



# NATIONAL BORDER PATROL COUNCIL

## LOCAL 2266

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AFFILIATED WITH AFL-CIO

---

Sean P. Walsh  
Vice President  
2224 Vt. Rte. 111  
Derby, Vt. 05829

Office: (802) 334-1333  
Home: (802) 310-2502  
Email: [Local2266@gmail.com](mailto:Local2266@gmail.com)

March 3, 2014

John C. Pfeifer  
Chief Patrol Agent  
Swanton Sector

Cc: Julie Dutton (Designee)

***Re: Step II Grievance***

Chief John Pfeifer,

This document constitutes a Step II grievance in accordance with Article 33(E) of the 1995 Collective Bargaining Agreement between the National Border Patrol Council and Immigration and Naturalization Service ("CBA"). This grievance is being submitted due to Patrol Agent in Charge "PAIC" Paul Kuhn's order that forced Union Representative Dan Dolan to work AUO, despite already working eight hours of pre-approved official time. In doing so, PAIC Kuhn failed to adhere to the negotiated CBA. The Union also believes the Beecher Falls Management has violated federal labor laws, specifically, 5 U.S.C. § 7131, 5 U.S.C. § 7102 and 5 U.S.C. § 7116 respectively and the Fair Labor and Standards Act of 1938.

**I. SUMMARY OF FACTS:**

On January 3, 2014 Union Representative Daniel Dolan requested eight (8) hours of Official Time, via form G-955. Union Representative Dolan was approved the full eight hours.

On January 3, 2014 Union Representative Dolan traveled to the Newport Border Patrol Station for a step II grievance meeting. In attendance at the meeting for the Union was NBPC Local 2266 Vice President Sean Walsh and Chief Steward Darren Elwell. In attendance for management was Operations Officer "O.O." Julie Dutton, O.O. Raulan Masada and LER Specialist David Cadavid.

At approximately, 1:50 p.m. Union Representative Dolan was traveling back to the Beecher Falls Station when PAIC Kuhn contacted him, via service radio. PAIC Kuhn ordered Union Representative Dolan to the Beecher Falls Station and make contact with Supervisory Border Patrol Agent "SBPA" Connell.

Shortly after 2:00 p.m., Union Representative Dolan arrived at the Beecher Falls Station. Upon arrival, SBPA Connell informed Union Representative Dolan that PAIC Kuhn had ordered him to stay at the station and assist in the administrative processing of undocumented aliens. SBPA Connell also stated that the work would be conducted under Administratively Uncontrollable Overtime "AUO".

Union Representative Dolan immediately informed SBPA Connell that he had just completed eight (8) hours of pre-approved official time. Union Representative Dolan further explained that, Article 7 of the CBA states, "Union representatives will not suffer any loss of pay, allowances, or other penalty for use of official time. All official time, including travel to and from meetings, will be excludable for AUO purposes". Yet, SBPA Connell still ordered Union Representative Dolan to continue past eight hours of official time and work five hours of AUO in order to

assist other agents in the administrative processing of undocumented aliens.

On January 3, 2014 the Beecher Falls Station manpower (not including Dolan) were as follows:

On-Duty Day Shift: three (3) BPA's, one (1) SBPA, one (1) DPAIC, one (1) PAIC.

On-Duty Swing Shift: two (2) BPA's reported to work at 2:00 p.m.

The two swing shift agents that reported to work at 2:00 p.m. were ordered to the field instead of processing.

At approximately 4:00 p.m., before the completion of processing, day shift BPA Kermis was allowed to end his shift.

At approximately 7:00 p.m., Union Representative Dolan was allowed to end his shift.

On January 5, 2014, NBPC Local 2266 President Christian Porras sent an email to CPA Pfeifer. President Porras informed CPA Pfeifer of the situation and explained the Union's concerns and the continuing appearance of management's lack of knowledge concerning official time.

On January 6, 2014, CPA Pfeifer replied to President Porras stating, "We are looking into this".

On January 7, 2014, SBPA Connell served Union Representative Dolan Weingarten rights and ordered him to write a memorandum explaining in detail his union activities on January 3, 2014. Union Representative Dolan submitted his compelled written statement on January 8, 2014 to SBPA Becker.

On January 13, 2014, SBPA Forkey contacted Union Representative Dolan and ordered him to change his Time and Attendance "T&A" to reflect hours worked beyond his eight hours of official time to reflect AUO worked not overtime; in clear violation of both the rules and regulations that govern AUO and what is outlined in the CBA. Union Representative Dolan voiced his objection at which time SBPA Forkey rejoined that if he did not make the changes to his T&A then he will only be paid for 80 hours without any premium pay. Due to the threat of being adversely effected, accused of insubordination and the financial harm, Union Representative Dolan complied and changed his T&A to reflect AUO instead of overtime.

On January 13, 2014, Union Representative Dolan sent an email to SBPA Forkey reaffirming what had occurred. SBPA Forkey had concurred with the following email sent by Dolan:

"On 1/13/2014 at 0600 you informed me that I was not allowed to claim overtime for the 4 and half hours that I was ordered to work on 1/3/14 after the end of my 8 hours of official time which caused my day to be excludible for AUO purposes as defined in Article 7 of the CBA, and insisted on by Swanton Sector Management. You stated that higher-level management is ordering you to order me to change my TNA and claim 4 and half hours of AUO and certify it untruthfully. You also stated that if I do not edit my TNA and certify it untruthfully that the direction from higher management you were receiving was to pay me 80 hours for the pay period and not include any of the premium pay that I worked. You edited my TNA in red ink refused to sign off as the editing supervisor and ordered me to submit a new untruthful TNA. In order to minimize any misunderstandings, please let me know if you disagree with any of the above. Please do not hesitate to contact me if you have any further questions or concerns"

On January 23, 2014, Union Representative Dolan was ordered to write a second memorandum regarding his use of official time on January 3, 2014. This compelled memorandum was submitted on January 25, 2014.

On February 10, 2014, President Porras sent CPA Pfeifer an email requesting an update. The email sent stated, "I haven't heard any updates in regards BPA Dolan's pay issue. The last correspondent from Beecher Fall's management was to order BPA Dolans to write a Memorandum. Please let me know the status of this issue. Thanks."

On February 10, 2014, Operations Officer Julie Dutton replied to the above-mentioned email and stated, "On January 3 2014, BPA Dolan was notified to report back to process prior to the end of his shift and the time worked after 8 hours was claimed as AUO.

On February 11, 2014, Union Representative Dolan requested a meeting with either PAIC Kuhn or DPAIC Qualter. PAIC Kuhn responded that he would meet with him on February 12, 2014.

On February 12, 2014, Union Representative Dolan presented a Step I grievance to PAIC Kuhn and DPAIC Qualter regarding being ordered to work AUO after the completion of eight hours of pre-approved official time.

On Saturday February 15, 2014, PAIC Kuhn informed Union Representative Dolan that he was denying the step 1 grievance. The only information or reasons that PAIC Kuhn provided was that Union Representative Dolan had 15 days to file a step 2.

## II. ARGUMENTS:

At the time that Beecher Falls management ordered Union Representative Dolan to work AUO they were aware he had completed eight hours of pre-approved official time. Beecher Falls management was also aware that the CBA states, "Union representatives will not suffer any loss of pay, allowances, or other penalty for use of official time. All official time, including travel to and from meetings, will be excludable for AUO purposes". The fact that the CBA clearly defines official time to be excludable for AUO purposes demonstrates Swanton Sector management's intent to inflict personal hardship and monetary damages onto Union Representative Dolan for his performance of a protected activity. Management cannot claim to be unaware that working AUO was a clear violation of the CBA because Union Representative Dolan immediately informed SBPA Connell of those facts. Additionally, these violations were addressed in the step I grievance, yet Beecher Falls management refused to remedy the grievance. 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.

Beecher Falls Management clearly violated the CBA and Federal Labor Laws by forcing Union Representative Dolan to work beyond his eight hours of official time. The need for PAIC Kuhn to order Union Representative Dolan to work AUO was proven erroneous by the total number of agent's on-duty at the time. The operational necessity for Union Representative Dolan diminished even further, when additional agents arrived at work and the release of those agents to the field. Furthermore, management determined at approximately 4:00 p.m., that a day shift agent was no longer needed and was allowed to leave off-duty. The CBA 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 that using a proven non-operational manpower issue as an excuse to force a Union Representative to work beyond eight hours of official time is fundamentally flawed. Swanton Sector management cannot show an emergency or critical need nor did management show any effort to make any other adjustments to ensure minimal staffing needs.

Apart from eight hours of official time being an excludable day, the work performed that day should not have been compensated as AUO. The compensation of time by AUO is only when the nature of the work is administratively uncontrollable in nature. The situation must require an agent to remain at work in order to continue and perform his duties. The continuation of duties cannot be administratively controlled. Therefore, if the duties are controllable, then regular overtime instead of AUO is used for compensation. Beecher Falls management are trained in administration and management of AUO thus, should have recognized that AUO was not appropriate for processing at the end of a scheduled tour of duty when other agents were available; especially in light of Union Representative Dolan being on Official Time.

According to the Fair Labor Standards Act of 1938 29 USC 201, employees that work over 40 hours a week must be compensated at a rate of one and half their normal pays. Border Patrol Agents are not one of the exempted occupations from FLSA. All work that is in excess of 40 hours a week that cannot be claimed as AUO must be claimed as Overtime pay. Agreements between employees and employer cannot change this, nor can management state that all overtime must be pre approved.

REMEDIES

1. Immediate and full adherence to all laws, government-wide regulations and the 1995 Agreement between the U.S. Immigration and Naturalization Service and the National Border Patrol Council (“CBA”).
2. Swanton Sector management, specifically Beecher Falls management, not retaliate on any bargaining unit member for their involvement in protected Union activities.
3. Post a notice signed by the Chief Patrol Agent, Swanton Sector, which acknowledges the agency's violations of the Collective Bargaining Agreement in this case as well as the remedial efforts that it will undertake to make the Grievant whole. The notice will be written to the satisfaction of the Union and given to the Union for approval prior distribution.
4. Swanton Sector financially makes whole, Union Representative Dolan the overtime 45 act for the performance of his duties on January 3, 2014.
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.

Sincerely,

Sean P. Walsh  
Vice President  
NBPC Local 2266