



**U.S. Customs and  
Border Protection**

April 1, 2014

Mr. Sean P. Walsh  
Vice President, Local 2266  
National Border Patrol Council  
2224 Vt. Rte. 111  
Derby, VT 05829

Dear Mr. Walsh:

This letter constitutes my decision regarding the Step II grievance that you filed on behalf of the union. The grievance, dated March 3, 2014, and received March 3, 2014, is filed under the negotiated grievance procedures contained in the U.S. Immigration and Naturalization Service and National Border Patrol Council (NPBC) Collective Bargaining Agreement (CBA), dated February 6, 1995, which is in force between the NPBC and U.S. Customs and Border Protection (CBP).

The grievance concerns an allegation that Swanton Sector management ordered, Border Patrol Agent (BPA) Daniel Dolan, the grievant, to work AUO on an excludable day that he had worked Official Time, in an attempt to inflict personal hardship and monetary damages for Union Representative Dolan's performance of a protected activity. The Union alleges by doing so, Swanton Sector Management has violated the CBA and federal labor laws, specifically, 5 U.S.C. §7131, 5 U.S.C. §7102 and 5 U.S.C. §7116, and the Fair Labor and Standards Act of 1938.

As a remedy to this grievance you have requested the following:

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.

The Union alleges at the time Beecher Falls management ordered Union Representative Dolan to work AUO they were aware he had completed eight hours of pre-approved official time. The Union claims 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 Union claims 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. The Union claims 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. The Union claims these violations were addressed in the step I grievance, yet Beecher Falls management refused to remedy the grievance. The Union claims 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. The union claims it calls into question whether management is acting in good faith in accordance with the Federal Service Labor Management Relations Statute.

The Union alleges 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 Union claims 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 Union claims 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. The Union claims 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 Union claims the CBA prohibits any restraint, interference, coercion, or discrimination against a Union official because of the performance of union duties. The Union claims 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. The Union claims 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.

The Union alleges apart from eight hours of official time being an excludable day, the work performed that day should not have been compensated as AUO. The Union claims the compensation of time by AUO is only when the nature of the work is administratively uncontrollable in nature. The Union claims the situation must require an agent to remain at work in order to continue and perform his duties. The Union claims the continuation of duties cannot be administratively controlled. The Union claims if the duties are controllable, then regular overtime instead of AUO is used for compensation. The Union claims 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.

The Union alleges 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. The Union claims Border Patrol Agents are not one of the exempted occupations from FLSA. The Union claims all work that is in excess of 40 hours a week that cannot be claimed as AUO must be claimed as Overtime pay. The Union claims agreements between employees and employer cannot change this, nor can management state that all overtime must be pre-approved.

I have reviewed your Step II grievance. First and foremost, the Union's argument that management retaliated against BPA Dolan for his participation in protected Union activities are without merit nor is it supported by any evidence whatsoever. Calling BPA Dolan in prior to the end of his shift and working Administratively Uncontrollable Overtime (AUO) had nothing to do with his role as a union representative, it was based solely on OPM regulations and the needs of the service.

Contrary to the Union's allegations, Union Representative Dolan was notified prior to the end of his shift and did not suffer any loss in pay, in fact Union Representative Dolan worked two and a half hours more AUO than he normally works. Article 7D of the CBA provides, "Union representatives will not suffer any loss of pay, allowances or penalty". The day is excludable as a Union representative taking official time at the end of the day or taking the full day of official time does not have the opportunity to work AUO to keep his overtime percentage. Agent Dolan was informed that he had to report back to the station prior to the end of his 8 hour shift as he was needed at the station to help process aliens. Article 6, Status of Employee Representatives, section C of the CBA states, "This does not preclude employees, including those on leave without pay, being called back to their official duties when there is an immediate need for their services". It was necessary for Agent Dolan to work AUO rather than end his shift and call it excludable. The Union's statement that Agent Dolan was notified after he worked a full eight hours of official time is erroneously stated. Agent Dolan was notified prior to the end of his shift and confirmed this as he wrote in his memorandum, titled "Official Time on 1/3/14" and dated January 8, 2014. Union Representative Dolan stated in this memorandum he was notified of the need for him to report back to the station at 1350 hours, which is prior to the end of his shift as his shift began at 0600.

In accordance with U.S. Border Patrol policy, titled "Hold Rooms and Short Term Custody," and dated January 31, 2008, section 6.2.1 states "Whenever possible, a detainee should not be held for more than 12 hours. Every effort will be made to promptly process, transfer, transport, remove, or release those in custody as appropriate and as operationally feasible. The aliens were apprehended at 11:15 a.m. and were all processed as WA/NTA (Warrant of Arrest/Notice to Appear) cases. Article, 4A of the CBA and 5 U.S.C. §7106(a)(1)(B) provides management has the right to "to determine the personnel by which Service operations shall be conducted". There were four illegal aliens and four agents to process them. All bargaining unit agents were held to process, not exclusively Agent Dolan.

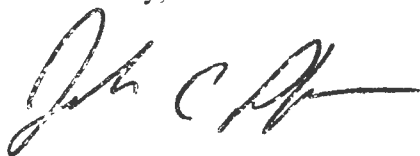
The Union claims management called BPA Dolan in retaliation for performing Union activities. This is an erroneous opinion as there have been many days where Union representative Dolan has been approved OT for all or part of the workday which was claimed and paid as excludable.

None of these seven occasions, which have occurred since October 2013, has Union Representative Dolan been called in to work after his excludable day.

Management does not argue that certain Border Patrol Agents who work in excess of the regularly scheduled workweek, who cannot be compensated by AUO, are to be paid other premium pay for "regularly scheduled work" hours. The fact is that the work BPA Dolan was called in for was compensable by AUO.

Consequently, the grievance and remedies requested are denied.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Pfeifer", with a stylized flourish at the end.

John C. Pfeifer  
Chief Patrol Agent  
Swanton Sector

CC: Luis Cadavid, Labor and Employee Relations Specialist