



# NATIONAL BORDER PATROL COUNCIL

## LOCAL 2266

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

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February 24, 2014

John C. Pfeifer  
Chief Patrol Agent  
Swanton Sector

***Re: Union Initiated Grievance / Unjust Denial of Official Time***

Chief Pfeifer,

This document constitutes a Union Initiated Grievance (UIG) in accordance with Article 33 F of the *Collective Bargaining Agreement between the National Border Patrol Council and Immigration and Naturalization Service* (CBA). NBPC Local 2266 Union Representatives have been denied the use of Official Time (OT) based on Swanton Sector management's unilaterally implemented standards, which management claims is derived from an arbitration award referred to as the "Massey Award" (FMCS No. 00-13188-A). In addition, management is improperly but repeatedly using "manpower" to justify their decisions to deny advanced OT requests. The Union believes that the new restrictions are in violation of the CBA, including but not limited to Article 2, Article 6, Article 7, Article 28, and the local agreement reached in the November 7, 2013 meeting that resulted in the signed agreement between Local 2266 and Swanton Sector management dated December 18, 2013. Swanton Sector is also in violation of recent arbitration decisions and Federal Law specifically 5 U.S.C. § 7131(d), 5 U.S.C. § 7102 and 5 U.S.C. § 7116.

OT is needed by Union representatives in order to carry out their duties and adequately represent the bargaining unit employees and their interests. OT is the foundation of all of the Union's activities and responsibilities. Without OT, grievances cannot be filed, complaints cannot be investigated, precedents and authorities cannot be researched, and the result is that the needs of the employees cannot be met or even addressed by the Union. Bearing in mind that the Federal Service Labor-Management Relations Statute "FSLMRS" states that labor organizations are in the public interest, that interest is undermined when the ability of the Union to represent the employees is thwarted by the Agency.

**I. SUMMARY OF FACTS:**

On November 7, 2013, Local 2266 leadership met with Swanton Sector management to address a number of open grievances that had been filed by the Union. Present at this meeting were

National Border Patrol Council (NBPC) Vice-President Jon Perkins, Local 2266 President Christian Porras, and Vice President Sean Walsh. In attendance on behalf of Swanton Sector management were Chief Patrol Agent (CPA) John Pfeifer, Deputy Chief Patrol Agent (DCPA) Mark Butler, and Operations Officer Raulan Masada.

Among the open Union grievances addressed at the November 7 meeting were two Step I grievances concerning the denial of OT at the Beecher Falls, Vermont and Newport, Vermont Border Patrol Stations. To partially remedy the Step I Grievances, Swanton Sector Management agreed to, i.) Provide a six-month extension to the Union's right to pursue the Step I grievances as Step II grievances, ii.) Return annual leave to Local 2266 representatives who were forced to use annual leave due to unlawful OT denial, and iii.) Agree that,

OT should not be denied for any reasons other than needs of the service or the agency has evidence of abuse regarding the use of OT by the Union Representative. Union Representatives will be reasonable with the request of OT and provide sufficient justification for time requested as per the CBA. Management will make every reasonable effort to approve OT requested by the Union Representative.

Following the November 7, 2013 meeting, in an effort to provide the Agency with more information in field 6, "Activity Performed" on Form G-95, the Local 2266 President advised the stewards to be more specific in field 6. Instead of merely stating "Article 7 A.4", state the specific subsection and attach the corresponding language of that subsection in field 6 of the G-955. For example, if a steward was planning to respond to an Agency change of work condition notification ("3A notification"), the steward may place,

"Article 7.A. (e). Review of and response to memoranda, letters, and requests from the Employer, as well as review and dissemination of instructions, manuals, and notices which affect personnel policies, practices, or working conditions."

The Union added this restriction to their stewards' OT requests as a good faith effort to abide by the recent agreement between Local 2266 and Swanton Sector management. Initially, the Agency seemed to accept the updated G-955s during the time period following the November 7, 2013 meeting until sometime in mid-January 2014. Union stewards experienced no denials of OT using the system described above over this period.

One example of the Agency's agreement with the Union's more thorough reporting system is exemplified as follows. On December 4, 2013, Deputy Patrol Agent in Charge (DPAIC) Daniel Doty approved an OT request by Local 2266 representative Matthew Emrich. Representative Emrich requested OT as per Article 7.A.4. (a). In addition to the relevant article and sub-articles of the CBA, Representative Emrich also pasted the language cited in Article 7.A.4.(a) of the CBA to explain the nature of his activities.

Investigation, preparation, and representation in regard to discrimination complaints and appeals; informal employee or labor-management complaints; unfair labor practice complaints; grievances/arbitrations under the negotiated grievance and arbitration procedure; and statutory appeals.

Representative Emrich's OT request was approved and Representative Emrich was granted the desired OT. Representative Emrich did not include an explanation of the specific task(s) that he intended to perform, merely the general summary of Article 7.A.4. (a) of the CBA. Interestingly, the DPAIC advised Representative Emrich that, "...the explanation does not have to be that long on the form. Short explanation like "investigation & prep" or "representation" or similar is good enough for me."

On January 22, 2014, President Porras requested clarification from Operations Officer (OO) Julie Dutton, Swanton Sector Chief's designee, to explain why Beecher Falls Station began to deny OT requests. Ms. Dutton answered President Porras's query by reporting in an email dated January 22, 2014 that, "...the G-955s were lacking sufficient information as to the purpose for official time. The G-955s will continue to be disapproved until there is sufficient purpose listed as per the agreement you made in the meeting with CPA Pfeifer." To define the Agency's determination of what it finds "reasonable" information, OO Dutton referenced pages 24-25 of the "Massey Award" (FMCS No. 00-13188-A). This was the first time that the "Massey Award" was named as a standard for what information would need to be provided in field 6 of Form G-955 for approval of OT.

On February 1, 2014, Union Representative Emrich sent, via email to PAIC Sean Mcvey and O.O. Dutton the Union's position regarding the newly applied standard of exclusively using the "Massey Award" as the guideline to approving OT requests. Union Representative Emrich stated in part, "In particular is the Hernandez case in Yuma Sector, which specifically addresses the documentation of Union activity in block 6 of the 955. I have attached the ruling and would draw your attention to pages 20-23 where the arbitrator agreed with the Union that simply stating which section of Article 7 of the CBA and the appropriate activity performed is more than sufficient documentation for the Service's needs."<sup>1</sup>

In response to Union Representative Emrich, PAIC Mcvey sent an email on February 3, 2014 stating, "Your G-955 is denied again because of insufficient information regarding the activities being performed."

In addition, on February 3, 2014, O.O. Dutton sent an additional email to Local 2266 President Porras that inaccurately stated, "As you know, the Hernandez case which Mr. Emrich cites in the attached word document is not what was agreed upon between Union and Management. Union presented the Massey award decision to management in regards to the 955 submission. As a result of the presentation of the Massey award by the Union, management agreed with the local Union including the National Union Vice President, more information than citing the letter of a-h of article 7A4 of the CBA needs to be provided in block 7 of the G-955. The agreement was made specifically citing the Massey case in the meeting as to how the 955 would be filled with the reason for the official time use. In concurrence with the agreement Union made with Management, the Union is to provide Management enough information to make a determination to approve or deny official time without specifying the "meat and potatoes" of the official time use. As I have mentioned previously, the G-955s will not be approved until the Union follows through with what you agreed upon in specifying the reason for the official time. Ensure your stewards are aware of this."

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<sup>1</sup> Union Representative Emrich is referring to the Award by Arbitrator Eggert, FMCS Case No. 091118-83923, which is discussed further *infra*. The Grievant's name is Hernandez.

On February 9, 2014, Local 2266 Vice President Sean Walsh sent a letter to O.O. Dutton in another attempt to resolve and/or understand what created the swift and unexpected changes regarding G-955 OT requests. The Union explained that the “Massey Award” was *not* part of the agreement made on November 7, 2013 regarding OT. In addition, the Union requested information addressing the sudden change of how to request OT. The Union also requested the information management claimed was presented to them that proposed using the “Massey Award” as the sole and exclusive guideline to approve or deny OT.

As of the date this grievance was submitted, O.O. Dutton has not responded to the Union’s Feb. 9<sup>th</sup> letter. In fact, Swanton Sector Management has increased their restrictiveness regarding OT requests. This is evidenced by Local 2266 Vice President Walsh’s February 10, 2014 attempt to maximize efficiency, practicability and planning by sending an electronic G-955, via email to SBPA Bryan McDonald. It should be noted that SBPA McDonald is Vice President Walsh’s immediate supervisor and was on-duty at the time of the request. By utilizing email, this request was made approximately 24 hours earlier than if it were to be delivered, via “hard copy.” The use of email is used on a daily basis for labor/management official communication and as a form of official communication throughout the Agency for non-labor/management communication as well. As such, Vice President Walsh assumed this practice advantageous for both parties since email has been accepted as the standard communication for the Agency.

On February 11, 2014, at approximately 11:00 a.m., SBPA McDonald called Vice President Walsh via phone and informed him that he would not accept an emailed G-955, even when it was signed and verified. SBPA McDonald further explained that Vice President Walsh needed to physically go to the station and request the time in person. When questioned as to why this time cannot be accepted either electronically and/or by the active phone call, SBPA McDonald refused to provide any reasonable explanation. SBPA McDonald unreasonably restricted the Union from submitting a routine document either electronically and/or orally. The restriction SBPA McDonald imposed and the subsequent denial of OT disrupted the performance of current Union duties and forced Vice President Walsh to finish his OT at 6:00 p.m., the earliest time possible and report to work four hours later at 10:00 p.m.

It should be noted that the Union and Management communicate electronically and telephonically for many types of labor/management business, such as the telephone call SBPA McDonald made to deny an emailed G-955. Some of the various types of labor/management communication sent via email and/or telephonically within Swanton Sector on a routine basis in the past are: G-955 requests and denials, grievances and responses, 3A notices, request for information and responses, informal meetings, formal meetings, demand to bargain, bargaining proposals, Health and Safety issues, discipline actions, discipline responses, various agency requests, agency counter proposals, Memorandums of Understanding, agreements, summaries of meetings, summaries of discussions, tentative requests for labor/management meetings, scheduling requests and responses, etc.

On February 11, 2014, at 5:56 p.m., Vice President Walsh sent an email to SBPA McDonald in an attempt to explain the Union’s position regarding the request of OT. The email also included, in part, the recent 2012 MOU between NBPC and CBP that confirmed electronic email transmissions to be an acceptable method of service. In particular, Section C of that MOU states the following: “In recognition of the advances in technology, the parties agree to include fax and electronic email transmissions as acceptable methods of service, provided that the documents are

properly signed and any faxed or emailed correspondence contains sufficient information to ascertain the validity of the document(s).” Vice President Walsh further explained, “Email has been an effective and efficient way of doing business for all types of agency communication. In fact, on daily basis agency employees, to include Swanton Sector and Local 2266 Representatives, communicate and transmit numerous documents and forms through email, faxes and phones. We rely on these types of communications to be able to be more efficient due to the practicality and convenience of using electronic communication.”

On February 11, 2014, at 10:00 p.m., Vice President Walsh reported to the Newport Border Patrol Station for regular patrol duties due to the denial of OT. SBPA McDonald was on duty from 6:00 p.m. to 2:00 a.m. but made no contact with Vice President Walsh.

On February 12, 2014, Chief Steward Darren Elwell sent via email a clarification request to his supervisors, SBPA Curran and SBPA Lavallee. Chief Steward Elwell stated, “Several of my requests have been denied recently even though the 955 was filled out with the same level of clarification that has been accepted on previous 955’s. If management is now requiring additional information could you please elaborate on what you now believe is required?” To date, neither SBPA Curran nor SBPA Lavallee has provided any clarification.

On February 13, 2014, a bargaining/negotiation meeting had been scheduled via email between Local 2266 and Swanton Sector Management. As such, Vice President Walsh arrived at the Newport Station at 6:00 a.m. and checked his mailbox, government email, and Union email. There were no responses from SBPA McDonald to the aforementioned clarification and additional request for OT.

On February 13, 2014, at 10:54 a.m. SBPA McDonald sent via email to Vice President Walsh and all other management officials at Newport Station a new unilaterally implemented OT policy stating “Newport Station management will not accept requests for official time (G-955's) through email. The method for requesting official time will remain the way it currently is, by submitting a G-955 to a SBPA, the DPAIC, or the PAIC, in person at the station.”

Upon completion of the bargaining meeting with Swanton Sector Management, Local 2266 President Porras and Vice President Walsh discussed the submissions of G-955’s thru electronic communication with Assistant Chief Patrol Agent Todd Jewel and O.O. Dutton. ACPA Jewell advised Vice President Walsh that he would be notified on how to proceed.

At approximately 2:30 p.m. that day, Vice President Walsh and Chief Steward Darren Elwell arrived at the Newport Station. Both Representatives departed the station, as their shift should have ended at 2:00 p.m. but they were required to pick up an additional vehicle at the Swanton Sector Headquarters after the meeting.

At 2:59 p.m. the same day, O.O. Dutton sent, via email management’s response to Vice President Walsh’s emailed G-955 request. O.O. Dutton stated, “This email is in regards to our discussion today regarding the submission of electronic G955s at Newport station. Submission of the G955 in hard copy format has been and continues to be the practice at the Newport Station. Any changes to this established practice would need to be discussed and agreed upon by both union and station management. If you have questions/concerns regarding Newport Station G955 submissions, please contact Newport Station management.”

Later the same day, NBPC Vice President Jon Perkins acting as Vice President Walsh's representative attempted to discuss these violations with O.O. Dutton and subsequently the on-duty supervisor at Newport Station, SBPA Timothy Sevall. However, SBPA Sevall informed NBPC Vice President Perkins that management required Vice President Walsh to physically go to the station and present a "hard-copy" G-955 in order to request OT.

At approximately 5:30 p.m. the same day, Vice President Walsh, as required by his station management, physically reported to the Newport Station in order to be approved OT.

On February 14, 2014, NBPC Vice President Perkins, discussed OT issues via telephone with O.O. Dutton. O.O. Dutton refused to allow Local 2266 Representatives to request OT, via email. O.O. Dutton stated that Swanton Sector Management needed Union Representatives to physically deliver a hard copy G-955 in order for a SBPA to view the schedule.

## **OFFICIAL TIME DENIALS**

### **BEECHER FALLS STATION:**

#### **Local 2266 Union Representative Dan Dolan**

Since January 21, 2014, Local 2266 representative Daniel Dolan, a Border Patrol Agent at the Beecher Falls Border Patrol Station, has requested OT from his management on at least eight occasions. Of those eight requests, Swanton Sector Management has granted none. A breakdown of the rationale expressed by Swanton Sector management for denying Representative Dolan his OT requests are as follows.

January 21, 2014 requests for 8 hours of OT for January 22, 2014, were requested by both Representative Troy Land and Dolan. The reason for Swanton Sector management's denial was a "lack of information" for Representative Land and "need more info" and "manpower issues" for Representative Dolan.

January 21, 2014 request for 8 hours of OT for January 23, 2014, was requested by Representative Dolan. The reason for Swanton Sector management's denial Representative Dolan's request was, "need more info" and "manpower issues".

January 22, 2014 request for 8 hours of OT for January 23, 2014, was requested by Representative Dolan. The reason for Swanton Sector management's denial to Representative Dolan's request was, "lack of information" and "lack of manpower". The Massey Award was named as a standard that should be consulted and followed by the Union.

January 22, 2014 request for 8 hours of OT for January 24, 2014, was requested by Representative Dolan. The reason for Swanton Sector management's denial to Representative Dolan's request was, "lack of information". The Massey Award was named as a standard that should be consulted and followed by the Union.

January 23, 2014 request for 4 hours of OT for January 24, 2014, was requested by Representative Dolan. The Agency allowed a diminished, 2-hour period of OT from 10-12

“under the assumption of a Step 1”. Despite Representative Dolan including in field 18, “Remarks”, that the purpose of OT was for, “Investigation and research of management activities that are negatively affecting bargaining unit members”, Swanton Sector management stated that, “more specific information requested.”

January 23, 2014 request for 7 hours of OT for January 23, 2014, was requested by Representative Dolan. The reason for Swanton Sector management’s denial to Representative Dolan’s request was, “manpower”, and, “not timely”.

January 27, 2014 request for 8 hours of OT for January 29, 2014, was requested by Representative Dolan. The reason for Swanton Sector management’s denial to Representative Dolan’s request was, “lack of specificity” and “manpower”. This denial was interesting as Representative Dolan’s management notified him that they had originally approved the request to, “be reasonable” but then appeared to change their minds.

February 8, 2014 request for 8 hours of OT for February 11, 2014, was requested by Representative Dolan. The reason for Swanton Sector management’s denial to Representative Dolan’s request was, “request must be more descriptive”. As in other denials, the Massey Award was referenced.

### **RICHFORD STATION:**

#### **Local 2266 Lead Steward Matthew Emrich**

January 9, 2014, Representative Emrich requested 16 hours of OT for January 14-15, 2014. The reason for Swanton Sector’s Management’s denial of time was “do [sic] to shortage of manpower”.

January 14, 2014, Representative Emrich requested 8 hours of OT for January 14, 2014. Swanton Sector Management interestingly approved the OT, yet previously, had denied the requested time period as stated above because of “manpower” issues.

January 17, 2014, Representative Emrich requested 16 hours of OT for January 29-30, 2014. Swanton Sector Management approved this request without incident.

January 17, 2014, Representative Emrich requested 16 hours of OT for February 5-6, 2014. Swanton Sector Management approved this request without incident.

January 30, 2014, Representative Emrich requested 32 hours of OT for February 13-14, and February 20-21, 2014. DPAIC Doty denied Representative Emrich’s request stating in his January 31, 2014 response, “The request does not provide sufficient justification for me to approve the request”, and arguing that in spite of past approvals of official time requests, “Simply citing and copying a section from the CBA is not acceptable. “ This seemed contrary to previously accepted/approved official time requests, which provided the same amount of information, yet the basis for this denial was lacking specificity.

On January 31, 2014, Representative Emrich inquired with DPAIC Doty in response to his G-955 denial. Specifically, Representative Emrich asked DPAIC Doty, “Are you alleging that the

amount of official time I am taking is unreasonable and excessive?” DPAIC Doty replied shortly after, “I do not believe I have ever doubted/questioned the reasonableness of the amount of time you have requested.”

On February 1, 2014, Representative Emrich attempted to resubmit his G-955 with the original language in field 6, to Richford Station Patrol Agent in Charge (PAIC) Sean McVey. In addition to the G-955, Representative Emrich included a recent arbitration decision, “Eggert Award”, concerning official time use and the necessary language for field 6 of Form G-955 (FMCS No. 091118-83923) and a summary of the Union’s position on the OT denial. Representative Emrich also included O.O. Dutton, Local 2266 Executive Board, and DPAIC Doty in the email. Later on the same day, Swanton Sector Management denied the request stating, “The initial request was denied by DPAIC Doty because of insufficient information as to the activities being performed”. The 2<sup>nd</sup> request is being denied because no new information has been provided. If you provide additional information regarding the activities being performed, your request will be reconsidered.

February 5, 2014, Representative Emrich resubmitted a request for 32 hours of OT for February 13-14, and February 20-21, 2014 as per PAIC McVey’s response. Swanton Sector Management’s denial of time was “Denied due to lack of manpower, if approved this would leave only 1 agent on duty and would create an officer safety issue”. This denial was again interesting, the initial denial of OT by PAIC McVey on January 30, 2014 cited specificity of union activity being performed, as the reason for denial, there never was a mention of “manpower” concerns before this submission; yet PAIC McVey was now using this as the reason for denial of time. It should be noted that Representative Emrich abided by PAIC McVey’s request and provided additional information in block 16 of the G-955, which specifies what activity is being performed.

On February 6, 2014, Representative Emrich contacted PAIC McVey via an inter-office email and provided an explanation of his need for official time during the periods indicated on his Form G-955 submissions. PAIC McVey responded stating that he would only approve the 8 hour period requested for February 13, 2014, a meeting with sector management. The remainder of Representative Emrich’s request was denied with the broad explanation that, “...manpower is an issue next pay period”. As a footnote, Local 2266 had a meeting scheduled with Swanton Sector management on February 13, 2014, and Representative Emrich was selected by the Union as one of its attendees.

February 7, 2014, Representative Emrich requested 16 hours of OT for February 13-14, 2014, to attend and prepare for a meeting arranged by Swanton Sector Management. Swanton Sector Management’s denial of time was “8 hours for Feb 13 DMT meeting scheduled for 0900-1200 hrs. CBA allows 2 hrs. to prepare for labor-management meetings. Feb 14 denied due to lack of manpower”.

February 7, 2014, Representative Emrich requested 16 hours of OT for February 18 & 22, 2014. Swanton Sector Management’s denial of time was “Lack of manpower on both days”.

February 8, 2014, Representative Emrich requested 16 hours of OT for February 11-12, 2014. Representative Emrich request was made to attend a scheduled meeting by Swanton Sector Management. However, upon submission of OT, Swanton Sector Management denied the



request stating, “02/11/2014 and 02/12/2014 are denied due to lack of manpower. If either day were approved then only (1) agent would be working and that would create an officer safety issue”.

February 8, 2014, in light of the numerous denials of OT due to “manpower” Representative Emrich requested 32 hours of OT for February 25-28, 2014, giving Swanton Sector Management seventeen (17) days prior notice to address any scheduling problems. Swanton Sector Management denied the request stating “ **Denial:** 02/26-02/28/2014 is denied due to lack of manpower. If approved then only (1) agent would be working and that would create an officer safety issue. **Approval:** 8 hours on 02/25/14 is approved”.

February 12, 2014, Representative Emrich resubmitted 8 hours of OT for February 18, 2014 to again attend a meeting scheduled by Swanton Sector Management. This request was denied as well stating, “02/18/2014 is denied due to lack of manpower. If approved then only (1) agent would be working and that would create an officer safety issue”.

February 13, 2014, Representative Emrich requested 8 hours of OT for February 20, 2014, to attend a meeting scheduled by Swanton Sector Management. Swanton Sector Management responded stating, “Denied due to lack of manpower. If approved then only (1) agent would be working and that would create an officer safety issue”.

### **NEWPORT STATION:**

#### **Local 2266 Vice President Sean Walsh**

On February 6, 2014, upon returning from a DMT negotiation meeting and after performing eight hours of OT, Local 2266 Vice President Walsh submitted G-955 OT requests to SBPA Bryan McDonald. Vice President Walsh was advised that management needed more of an explanation in field 6 of the Form G-955. Having just returned from emergency family leave and annual leave, Vice President Walsh was in dire need of substantial OT to complete Union work, including researching, writing, and filing grievances, responding to Swanton Sector correspondence, and other matters. Vice President Walsh again requested OT, submitting a new Form G-955 containing more information in field 6. He was notified that the requested time would again be denied for February 7 and 8, 2014; this time management reported that they lacked manpower during the period of time Vice President Walsh requested. However, the Union believes that this determination was arbitrary and unreasonable. According to the schedule, there were four additional agents scheduled to work from 4:00 p.m. to 12:00 a.m. on both February 7 and 8, 2014.

February 10, 2014, Local 2266 Vice President Walsh requested OT for February 12 and 14 sending a G-955, via email to his immediate Supervisor Bryan McDonald. In addition, Vice President Walsh added the additional specificity as previously requested, even though he disagreed with Swanton Sector management that the Union should have to reveal so much information to the Agency. However, on February 11, 2014, SBPA McDonald contacted Vice President Walsh, via phone and informed him that he would not accept the G-955 thru email nor would he approve it over the phone. Therefore, both G-955 OT requests were denied.

On February 12, 2014, Local 2266 Vice President Walsh requested OT for February 14,15,17,18,

and 19 and again sent them to SBPA McDonald, via email. In addition, Vice President Walsh added the additional specificity as previously requested.

February 13, 2014, at 10:54 a.m., SBPA McDonald, via email, denied the OT requests based on not accepting G-955's electronically. After the completion of negotiations with Sector Management on a separate issue, this denial and issue were discussed with Sector Management. An answer regarding the denial and issue were to be provided after Sector Management conferred with each other. At approximately 2:30 p.m., Vice President Walsh and Chief Steward Darren Elwell arrived at the Newport Station and immediately departed as their tour of duty ended at 2:00 p.m. At 2:59 p.m. the same day, O.O. Dutton sent, via email her response to Vice President Walsh's G-955 request, which effectively denied his OT request.

Later the same day, NBPC Vice President Jon Perkins acting as Vice President Walsh's representative attempted to discuss these violations with O.O. Dutton and, subsequently, the on-duty supervisor at Newport Station, SBPA Timothy Sevall. However, SBPA Sevall informed NBPC Vice President Perkins that management required Vice President Walsh to physically go to the station and present a "hard-copy" G-955 in order to request OT.

At approximately 5:30 p.m. the same day, Vice President Walsh, as required by Newport Station Management, reported physically to the Newport Station in order to request OT. The request was for February 14, 15, 18, and 19 and Vice President Walsh cited the reasons in accordance to the new guidelines that required additional specificity, as per O.O. Dutton. This request was partially approved, as February 18, 2014 was denied due to manpower issues.

On February 18, 2014, at approximately 10:00 p.m., Vice President Walsh informed SBPA Graciano, via telephone, that he had G-955 OT requests to turn in. SBPA Graciano requested that Vice President Walsh place them in his mailbox. In addition, Vice President Walsh added the additional specificity in accordance to the new guidelines.

Those requests were as follows: (1) February 22, 2014, four hours specifying reasons stated in Article 7.A.4.(a). (2) February 22 and 24, 2014 for eight hours specifying reasons stated in Article 7.A.4.(e). (3) February 24 and 25, 2014 for twelve hours specifying reasons stated in Article 7.A.4.(b). (4) March 6 and 10, 2014 specifying reasons stated in Article 7.A.4.(a). As of February 23, 2014 the requests were approved as follows: February 22 was approved the same night as submission. February 24 and February 25 were assumed approved as the official time was scheduled, via g-259 (bi-weekly schedule). March 6 and 10 were approved, via G-955 (signed by DPAIC Gilligan on February 20, 2014 at 1300 hrs) and found placed in Vice Presidents mailbox on February 22 at 9:00 p.m.

#### Local 2266 Chief Steward Darren Elwell

January 18, 2014, Chief Steward Elwell requested OT for January 20, 2014 and in box 6 he wrote, "Article 7 4 (a)(b)(e)." This request was approved.

On February 11, 2014, Chief Steward Elwell requested OT for January 12 and 13, 2014. Swanton Sector Management denied OT request due to "insufficient information". Union Representative Elwell mistakenly requested the wrong month on requests. SBPA Curran

brought this to Chief Steward Elwell's attention and the form was amended the official time was denied.

On February 12, 2014, Chief Steward Elwell requested OT for February 13 and 17, 2014. Swanton Sector Management denied OT due to "insufficient information".

On February 12, 2014, Chief Steward Elwell resubmitted OT requests for February 13, 2014 with three separate G-955s, which broke down each specific union activity to be performed. Due to the limited space in box 6 of G-955, Union Representative was forced to submit three separate forms G-955 to outline exactly what union activity was being performed. The first G-955 requested four (4) hours of OT using the language from the CBA. In box 18 the supervisor wrote, "Per phone discussion w/ BPA Elwell to be used in regards to DMT meeting at sector on the 13<sup>th</sup>". The official time was approved. The second G-955 was submitted requesting one (1) hour of OT with additional specificity. In box 18 supervisor wrote in, "Per phone discussion w/ BPA Elwell to be used in regards to DMT meeting at sector on the 13<sup>th</sup>". The official time was approved. The third G-955 requested three (3) hours of OT. In box 18, Chief Steward Elwell's supervisor wrote in, "Per phone discussion w/ BPA Elwell to be used in regards to DMT meeting at sector on the 13<sup>th</sup>". The official time was approved.

On February 17, 2014, Chief Steward Elwell requested OT for February 18 and 19, 2014, with four separate G-955s. The first Form G-955 was for one hour on February 18, 2014, and in box 6 he wrote Article 7. 4.(e) with language from the CBA and added, "including but not limited to emails from Swanton sector management." In box 18 DPAIC Gilligan wrote, "emails back and forth from sector Denied due to manpower". Official time denied. The second G-955 request was for seven hours on February 18, 2014, and in box 6 Chief Steward Elwell wrote, "Article 7. 4. (a)", including the appropriate language from the CBA and added, "including but not limited to grievances in Swanton sector". In box 18, DPAIC Gilligan wrote, "7 hours prep time for UIG Denied due to manpower." The official time was denied. The third G-955 was for one hour on February 19, 2014, and in box 6 Chief Steward Elwell wrote, "Article 7.4.(e)", with the appropriate language from the CBA and added, "including but not limited to emails from Swanton sector management." In box 18, DPAIC Gilligan wrote, "emails back and forth to sector". Official time was approved. The fourth G-955 was for February 19, 2014 and in box 6 he wrote, "Article 7.4.(b)", with the appropriate language from the CBA and "including but not limited to meetings with Swanton sector management". In box 18 DPAIC Gilligan wrote, "preparing for snowmobile equipment training /equipment negotiating". Official time was approved.

## **ARGUMENTS:**

### **1. Violations**

The Sector has suddenly changed the standards for approval of official time, which has resulted in numerous denials of official time that would have – and should have – been granted pursuant to the CBA. The Agency's unilateral changes to the amount of information required, the manner in which the G-955 must be delivered to the supervisor, and the sudden adoption of "manpower" as a pretext to deny official time is a blatant violation of Article 7. Local 2266 Representatives have been forced to perform duties that are suitable for OT as per the CBA during their personal

off-duty time, or the representatives have been forced to complete the work on annual leave. Most if not all of this off-duty and annual leave work was necessary due to Swanton Sector's denial of union representatives' Form G-955s. Representatives have also been required to report to work with four hours or less between shifts, due to unwarranted denials of OT requests.

Swanton Sector Management was informed by the Union of the conflict between their new policies and the agreement reached on November 7, 2013 and subsequently signed in an MOU on December 18, 2013. The Union informed management on numerous occasions of how the Local believed management is in conflict with both the MOU and the national CBA, yet Swanton Sector management did not attempt to correct the situation and revert to the terms of the CBA. The Union believes these violations of the CBA regarding OT are an inventive new way to inflict personal hardship and monetary damages onto Union Representatives for their performance of protected activity. Swanton Sector Management's actions towards the bargaining unit has the effect of placing "a chill on engaging in representational activities" and creates an environment that makes bargaining members "think twice" before engaging in union activities. Furthermore, it calls into question whether management is acting in good faith in accordance with the Federal Service Labor-Management Relations Statute.

## 2. The Agency is Showing Significant Dishonesty in its Rationale for Denying Official Time.

The Agency has already asserted that their new specificity requirements for field 6 of Form G-955 are acceptable. Swanton Sector management has stated that the new expectations and details for box 6 of the G-955 form were introduced and agreed to by the Union. Specifically, O.O. Dutton stated in her February 3, 2014 email response to Local 2266 President Porras that,

Union presented the Massey award decision to management in regards to the 955 submission. As a result of the presentation of the Massey award by the Union, management agreed with the local Union including the National Union Vice President, more information than citing the letter of a-h of article 7A4 of the CBA needs to be provided in block 7 of the G-955. The agreement was made specifically citing the Massey case in the meeting as to how the 955 would be filled with the reason for the official time use. (Excerpt).

The entirety of the O.O. Dutton's summary regarding the Massey Award *is utterly false*. The Massey Award, FMCS No. 00-13188-A, was *never* introduced by the Union as an example for the proper filing of a Form G-955. It was *never* agreed to by the Union and management as the appropriate model for completing field 6 of Form G-955. Finally, the Union *did not agree* with management that more information than that provided by citing Article 7.A.4 and the corresponding subsection was required for acceptance of an official time request. It is noted that O.O. Dutton was not in attendance at the aforementioned November 7, 2013 meeting that she is referencing, and therefore she has no firsthand knowledge of what was discussed.

Proof that the Massey Award was never introduced, supported, or condoned by the Union, and that this claim is instead a fabrication by Swanton Sector management, is detectable in multiple pieces of evidence. First, consider the language of the *National Border Patrol Council Local 2266 and Swanton Sector Border Patrol Management Agreement* dated December 18, 2013 (MOU). One would assume that if a standard as strict as that imposed in Massey Award were actually adopted by both parties, as Swanton Sector Management claims, there would be mention

of the policy in the MOU. That, however, is not the case. Nowhere in the MOU is there any mention of FMCS No. 00-13188-A, the “Massey Award”, or language indicating that the precepts of that case will be adopted by the parties for submission of a Form G-955. One can only speculate as to why mention of the arbitration award was left out of the MOU signed by both Swanton Sector CPA Pfeifer and Local 2266 President Porras if it was agreed to as reported two-and-a-half months later by management. The Union’s position is that the reason the Massey Award FMCS No. 00-13188-A was not included in the language of the agreement is ***that it was never discussed or agreed to*** at the November 7, 2013 meeting.

Moreover, Article I. subsection iii of the MOU reads:

OT should not be denied for any reasons other than needs of the service or the agency has evidence of abuse regarding the use of OT by the Union Representative. Union Representatives will be reasonable with the request of OT and provide sufficient justification for time requested as per the CBA. Management will make every reasonable effort to approve OT requested by the Union Representative.

The second sentence of this paragraph is of great value to discern the sentiment of the signers of the Agreement. The relevant portion of the sentence states that stewards will, “provide sufficient justification for time requested as per the CBA.” We feel that this sentence supports the practice adopted by the Union, to request OT by providing the CBA article regulating the work that they intend to perform. It would after all be providing justification “as per the CBA.” This interpretation would allow the Union to play its cards close to its chest (as explicitly permitted in the arbitration award issued by Arbitrator Eggert) by not providing overly specific data to the Agency, and still affirm to Swanton Sector management that the steward was using OT as per the contract. Yet again, if the Agency and Union intended to have a more comprehensive, explicit explanation of work to be performed, they would have said so in the Agreement. That was not the case, and we can draw the conclusion that not only was FMCS No. 00-13188-A not mentioned in the Agreement, it was not the intention of either party to apply that standard to Form G-955 requests. Rather, the intention was instead to employ the method of justification adopted by the Union shortly after the November 7, 2013 meeting, cite the article of the contract used, “as per the CBA.” This was an agreeable interpretation to Swanton Sector management and successfully used without objection for two-and-a-half months by Union stewards requesting OT.

This is, by no means, the end to the evidence, which illustrates that, the “Massey Award” was not agreed to as the standard to request OT. Upon completion of the November 7, 2013 meeting, the Union was provided a copy of the meeting notes as recorded by O.O. Masada. It should be noted that while O.O. Masada’s notes are difficult to understand, they do entail enough specificity for a reader familiar to the issues to follow the train of the conversation between the parties. In the eight pages of notes written by O.O. Masada, there is absolutely *no* mention of the “Massey Award”, FMCS No. 00-13188-A, or any indication that the Union’s citing the Article and subsection of the CBA would not be sufficient for management to make a decision.

Prior to the November 7, 2013, meeting CPA Pfeifer sought out President Porras for his input on the matter of OT. In a November 1, 2013, email, President Porras provided a summary of arbitration cases and findings for the CPA to review before discussing OT. Some of the cases referenced were the “Jaffe Award”, “Goodfriend Award”, “Gentile Award”, and the aforementioned “Eggert Award” (FMCS No. 091118-83923), wherefrom the Union’s summary

was derived. At no time though did the Union introduce the “Massey Award” or FMCS No. 00-13188-A. This is a complete contradiction with the story told by O.O. Dutton, and every Swanton Sector manager who has denied OT on the pretext that this was a standard introduced and agreed to by the Union.

The final piece of evidence indicating that the Union’s system of requesting OT is consistent with the agreement made on November 7, 2013 is the preponderance of G-955s submitted and approved over the two-and-a-half months following the November meeting. Prior to mid-January, when managers suddenly began citing the Massey Award FMCS No. 00-13188-A and demanding more information regarding Union activities on OT, Local 2266 stewards filed and were approved for well over 30 OT requests. All approved requests used the system of citing the pertinent Article and sub-section of the CBA in field 6 as justification for OT. There was never any significant problem or concerns expressed by Swanton Sector management with the report of what article of the CBA was being used. There were no recorded concerns that one steward or another may be abusing OT. Then, in mid-January something changed. Management unilaterally adopted a new system of reporting which required far more specifics, all under the pretense that this had been agreed to as per the Massey Award at the November 7, 2013 meeting.

The Union further asserts that most of the changes adopted by Swanton Sector are not permitted by the Massey Award. Nothing in the Massey Award permits a station to demand the union representative hand a hard copy of the G-955 to the supervisor rather than emailing a signed copy of the G-955. Nor is it a “past practice” for a station to impose additional requirements on a union representative beyond those that apply to all union representatives in the Sector. For a past practice to exist, it must be consistently followed for a substantial period of time with the full knowledge and consent of both parties. Requiring a paper copy of the G-955 be handed to the supervisor personally has not been consistently required throughout the Sector, has never been agreed to by the Local, and is contrary to the National MOU authorizing the use of electronic mail.

The Massey Award also prohibits routinely denying requests for official time based upon “manpower”. As stated by Arbitrator Massey: “Further, the Agency may question the use of official time on **a very limited basis** and that is whether the **amount of time** claimed **for a particular activity** is excessive. . . . Generally speaking, if the amount of time is reasonable for the task and it is appropriate Union business then, with little exception, Management is obligated under the CBA to grant the use of official time.” (Massey Award, p. 21. Emphasis in original). In that same paragraph, the Arbitrator points out that management has no right to question whether the Union is generating too much activity, and management cannot attempt to inhibit the use of official time in the event that a Union official chooses to become more active and/or adversarial. In fact, the CBA contains language addressing this same point. In Article 7 Section A.1 the CBA states:

“Local Presidents or their designees will normally be released to perform appropriate labor relations duties, subject to workload requirements. In making this determination, local management will be sensitive to the obligation under Article 6 of this Agreement.”

Article 6, of course, prohibits any restraint, interference, coercion, or discrimination against a Union official because of the performance of union duties. This contractual language acknowledges that the parties are aware the use of manpower as an excuse to deny official time

is susceptible of abuse. Other cases, such as Arbitrator Williams' sequel to the Massey Award (addressing the same grievant and the same time period as the Massey award) have found that unless the Sector can show an emergency or critical need, official time for representational purposes may not be routinely denied based upon manpower considerations, particularly where there is no showing of any effort to make any other adjustments to ensure minimal staffing needs.

### 3. The Denial of Official Time Is Retaliatory

The circumstances surrounding these copious denials of official time illustrate the wholly hostile nature of Swanton Sector management against the Union. The denial of OT due to a "lack of manpower" to union representative Emrich and others who requested OT well before the station work schedule was posted, now seems more like an Agency ploy than a legitimate "needs of the service" claim. The requests made by Representative Dolan prove that the Agency has no intention of allowing OT, regularly hiding behind the perpetual argument that there is never enough manpower to allow a steward OT. How many times must Representative Dolan request OT before there is sufficient manpower available? Such denial itself seems to conflict with the MOU between the Union and Swanton Sector CPA Pfeifer, which states, "Management will make every reasonable effort to approve OT requested by the Union Representative." What is "reasonable" about management adopting unreasonable, unilateral restrictions, which stem from an arbitration award that was not even mentioned until the Agency began restricting leave? In reality, there is no component of management acting in a reasonable fashion. Rather than considering the OT arbitration rulings provided by the Union at CPA Pfeifer's request, the Agency has instead adopted a fictitious standard based on an arbitration case that was never mentioned or agreed to by the Union, which differs from the past practice of the parties, and which is inconsistent with the more recent arbitration awards interpreting and applying Article 7 of the CBA.

The Union speculates that Swanton Sector management's newest round of OT denials is the result of an article posted on the Union's webpage criticizing CPA Pfeifer for not taking the appropriate steps to provide safety equipment to agents assigned to operate snowmobiles. It was only a day or two after the Union posted the article, and filed a related UIG, that the Agency began restricting and denying OT because requests were not specific enough, or the request was not timely and or citing the lack of manpower. By the proximity of the events, it would appear that CPA Pfeifer was insulted by the Union's allegations and grievances and made the decision to begin hampering the Union and its membership by adopting a new standard regarding the amount of information necessary before official time would be granted. In taking this action, Swanton Sector management has failed to separate their personal feelings from their professional responsibilities. The Sector is in violation of Article 6 Section A and C, as well as 5 U.S.C. §7116(a) (2).

### III. REMEDIES:

In light of the violations, the Union requests the following remedies.

1. Immediately return to the previous method for requesting OT, as employed by Local 2266 Union stewards from the November 7, 2013 meeting until middle January 2014 when the “Massey Award”, FMCS No. 00-13188-A, was unilaterally adopted by the Agency as the new standard for completing box 6, “Activity Performed”, on Form G-955.

This would be consistent with the more recent ruling in the Eggert Award FMCS No. 091118-83923, and require the steward to cite the portion of the contract that they intend to exercise while on OT. It should be noted that the Eggert Award was issued a decade after the Massey Award, and took into account not only the Massey Award, but also a number of other Arbitration Awards interpreting Article 7 Official Time of the national CBA between the parties.

2. Cease and desist all violations of Article 6 Section A and Article 7 Section A of the national CBA.
3. Provide reimbursement, via pay at a “regular time” rate with interest, for all Local 2266 stewards who have spent off-duty hours performing Union duties eligible for OT because of the Agency’s denial of the employee’s Form G-955 requests.
4. Chief Pfeifer will provide a notification to all management and bargaining unit employees in the Swanton Sector that they will be treated no differently if they exercise their employment rights, dispute proposed Agency actions, affiliate with the Union, or engage in any other activity protected by law or contract. In addition to the aforementioned notification, Chief Pfeifer will provide an acknowledgement to employees that the Agency wrongly restricted Union activity and put bargaining unit employees at risk by attempting to curb Union activity. This message will be disseminated to all employees through both physical memoranda and Government electronic mail.

To insure compliance, NBPC Local 2266 President Christian Porras and NBPC Local 2266 Vice President Sean Walsh will be provided an advanced copy for approval before the messages are disseminated. Upon issuance to employees via Government electronic mail, Local 2266 President Porras and Vice President Walsh will be included in all mailings.

5. Reimbursement for any legal fees incurred by the Union, to include all costs of hiring attorneys, arbitrators, court reporters, and any other expenses, in an effort to resolve this violation.
6. And any other remedy deemed necessary.

Respectfully,

Sean P. Walsh  
Vice President  
NBPC Local 2266