did so to avoid the introduction of evidence not related to the issue and to ensure that he properly understood the Agency to be claiming it never denied Grievant the opportunity to work on the CABA project. The Agency said nothing at that point or later during the hearing to rephrase or alter its stipulation.

Positions of the Parties

The Union1

This dispute is about the universe asked to participate in CABA overtime, how the request was made and by whom it was received. The evidence shows Grievant was not solicited or even given the opportunity to perform CABA overtime. It also shows that Grievant would have volunteered if asked to do so.

In addition, Article 10, Section E provides in a situation of "open overtime", that the overtime be offered and distributed in a fair and equitable manner. Ms. Arrington admits that this was an open overtime situation. Therefore, the Agency was obligated to offer the overtime to Grievant.

The Agency

Grievant was properly notified of the Project. E-mail was sent to the modules and the divisions asking for volunteers. "The modules were to inform the CAs of the criteria and then solicit for volunteers" (Br. p.4). Training of the volunteers was necessary because of changes which had taken place in the system applicable to the claims being processed. Grievant did not volunteer for the project or to

participate in the two-day training for it. The Grievant spoke to no one with the authority to turn him down or to allow him to volunteer in the middle of the project.

Grievant asked to be excused from participation in the CABA Project. The Grievant and his representative, Jan Shpeigelman, came to discuss with Ms. Arrington pressure Grievant was getting from his mod manager to work on the project and that Grievant did not want to participate in the Project because it would damage his CA job and he did not remember enough about the BA job. He also indicated he did not meet the criterion that to participate he had to have performed BA work in the past five years. Ms. Arrington told Grievant he was excused and so advised Grievant's supervisor.

In addition, "it was management's right to determine that recent experience on particular projects distinguished the Grievant from the volunteers selected for CABA overtime and was a necessary qualification for the project" (Br. p. 14), Also, it is well settled that management has the right to determine the qualifications for working overtime, Only CAs who had previously worked as a BA in the past five years were permitted to work CABA overtime. This is not inconsistent with the Agreement. Moreover, "the Agency concedes that the grievant was not allowed to volunteer for CABA overtime during the period October 1, 1998 until June 26,1999 because the CABA project had been in process since April of 1999" (Br. p. 1 9). There was overtime for Grievant to work overtime as a CA, but Grievant was not qualified to perform CABA overtime,

Furthermore, "the grievance depends significantly on the credibility of the witnesses" (Br. p.20). The Agency witness was entirely credible while the Union witnesses were not credible,

Union Position on Grievant Opting Out of CABA

This defense was not raised prior to the hearing. Ms. Arrington was asked by Program Analyst Bob Harmon, a coordinator of the CABA project to whom Grievant complained about being excluded from CABA, what she said to Grievant. Her reply was that Grievant was not qualified to do the work. She made no mention of Grievant saying he wanted to opt out.

DISCUSSION AND ANALYSIS

1. Effect of the Stipulation

As stated above, the Agency stipulated that had Grievant volunteered to work on CABA he would have been accepted into the Project and allowed to have worked CABA overtime.

Nevertheless, the Agency now argues that it had the right to determine who was qualified for the CABA project. That is not an issue before the Arbitrator. The Agency stipulated that had Grievant volunteered, he would have been allowed to work CABA overtime. The Agency's point about its exclusive right is anomalous in view of the claim by the Agency that the Partnership Council agreed on the qualifications standard,

The Agency now argues that Grievant was not qualified to perform the CABA tasks because of the time which elapsed since he last did BA work. This argument is contrary to the Stipulation.

The Agency now argues for the very first time that the Grievant was ineligible to participate in the CABA project because he did so after the project began in April 1998. Not only will the Arbitrator not accept a defense of which the Union had no ability to be aware of, the Stipulation gave no hint of the timeliness of Grievant's volunteering being an issue to which testimony and evidence should be addressed. The stipulation, in contrast, is that Grievant would have been allowed to work CABA overtime. Moreover, in its opening statement - which was not recanted during the hearing - the Agency proclaimed it never denied Grievant the opportunity to work overtime on CABA.

These arguments may be consistent with the Agency's Step 3 response, but the Agency cannot shift gears again when it has affected the focus of testimony and evidence present at the hearing. That focus was based on the Agency's stipulation which removed the Grievant's qualifications as an issue. The Agency's only witness was to show that Grievant opted out of CABA.

2. Did Grievant Request to Opt Out of CABA?

Grievant maintains that not only did he not request to opt out of CABA, but that he did not meet with Ms. Arrington on this subject (Tr. p. 162). He states he did meet with her pertaining to the timing of when he was to take training in recovery (Tr. p93).

In contrast, Ms. Arrington testified that Grievant never spoke to her about recovery training but specifically requested to stop his supervisor from pressuring him to participate in something he did not want to do and for which he was not qualified (Tr. p. 120).

The Agency is correct in that there is no way to reconcile these disparate accounts and that a credibility finding must be made.

Mr. Harmon's testimony tends to show that Grievant did meet with Ms. Arrington about CABA, By Mr. Harmon's account she did not say "What meeting?" She stated that Grievant was not eligible for CABA (Tr.pp.148-149). At the same time if the crux of her discussion with Grievant was that he was being forced to do

something he did not want to do, she would have told Mr. Harmon that she got the supervisor off Grievant's back.

In fact, it was just this context that prompted the Arbitrator to question what she did after her meeting with Grievant. It was only after the Arbitrator made it clear that he was trying to ascertain whether she contacted Grievant's supervisor and, if so, what she said, that Ms. Arrington made a conclusionary statement she talked to the supervisor. This was not accompanied by anything but that broad brush statement (Tr. p. 132). Agency counsel did engage in redirect examination and despite the Arbitrator indicating that Ms. Arrington's response was critical to the case, no questions were asked of Ms. Arrington to amplify or explicate her statement to give it enough substance to be subject to verification (Tr. p. 133 et seq.)

It is not believable to this Arbitrator based on both the response to him and to Mr, Harmon that Grievant asked to be excused from CABA. In fact, Grievant asking to be excused is inconsistent with the totality of the circumstances. Grievant came to Mr. Harmon seeking to be placed on the Project and expressed that the 5-year criterion was unfair(Tr.pp.146-149)- It is obvious that Grievant desired to be on the project and was not seeking a way to be excused from it. Mr. Shpiegelman also confirmed Grievant's unhappiness with the five-year criterion (Tr.p. 157). There is nothing otherwise in the record which would refute the testimony of Michael Moynihan that "the Grievant was begging to work overtime, not declining the opportunity" (Tr. p.46).

In summary, in the absence of Ms. Arrington's testimony. it is not believable that Grievant asked to be excused from the project. There is nothing to show that Ms, Arrington did anything consistent with a request by Grievant to not be forced into volunteering Her response to the Arbitrator and Mr. Harman are convincing to the arbitrator that Grievant did not ask her to be excused from the project.

3. Did the Grievant volunteer to be on the CABA Project?

Since Grievant claims he did not meet with Ms. Arrington to volunteer for the CABA overtime, there is nothing in the record to substantiate that he did volunteer. Since the issue agreed upon by the parties is whether Grievant was afforded the opportunity to "volunteer", Grievant's failure to volunteer is not dispositive. The dispositive question then is whether Grievant was afforded the opportunity to volunteer.

4. Did the Agency Afford Grievant an Opportunity to Work CABA Overtime?

The Agency tried to portray a picture of all CAs being notified of the CABA Project and then going to their respective supervisors and relies on Ms. Arrington's testimony to support this (Tr. P. 118, Br. p. 5). In other words, the Agency appears to liken the process to applicants responding to a vacancy

notice. However, Ms. Arrington, upon cross-examination, testified that management was trying to limit volunteers to those who had been BAs within the past five years because they felt those exceeding that limit might not really remember enough to be effective (Tr. pp. 121-122). This is consistent with Mr. Harmon's testimony that he sat in on "initial meetings to determine criterion for what CAs we would ask to volunteer from" (Tr. p.145). He later affirmed that those asked to volunteer were those CAs who had had BA experience after January 1993 (Tr. pp. 152-153).

Grievant asserts he was never given the opportunity to volunteer for CABA (Tr. p79). Given the fact that the Agency was asking only certain CAs to volunteer and the category of CAs it asked was intended to exclude him, Grievant's testimony was credible. Therefore, Grievant was never given the opportunity to volunteer for CABA.

Mr. Harmon in August or September 1998 did advise Grievant to speak to Ms. Arrington (Tr. pp. 144-147). Grievant did not do so (Tr. p.94). He convincingly stated he felt it would be "moot" to do so (Tr. p. 167). However, the Agency in its brief "concedes" that Grievant would not have been allowed to participate in CABA because the project had already begun in April (Br. p. 19).

What this means to the Arbitrator is that once the Agency never solicited Grievant to volunteer, he was never given the option to participate. In view of the five-year criterion, even had Grievant volunteered at the onset of the Project, it is clear he would not have been accepted -notwithstanding the stipulation by the Agency. There is no evidence that the Agency allowed anyone who did not meet the five-year criterion the option to participate. Grievant cannot be required to have engaged in what he could have reasonably perceived to be a futile act,

Finally, there is no claim by the Agency that there was not adequate CABA overtime work for others. In fact, Ms. Arrington testified that there was "plenty" of overtime work (Tr. pp. 140-141).

Conclusion

The very wording of the issue agreed to by the parties - did the agency not afford the Grievant the opportunity to work available overtime in the CABA Project - when combined with the Stipulation by the Agency that Grievant would have been allowed to participate in CABA - must necessarily imply that at the hearing the Agency agreed Grievant was qualified to perform the overtime work. Otherwise, the issue before the Arbitrator would have included whether the Agency, under the circumstances, was entitled to establish the eligibility of CABA and whether Grievant met the appropriate qualifications. This was not the issue.

It is in this specific context that Article 10, Section E2 applies: overtime will be offered to employees on an equitable basis. As discussed above, CABA overtime was not offered to Grievant. Grievant never had a meaningful opportunity to "volunteer" for CABA. Grievant did not seek to be excused from performing CABA overtime work. The evidence shows Grievant would have "volunteered" had he had a meaningful opportunity to do so. And, as stipulated, the Agency would have accepted him as a volunteer.

Remedy

1. Back Pay

Were it not for the Agency's unlawful abrogation of the Agreement by not affording Grievant the opportunity to work overtime on the CABA Project, it is clear - after full consideration of the testimony, evidence, and arguments of the parties as well as applicable case law - that Grievant would have accepted, if asked, overtime work an the CABA Project.

The question remains how many hours is that? Grievant claims he would have worked 202 hours based on computations that would exclude hours he worked other overtime (See Union Ex, 4, 5, 6; Tr. pp.80-90). It appears that these computations contemplate Grievant working all available overtime which would have been offered to him under CABA, excluding hours he otherwise worked overtime. It does not seem reasonable that circumstances would have allowed Grievant to have do so. The purpose of back pay is to make Grievant whole without giving him a windfall benefit.

The only fair way to estimate what overtime Grievant would have worked is to compare him to what others on CABA worked. Accordingly, the Arbitrator directs the parties to arrive at such a computation based on average, mean, or what other mathematical equation they agree is appropriate and to pay Grievant that sum, with interest. The Arbitrator shall retain jurisdiction over the amount of back pay in the event that the parties cannot reach agreement or if upon a petition of a party that the opposite party has taken excessive time in reaching such agreement.

2. Other

The MOU, Paragraph 6 (Union Ex, 1) provides that CABA participants will receive a Letter of Commendation for their 7B Ext. File. Although the Union has not requested such, in order to make Grievant whole, offsetting his improper preclusion from CABA, Grievant shall receive the same Letter of Commendation given to CABA participants.

3. Attorney Fees

In view of the unjustified personnel action of the Agency in denying overtime to Grievant as fully described above it is in the interest of justice to award reasonable attorney fees incurred by the Grievant to make him whole. The Arbitrator directs the Agency to pay to the Union reasonable attorney fees within 30 days after this Award has become final and binding and the Union has submitted to the Agency appropriate documentation of such fees. Since an attorney is not needed to ascertain the amount of back pay in accordance with Paragraph 1 above, attorney fees shall not be applicable to such matters subsequent to the filing of briefs -unless that matter is referred back to the Arbitrator. Attorney fees shall be made payable to the Union's Legal Defense Fund.

The Arbitrator shall retain jurisdiction over the amount of attorney fees in the event that the parties are unable to reach agreement on the sum due.

AWARD

Consistent with the foregoing, the Arbitrator finds that the Agency has unlawfully denied Grievant participation in CABA overtime. Consequently, the Agency shall make Grievant whole by providing him back pay, with interest, in accordance with the Remedy section set forth above and a Letter of Commendation to be placed in his 7B Ext. File and by paying his reasonable attorney fees incurred to obtain such back pay.

Hugh D. Jascourt
Arbitrator
August 31, 2000

FN1Since the Union argument relating to the Agency's argument that Grievant requested to not participate in the project cannot be understood without first setting forth the Agency position, that portion of the Union position will be set forth after the Agency's position,