FEDERAL MEDIATION AND CONCILIATION SERVICE

Proceedings before

James M. Paulson, Arbitrator

In the matter of: **HANFORD GUARDS UNION, LOCAL 21** and **MISSION SUPPORT ALLIANCE, LLC**	Case No. 09-61107 Vehicle Accident Grievance

DECISION

PRELIMINARY STATEMENT

Alicia M. Berry, Liebler, Connor, Berry & St. Hilaire, represented Hanford Guards Union, Local 21.

Charles K. MacLeod, Chief Labor Counsel represented Mission Support Alliance, LLC.

Mission Support Alliance, LLC, hereinafter the "Company" or "MSA", and Hanford Guards Union Local 21, hereinafter the "Union", are parties to a collective bargaining agreement[1], hereinafter the "Agreement", which provides for the arbitration of unresolved grievances. The grievance[2] in this matter involves the treatment of bargaining unit members involved in vehicle accidents regarding overtime pay and the right of those members to subsequently drive their personal vehicles. The parties agreed that James M. Paulson was the arbitrator selected to arbitrate the matter and his decision would be final and binding as described in the Agreement.

[1] Joint Exhibit Nos. 1 & 2.

[2] Joint Exhibit No. 3.

On March 24, 2010 a hearing was held in a conference room at 2430 Stevens Center Place, Richland, Washington. At the hearing the parties were each permitted to present testimony and documentary evidence. The Company called as its witness: Montgomery J. Giuilo, Colonel and Deputy Chief Hanford Patrol. The Union called as its witness: Charles E. Nelson, Security Patrol Officer and Business Agent Hanford Guards Union, Local 21.

At the close of the hearing the Arbitrator ruled that the parties' briefs were to be e-mailed or post marked thirty days after the receipt of the transcript. The Arbitrator received the briefs of both parties on or before May 12, 2010 and will issue his Decision and Award on or before June 11, 2010.

STATEMENT OF THE ISSUES

The parties mutually agreed to the following statement of the questions to be submitted to arbitration:

" Did the Company violate the Labor Agreement, particularly Supplemental Agreement 1 regarding the Human Reliability Program (HRP), in its treatment of Security Police Officers (SPO's) following their on duty vehicle accidents in government vehicles with regard to the following:

1. HRP Disqualification/Temporary Removal
2. Overtime Pay Calculation
3. Personal Vehicle
4. Liability for personal vehicles delivered to Security Police Officer's residence by another SPO?"

"If so, what shall the remedy be?"

RELEVANT CONTRACT AND CFR PROVISIONS[3]

ARTICLE II – RESPONSIBILITY

1. * * *

B. Subject only to the express limitations stated in this Agreement, or in any other Agreement between the Company and the Union, the Company retains the exclusive right to manage its business and to direct the working force, including

[3] Since the Agreement incorporates by reference certain portions of the Code of Federal Regulations, those CFR sections which are relevant to the case will be set forth here.

(but not limited to) the right to plan, direct and control operations; to schedule and assign work to employees; * * * ; to establish and require employees to observe Company rules and regulations; to hire, lay off, transfer, promote or relieve employees from duties * * *.

2. None of the above rights **will** be exercised by management in contravention of the terms of this Agreement, or any other Agreement with the Union.

ARTICLE VII – HOURS OF WORK

1. SPOs will generally be scheduled to work either a straight or a rotational shift. * * *

   B. Rotational shift: SPOs will work a twelve (12) hour shift, including the lunch period, three (3) days one (1) week and four (4) days on the alternating week, which **will** constitute a regular schedule for such SPOs. * * *

3. The standard hours of work for rotational shifts are as follows:

   SPOs working the twelve **(12)** hour rotational shift will work a twelve (12) hour shift every other weekend off in a ten (10) week cycle. Within each two **(2)** week period, there **will** normally be one (1) workweek having **thirty-six** (36) regularly scheduled work hours [**three** (3) work days] and one (1) workweek having forty-eight (48) regularly scheduled work hours [**four** (4) work days]. Transition from Days to Nights or vice versa **will** occur at the end of the ten (10) week cycle. * * *

10. A SPO **will** be paid for time actually worked computed to the nearest one-tenth ($1/10^{th}$) hour.

ARTICLE IX – OVERTIME AND PREMIUM RATES

6. Twelve **(12)** Hour Shift Overtime Premiums

   A. Time and one-half (1-/2X) will be paid for all hours worked in excess of forty (40) hours in a workweek.

Supplemental Agreement 1

7. Types of Drug and Alcohol Testing Required

   SPOs **will** be tested for the use of illegal drugs and alcohol in accordance with the Federal Regulations. * * *

   The Federal Regulations set forth requirements for testing as outlined below: * * *

D. Reasonable Suspicion/Occurrence Drug and Alcohol Testing: All SPOs **will** be subject to drug and alcohol testing, and **will** submit to such testing on request when they engage in conduct which causes reasonable suspicion that drugs or alcohol are being used, or when they are involved in a reportable occurrence.

Code of Federal Regulations Title 10 Energy
Part 712—Human Reliability Program
Subpart A—Establishment of and Procedures for the Human Reliability Program

§712.11 General requirements for HRP certification.

(e) HRP-certified individuals may be tested for alcohol and/or drugs in accordance with §712.15(b), (c), (d) and (e) if they are involved in an incident, unsafe practice, or an occurrence, or if there is reasonable suspicion that they may be impaired.

§712.15 Management Evaluation.

(d) *Occurrence testing.* (1) When an HRP-certified individual is involved in, or associated with, an occurrence requiring immediate reporting to the DOE, the following procedure must be implemented:

(i) Testing for the use of illegal drugs in accordance with the provisions of the DOE policies . . ..
(ii) Testing for the use of alcohol in accordance with this section.

§712.19 Removal from HRP.

(b) The temporary removal of an HRP-certified individual from HRP duties pending a determination of the individual's reliability is an interim, precautionary action and does not constitute a determination that the individual is not fit to perform his or her required duties. Removal is not, in itself, cause for loss of pay, benefits, or other changes in employment status.

STATEMENT OF FACTS[4]

Background Facts

Mission Support Alliance, LLC is an outside contractor with the U.S. Department of Energy hired to participate in the cleanup of the 585 square mile Hanford Nuclear Reservation in southeastern Washington state. Part of the responsibilities of the Company include providing security to protect the existing plutonium grade nuclear fuel on federal property. In order to accomplish its responsibilities, the Company has a group of employees called the Hanford Patrol. Within this group are various types of Security Police Officers (SPOs). These SPOs are represented by the Union for purposes of collective bargaining.

The SPOs, among other things, are required to drive all terrain government vehicles over the grounds to patrol for individuals trespassing on the reservation or attempting to interfere with the nuclear fuel. The SPOs wear badges and combat clothing and are military trained and equipped to deal with terrorists. The SPOs drive these vehicles over various types of roads as well as off road, as may be needed, to perform their duties. Occasionally, these vehicles are involved in accidents in which the vehicle sustains some damage.[5] When an SPO is "involved in" or "associated with"[6] a vehicle accident which constitutes a "reportable occurrence"[7] to the DOE, he is sent within two hours of the incident for alcohol and drug testing.[8] While the results of the alcohol test are known immediately, it takes one to two days for the results of the drug test.[9]

Specific Facts Giving Rise to the Grievance

In February, 2009, following a meeting with Union officials[10], the Company changed its practice of allowing SPOs to stay at work following occurrence drug testing until the results of the drug tests were received. This former practice meant that the day after a drug test, the SPO (if he was scheduled to work) would come to the site and perform "make work". The SPO was

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[4] The following recitation is intended to describe in summary undisputed facts involved in this matter. Additional and disputed facts and legal issues will be discussed, as may be necessary, later in this Decision.

[5] The evidence showed that SPO driven vehicles were involved in accidents in about one in every one hundred thousand miles they are driven. Tr. 46-47.

[6] 10 CFR 712.15.

[7] Joint Exhibit No. 1, Supplemental Agreement 1, p. 113.

[8] Tr. 46.

[9] Tr. 47.

[10] The details of this meeting are somewhat in dispute and will be referenced later in this Decision. Tr. 55-56, 129-133, 140, 159-168, 172.

not permitted to perform his regular duties during this period. Following the February meeting, the SPO was sent home following the drug test until such time as the results of the test were known. He was paid "A" time while he was awaiting the drug test results. "A" time was straight time pay and not counted as "time worked" for purposes of accumulating the forty hours of work in a week necessary under the Agreement for overtime pay beyond forty hours of work. Under the prior practice when the SPO was given "make work" pending the results of the drug test, his time was considered as "time worked" for purposes of accumulating the forty hours in a week for overtime pay. SPOs on rotating twelve hour shifts worked thirty-six hours one week and then forty-eight hours the next. Eight of the forty-eight hours of a "long" week were paid at time and one half. Under the new practice, if the SPO was working a "long" week and was placed on "A" time while awaiting the results of a drug test, he may not receive his normal time and one half for the last eight hours he worked that week. For SPOs working twelve hour rotating shifts the new practice could mean a loss of up to eight hours at the overtime rate. Essentially, this meant that an SPO could lose four hours pay or about $125.

Additionally, following the February meeting, the Company no longer allowed SPOs awaiting the results of a drug test to drive their personal vehicles home after being tested.[11] Prior to this time if an SPO was sent for a drug test following an accident, he was allowed to drive his personal vehicle off the property. Under the new practice, the SPO could not drive his own vehicle off the site. He could be driven home by another Company employee either in a government vehicle or his own vehicle if he gave permission for it to be driven by the other person.

The Grievance

On March 24, 2009[12] the Union Business Agent and Company SPO Charles Nelson filed a step 3 general grievance[13] protesting the "current practice" of the Company regarding the pay treatment and the restrictions on the use of personal vehicles of SPOs involved in or associated with vehicle accidents who are sent for alcohol and drug testing. The Union alleged violations of the Agreement as well as the applicable federal regulations incorporated by reference into the Agreement. On May 12, 2009 the Company sent its answer to the grievance saying, in essence, that its change in its practice was consistent with the regulations and instituted to promote safety.[14]

[11] Tr. 161.

[12] Subsequent to the date of the grievance, effective August 3, 2009, the Company amended its policy on Internal Investigations/Disciplinary Action to partially reflect its practice in place on the date of the grievance. See, Union Exhibit No. 12, pp. 4-5; Tr. 152.

[13] Joint Exhibit No. 3; Joint Exhibit No. 1, p. 83.

[14] Joint Exhibit No. 4.

CONTENTIONS OF THE PARTIES

Union Contentions

The Union points out that by the Agreement, the parties agreed to be bound by the terms of 10 CFR §712. An analysis is then made of the facts in light of the requirements of the regulations. The Union draws the following conclusions: (1) If an employee is involved in a "reportable occurrence" such as a vehicle accident, the Company is required to test the employee for alcohol and drugs. (2) The Company can only remove a SPO from HRP duties if there is a "reasonable suspicion" that he is under the influence of drugs or alcohol. (3) Nothing in the regulations allows the Company to send an employee home pending a drug test. (4) Being tested for drugs because of a vehicle accident does not allow the Company to cause an employee loss of pay or benefits.

The Union then contends that nothing in the Agreement allows the Company to dock an employee's pay, to remove access to the site without reasonable suspicion of impairment or to deprive an employee of the use of his personal vehicle. The Union also asserts that the Company's claim that only hours worked count toward accumulating forty hours per week for purposes of overtime pay is not supported in the Agreement as there are at least two situations where the contract allows actual time not working to be counted as time worked for overtime purposes.

Finally, the Union deals with the Company contentions that the Union requested to be put on "A" time in a February, 2009 meeting and that the management rights clause gives the Company the right to do what it has done. The Union did not request to be put on "A" time as they were already sent home for the rest of a shift after an accident. In any event, an oral agreement is not binding under the Agreement. The Union then argues that the management rights clause is subordinate to the regulations and the regulations prohibit the Company's action.

Company Contentions

The Company first points out that the regulations require that the Company "must" have drug testing as part of it HRP program if an employee is "involved" in an "occurrence". An accident with a government vehicle is an "occurrence". The Company then asserts that the regulations provide for the "temporary removal" of an employee from work "pending a determination of the individual's reliability [as] an interim, precautionary action."

The Company then deals with the Union argument that SPOs sent home on "A" time should have that time credited as time "worked" for purposes of overtime accumulation in a week. The Company turns to the language in the Agreement which specifically states that overtime is to be paid for all hours "worked" over forty in a week. Moreover, the contract distinguishes between hours "paid" and hours "worked". In some instances the contract specifically provides that hours not actually worked will be treated as hours worked for overtime purposes.

The Company next deals with the Union argument that SPOs should be allowed to drive their personal vehicles home after alcohol testing but before drug testing results. Under the circumstances in question, the SPO has passed the alcohol test. The Company argues that there is no contract provision allowing the SPO to drive his personal vehicle under these circumstances. Moreover, the Company offer to drive the SPO home and to have someone from the Company drive the SPOs vehicle home remediates any legitimate concern of the Union.

With respect to the Union claim in the alternative that the Company must provide liability insurance coverage for circumstances when an SPO has given permission to another employee to drive his personal vehicle home, the Company notes that there is no contractual provision, on federal regulation or practice which requires the Company to do this. Accordingly, the argument goes, the Arbitrator has no basis for granting the Union's requested remedy.

The Company then asserts the affirmative argument that the Union is seeking to gain through arbitration what it could not gain through negotiations. An analysis is then made of the Union Business Agent's testimony and the conclusion that: (1) He admitted that he is trying to gain through arbitration what he could not get through negotiations. (2) The Union has pointed to no contract provision or specific regulation which requires the Company to treat the non working time between the taking of the drug test and the receipt of the results as working time for purposes of overtime hours accumulation.

Finally, the Company points to the specific language in the management rights clause giving it the "exclusive right to manage its business and to direct the working force" as affirmatively proving that its actions complained about in the grievance are authorized by and in compliance with the terms of the Agreement.

DECISION[15]

Burden of Proof

As the Company correctly points out, the Union has the burden of proof[16] in this case. This burden is to establish its case by a preponderance of the evidence. In the instant matter, the Union must prove the facts of what happened and that the language in the Agreement or applicable federal regulation was violated by the Company action. Any gap in the evidence or failure to point to a necessary provision in the Agreement or applicable regulation means that the Union has not met its burden of proof.

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[15] The parties stipulated to four separate questions within the general issue of whether or not the Agreement has been violated in the first general issue. This Decision will take each in turn.

[16] "In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof." St. Antoine, *The Common Law of the Workplace* (BNA 2nd Ed. 2005), §1.93, p. 55.

Removal from Work Pending Test Results

Both parties agree that whether the Company can refuse to allow SPOs to work pending the results of the drug test turns on the applicable provisions in 10 CFR §712. Initially, it appears virtually undisputed that an accident in a government vehicle constitutes an "occurrence"[17] under the regulations which, in turn, require alcohol and drug testing.

The real language in dispute is contained in 10 CFR §712.19 which allows "temporary removal of an HRP-certified individual from HRP duties *pending a determination of the individual's reliability*. . .." The Arbitrator understands that if the SPO's HRP certification is temporarily removed, he cannot be permitted to perform his duties that require certification. This apparently means that he cannot do his regular job. Presumably, he can perform "make work", which does not require certification. A threshold question is whether drug testing constitutes "a determination of the individual's reliability." While the regulations do not appear to specifically say that it does, the Arbitrator concludes that a reasonable and likely interpretation is that it does. Accordingly, if the regulations require the Company to drug test under the circumstances of a reportable occurrence, then it *may* temporarily remove the SPO from his job unless the Agreement or some other provision in the regulations prohibit it.[18]

The Union's task[19] is to point to a provision in the regulations which *prohibits* the Company from removing certification pending drug testing results. The overall structure of the regulations in question is to stress *when* the employer *may remove* certification rather than when an employer *may not* remove a certification. The Union's strongest argument comes from the last sentence in §712.19 which states, in part: "[r]emoval is not, *in itself*, cause for * * * other changes in employment status." (emphasis added). The question then is whether not allowing an SPO to perform his regular job is a *change in employment status* as intended in the regulation. The Arbitrator concludes that it is not. Clearly, the primary concern of the regulations in this regard is to not allow an individual who may be under the influence of drugs to make the critical and sometimes split second judgments that the duties of an SPO require. "[C]hange in employment status" refers to things such as "pay" and "benefits" and not to performing critical and sensitive duties of a person's job.

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[17] 10 CFR §712.15 As HRP certified individuals, SPOs are subject to drug testing if they are "involved" in an "occurrence".

[18] The Union argument that the Company may only remove certification based on "reasonable suspicion" or a "reasonable belief" is not consistent with the wording in §712.11. That provision sets out the circumstances under which an individual may be tested in the disjunctive and not the conjunctive. In other words, there does not have to be a "reasonable suspicion" for drug testing if there is an "occurrence." Moreover, historically the Company has always removed an individual from his regular duties (although giving him "make work") pending the results of a drug test.

[19] The Union cleverly, but erroneously, attempts to put the burden on the Company of proving it has the right to take the actions it did in this case. (Union Brief, p. 8).

Based on the foregoing, the Arbitrator concludes that the Union has not established by a preponderance of the evidence that the applicable regulations prohibit the Company from not allowing an SPO to work pending the results of a validly required drug test. In as much as the Union does not argue that a separate provision of Agreement prohibits the Company from removing certification or allowing an employee to work pending a drug test, the Arbitrator finds no violation of the Agreement as to the first issue.

Overtime Pay Calculation

In effect, the Union concedes that there is no specific contract provision which requires the Company to count non working time as time worked for purposes of overtime calculation. Indeed, the Company correctly observes that the clear contract language requires in general[20] that only time worked may be counted toward accumulating the requisite forty hours in a week to require time and half for hours over forty. That there are some bargained exceptions to counting nonworking time as time worked for purposes of accumulating forty hours in a week only reinforces the Company argument. Clearly, the parties have agreed to the specific situations in which nonworking time will be counted as time worked for purposes of overtime calculations. Nonworking time (even though spent waiting and paid for at straight time) pending the results of drug testing is *not* an agreed upon exception to the overall requirement of the Agreement that only actual time worked is to be counted for purposes of overtime calculations. If the parties had so intended, they would have made it clear in the Agreement.

The Union's strongest argument, however, is that the applicable language in the regulations prohibits the Company from not counting time spent waiting for drug test results as time worked for overtime purposes. As partially quoted above, §712.19 states, in part, that "[r]emoval is not, *in itself*, cause for loss of pay, ..." Literally, the Union is correct in pointing out that without the removal of their certification SPOs would still be allowed to work and to, therefore, accumulate "work hours" for purposes of overtime. On the other hand, this argument does not account for the language "in itself". It is the negotiated Agreement that sets the requirement that hours actually be worked in order for them to be counted toward overtime calculation. Accordingly, it is not the "removal" that directly causes the "loss" of overtime pay but rather the language in the Agreement. The parties could have bargained a provision , as they did elsewhere, that required nonworking time spent awaiting the results of a drug test be counted toward the eligibility for overtime in a work week, *but they did not.* It appears to the Arbitrator that the language in the regulations left up to, *inter alia*, collective bargaining to determine whether or not time waiting for test results would be counted as time worked for purposes of overtime calculation.

Again, the Union has not established by a preponderance of the evidence that the Agreement and, by incorporation, the regulations were violated by the Company refusal to count

[20] Overtime "will be paid for all hours *worked* in excess of forty (40) hours in a workweek." (emphasis added). Joint Exhibit No. 1, p. 44.

paid time spent awaiting the results of drug testing as time worked for the purposes of overtime accumulation.[21]

Right to Drive Personal Vehicle Pending Drug Test Results

Nothing in the Agreement or the regulations *directly* deals with the matter of an SPO driving his personal vehicle on site while awaiting the results of a drug test. Certainly driving one's personal vehicle on site to go home pending the results of a drug test is not "working" or performing the duties of an SPO's job. At the point in time the SPO would be driving his personal vehicle he is not "impaired" because of alcohol (he has passed the test) nor is he under "reasonable suspicion" of being under the influence of drugs. Indeed, §712.19 clearly states that removal of HRP certification pending drug testing results "does not constitute a determination that the individual is not fit to perform his or her required duties."

It is also worthwhile to note that prior to the Company's change in rules[22] SPOs were permitted to drive their personal vehicle pending the drug test results.[23] The Company's rationale for the change in rules is that it is "protecting the employee" and since accidents are so rare, being in the accident "is cause."[24] On the other hand, the Company put in no evidence that under the previous rules where an SPO could operate his personal vehicle any incident had occurred. There was no indication that anything had changed to justify the rule change—other than an apparent heightened concern to "protect" the employee.

The Arbitrator sees a clear distinction between whether a SPO should be allowed to perform his job duties and whether he should be allowed to drive his personal vehicle. The skills required to protect national security matters are considerably greater than those required to operate his personal vehicle.

The authority for the Company to prohibit an employee from driving his personal vehicle on site pending drug test results springs from the so-called "management rights" clause in the Agreement.[25] These rights include, *inter alia*, the "exclusive right" to "establish and require employees to observe Company rules and regulations." The management rights clause in the Agreement, however, is subject to the limitation that the Company may not exercise its right in

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[21] The Arbitrator does not find that there was any agreement by the Union in February, 2009 meetings with the Company to pay "A" time for time waiting such as to not count that time as time worked for purposes of accumulating forty hours toward overtime in a work week.

[22] The change grieved by the Union in March, 2009, were codified in the Patrol Policies, Procedures, and Training, effective August 3, 2009. Union Exhibit No. 12.

[23] Patrol Operations Bulletin-- Internal Investigations/Disciplinary Action, effective February 25, 2008, §3.1 Drug/Alcohol Screening, Step 7 ("[SPO] may only operate their POV until test results have been received.") and Step 8 ("If the SPO is not impaired * * * [he] will be allowed to drive personal vehicle at the end of assigned shift."), pp. 4-5.

[24] Testimony of Deputy Chief Giuilo, Tr. 71-72,

[25] Joint Exhibit No. 1, Article II, p. 2.

an arbitrary, capricious, discriminatory or clearly unreasonable manner. This management obligation springs from the common law implied covenant of good faith and fair dealing existing in every contract.[26] The Arbitrator concludes that the Company has exercised its management right in an arbitrary and unreasonable manner by changing it rules to not allow SPOs to drive their personal vehicles on site pending the results of a drug test where there is no indication that the SPO is impaired in any way. The mere remote possibility that the SPO may have drugs in his system is not enough to have a reasonable basis to deny him the benefit of being able to drive his personal vehicle home. Accordingly, the Arbitrator concludes that the Company has violated the Agreement.

Liability for Personal Vehicle Driven by Another Employee

In light of the determination of the Arbitrator immediately above, the issue of Company liability for another employee driving an SPO's vehicle pending drug test results is moot. There was no situation where an accident or any damage occurred to an SPO's personal vehicle. Accordingly, the Arbitrator makes no ruling on the last issue.

CONCLUSION

Based on the foregoing analysis, the Arbitrator concludes: (1) The Company did not violate the Agreement or applicable regulations by temporarily removing an SPO's HRP certification pending drug testing results. (2) The Company did not violate the Agreement or applicable regulations by not permitting an SPO to work pending drug testing results and not counting the pay given to the SPO as time worked for purposes of overtime calculation. (3) The Company did violate the Agreement by refusing to allow an SPO to drive his personal vehicle off the site pending the results of drug testing. (4) The Company is ordered to cease and desist such policy/rule. The Arbitrator makes no ruling on whether the Company was liable for any damage to an SPO's vehicle driven by another employee.

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James M. Paulson, Arbitrator

June 8, 2010

[26] *Fairview Southdale Hospital*, 96 LA 1129, 1135 (Flagler, 1991). See also, *Restatement of Contracts – Second*, §209, p. 99 (1981). "Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the 'sole judge' of a matter, management's action must not be arbitrary, capricious, or taken in bad faith." Elkouri & Elkouri, *How Arbitration Works*, (BNA 6th Ed. 2003), pp. 640-641. (citations omitted).