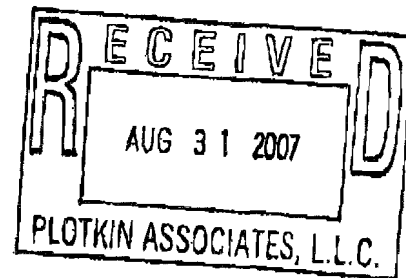


Thomas D. Hartigan  
Arbitrator/Mediator  
15 Tekening Way  
Hamilton, NJ 08690  
609-586-1505  
FAX # 609-586-8194  
Email – TDHartigan@aol.com



CLIENT'S COPY

August 28, 2007

Eric M. Bernstein, Esq.  
Eric M. Bernstein & Associates  
Two North Road, P.O. Box 4922  
Warren, NJ 07059

Myron Plotkin, Labor Relations Consultant  
Plotkin Associates, LLC  
P.O. Box 100  
Leeds Point, NJ 08220

Re: County of Atlantic  
And  
FOP Lodge 34  
PERC Docket No. AR 07-476  
(G. Clerico/Letter of Reprimand)

Gentlemen:

Enclosed please find two signed copies of my award in the above referenced matter.  
Also, I have enclosed a copy of my invoice and I ask that you forward it to the  
appropriate person for payment.

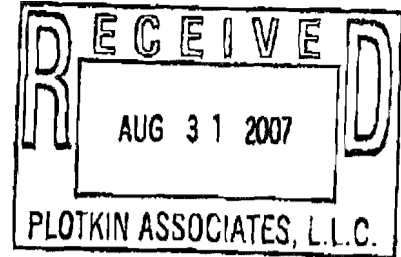
Sincerely,

A handwritten signature in cursive script that reads "Thomas D. Hartigan".

Thomas D. Hartigan  
Arbitrator

TDH;jh

Thomas D. Hartigan  
 Arbitrator/Mediator  
 15 Tekening Way  
 Hamilton, NJ 08690  
 609-586-1505  
 FAX # 609-586-8194  
 Email – TDHartigan@aol.com



CLIENT'S COPY

August 28, 2007

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County of Atlantic

-and-

PERC Docket No. AR 2007-476

FOP Lodge 34

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**ARBITRATOR'S INVOICE**

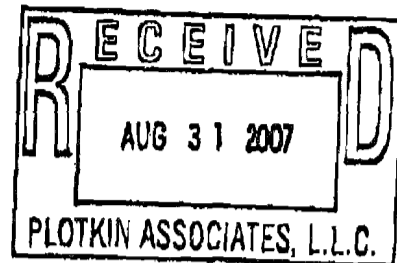
Hearing held on 7/20/07	\$1,200.00
Review of documents, writing & preparation of Award	1,200.00
Expenses – Hamilton to Galloway Tp. & return for 7/20/07	<u>63.80</u>
<b>Total</b>	<b>\$2,463.80</b>

Each Party's Share:

County	\$ 1,231.90
FOP	\$ 1,231.90

**STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

-----  
In the Matter of the Arbitration Between the  
**County of Atlantic**  
And  
**FOP Lodge 34**



**CLIENT'S COPY**

-----  
Before: Thomas D. Hartigan, Arbitrator

PERC Docket No. AR – 2007-476  
Issue: Gregg Clerico – Letter of Reprimand

**Appearances:**

**For the Employer:** Eric M. Bernstein, Esq.  
Eric M. Bernstein & Associates

**For the Union:** Myron Plotkin, Labor Relations Consultant  
Plotkin Associates, LLC

In accordance with the arbitration agreement between the parties and the rules of the NJ Public Employment Relations Commission, I was selected by the parties and designated by the Commission to hear and decide the matter set forth herein on February 13, 2007. A hearing was held on July 20, 2007 in the Conference Room of the Atlantic County Library in Galloway Township at which time

the parties were presented full opportunity to present any testimony, evidence or argument in support of their positions. The parties agreed to argue the matter by way of briefs to be postmarked by August 3, 2007. The Employer's brief, dated August 2, 2007, was received by Fax on August 3, 2007. The Union's brief, dated July 28, 2007, was received on July 31<sup>st</sup>. The record was deemed closed as of August 3, 2007.

### **ISSUE**

Did the County of Atlantic and/or its agent(s) violate the Agreement and/or the standards of just cause when it issued a reprimand to Officer Gregg Clerico based upon alleged falsification of an overtime slip on October 2, 2006? If so, what shall the remedy be?

### **BACKGROUND**

The County of Atlantic (hereinafter the County or the Employer) and FOP Lodge 34 (the FOP or the Union) are parties to a Collective Bargaining Agreement (CBA) covering the period of January 1, 2003 through December 31, 2006. (Joint Exhibit 1) Article I of the Agreement recognizes "the FOP as the exclusive bargaining agent for full-time employees classified as Correction Officers...." On November 9, 2006 Officer Clerico received a Written Reprimand from Warden Gary Merline, which stated "An investigation discovered that on October 2, 2006 employee filed a false overtime slip totaling .10 of an hour." (J-3) On November 19, 2006 the Union filed a grievance stating that "this officer was charged with falsifying documents for putting in a overtime slip". On November 22, 2006 Warden Merline denied the grievance, stating that "you were asked to file a report on the late relief to which you also gave no reasons for your overtime and only stated

you were relieved late. This was in direct contrast to what the relieving officer states and all of the documents show." The matter has now proceeded to this arbitration.

## **RELEVANT CONTRACT PROVISIONS**

### **Article II – Grievance Procedure**

#### **A. Purpose**

1. The Purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the problems which may arise affecting terms and conditions of employment. Both parties agree that these proceedings will be help as informal and confidential as may be appropriate at any level of this procedure.

#### **B. Definitions**

1. A "grievance" is a claim by an employee, group of employees, or the FOP on behalf of an employee or group of employees, based on the violation of this Agreement.

#### **C. Procedure**

**Level Four** – In the event a settlement has not been reached through Level Three procedures, the FOP upon determining that the grievance is meritorious, may submit the grievance to binding arbitration. The arbitrator shall be selected in accordance with the procedures established by the Public Employment Relations Commission (PERC).

The arbitrator shall be bound by the provisions of this agreement and restricted to the application of the facts presented in the grievance proceeding. The arbitrator shall not have the authority to add to, modify, detract from or alter in any way the specific and express written provisions of this agreement or any amendment or supplement thereto. The arbitrator shall have no authority to interpret any law, court decision or statute of this State or the United States in rendering any determination.

**Article III – Work Schedule**

- A. All officers of the Department of Public Safety covered under this Agreement shall work a 40 hour week, including a working lunch period. In addition, the Officers shall report for roll call 15 minutes before the start of their shift.

**Article IV – Overtime**

- A. There shall be overtime payment at one-and-one-half time's regular pay for all hours worked over 40 hours per week.

**Article XIX – Employee Rights****B. Advice of Rights**

15. No dismissal, demotion, transfer, suspension, reassignment, denial of promotion or reassignment, or any other disciplinary actions shall be taken against any Officer by reason of his/her lawful exercise of the rights and privileges guaranteed by the Constitutions and laws of the United states and of the State of New Jersey and/or the rights guaranteed herein, or elsewhere in the contract.

**POSITION OF THE EMPLOYER**

On October 2, 2006 Officer (Ofc.) Clerico submitted a slip for overtime to which he was not entitled. Lieutenant (Lt.) Giberson in reviewing the overtime slips for that date questioned several of the requests. He found that in the cases of Ofc. Hines and Navas the overtime was justified. In investigating Ofc. Clerico's slip, he asked Ofc. Sikora about relieving Clerico. Officer Sikora informed him that he relieved Clerico on time and that there were no problems that should have kept Clerico late. Lt. Giberson also reviewed the housing unit log and it showed no late entries that would have caused Officer Clerico to be held over. Ofc. Clerico's overtime was not approved based on this investigation.

Three days after the overtime slip was presented, Lt. Giberson ordered Ofc. Clerico to submit a report on the discrepancy between his slip and the housing log. Ofc. Clerico's report simply stated, "I was ordered to write this report by Lt. Giberson about being relieved late on Monday Oct 2 2006. I punched out at 1537 see over time slip." (Employer Exhibit 4)

Lt. Giberson also ordered Ofc. Sikora to write a report which said, "I relieved my post (F-Pod) on time. I did nothing to relieve my fellow officer late (i.e. stop to use the bathroom, etc.)." (E-5) Lt. Giberson concluded in his report to Operations Lt. Murphy that Ofc. Clerico had violated Employees Rules and Regulations 1.3.11, section 12.15 by falsifying records. Ofc. Clerico was then reprimanded for falsifying or altering department reports.

The County followed all proper procedures involved in this matter. Lt. Giberson conducted a full investigation including a review of the housing log, speaking to Ofc. Sikora, and ordering reports from both Ofc. Clerico and Ofc. Sikora. Lt. Giberson's conclusion that there was no basis for Ofc. Clerico's submitting an overtime slip was confirmed by the County during the grievance procedure. Additionally, Ofc. Clerico has never properly explained the delay that kept him late on October 2, 2006. His written explanation simply said that he was relieved late but Ofc. Sikora refuted that statement. His argument that the clocks at the facility aren't synchronized doesn't fit his statement that there is no clock on the wall at his station.

The Union's argument that Ofc. Clerico was disciplined because of his union affiliation has no basis in fact. As noted Lt. Giberson conducted a full investigation into this and other overtime requests of other FOP members. He found justification for the other officer's overtime requests and they were approved but he could

find no justification for Ofc. Clerico's overtime so it was denied as it should have been.

The County has paid overtime to officers who were relieved late but in the instant matter the Union has failed to show that this was the case. If an officer claims overtime, it is certainly the County's right to determine if that claim was justified. Ofc. Clerico's claim was determined not to be justified. This false claim represents a falsification of a document, justifying a disciplinary action by the County. Indeed, the County was quite lenient in its discipline of a written reprimand.

### **POSITION OF THE UNION**

While the CBA does not contain a specific "just cause" provision, it does provide in the "Purpose" section of the Grievance Procedure for "solutions to the problems which may arise affecting terms and conditions of employment." Certainly, the imposition of a letter of reprimand into an employee's file affects his terms and condition of employment. As such the commonly accepted review of this type of question is based on the employer's having "just cause" to impose the discipline. In the instant matter the County has not carried its burden that it had just cause to discipline Ofc. Clerico. Indeed, prior to the hearing in this matter the grievant has never been afforded the opportunity to speak to the incident. He was ordered to write a report but no interview was ever conducted.

Officers at the Justice Facility report to work fifteen minutes before the end of the previous shift for muster. They have their muster and then speak with the officer they are relieving about any problems or issues and exchange relevant information. The relieved officer then punches out at the time clock using a swipe card. If the officer punches out past the stated end of his shift, he is compensated for the overtime.

In his thirteen years with the County Ofc. Clerico has on many occasions punched out a few minutes late due to a delay and he has always been paid for this overtime. In the instant matter Ofc. Clerico's shift ended at 3:30 pm and his relief reported for muster at 3:15 pm. Ofc. Clerico clocked out six minutes beyond the end of his shift. While it is hard to imagine that he would attempt to falsify a record to achieve .1 hours of overtime that is what the employer has charged. However, the County has not been able to substantiate its charge. It has failed to prove that the grievant willfully and purposely tried to defraud the County of these six minutes of overtime.

Officer Clerico testified that on October 2, 2006 when his relief, Ofc. Sikora, reported to his station, Sikora was agitated at having been stuck with an overtime assignment. While Ofc. Sikora's report noted that he relieved his station on time, Ofc. Clerico testified and Lt. Giberson confirmed that there is no clock at the station. Therefore, an officer must rely upon his own watch to determine if he relieved someone on time. Although Ofc. Sikora's report was entered into evidence over the Union's objection, he was not called as a witness by the Employer and was not available for cross-examination by the Union. The Union noted and Lt. Giberson agreed that the handwriting at the bottom of Ofc. Sikora's log (E-3) did not appear to be the same as the rest of the handwritten log, further calling into question this document to which the Union objected.

Officer Clerico also explained that upon being relieved from his station, he had to walk down hallways to an elevator which he took to the first floor where he clocked out. He testified that he didn't know exactly how long this took but it certainly took a few minutes. While Ofc. Sikora's report indicated that he relieved his post on time, it does not account for the time needed to travel from the post to the time clock. He could have relieved Ofc. Clerico at 3:30 pm, thereby relieving his post on time, but Ofc. Clerico then

had to go down the hallway, onto the elevator and to the time clock before punching out. The County did not present any information to show that it had accounted for this travel time between the post and the time clock. Additionally, not having Ofc. Sikora available to testify the Union could not determine the meaning of his terminology on relieving his post "on time".

The County's investigation into this matter was seriously flawed. As noted Ofc. Clerico was never questioned about his overtime slip but simply told to write a report. While the County argues that Ofc. Clerico's report was inadequate in explaining the reasons for his being late, there was no follow up to the report. Indeed, Warden Merline testified that he never questioned Officers Clerico or Sikora before upholding the decision to discipline Ofc. Clerico.

The burden of proof is on the County to prove that Ofc. Clerico intentionally falsified the overtime slip. They have not carried that burden. Ofc. Clerico openly put in his overtime slip. He responded to the request to file a written report on the matter. The amount of overtime, six minutes, is so diminimus that no personal gain or compensation was available to warrant the risk of falsifying a document. The County's reliance on Ofc. Sikora's written report is undermined by their failure to have him testify and open himself to cross examination. The grievance must be upheld and the written reprimand removed from Ofc. Clerico's file.

### DISCUSSION

On October 2, 2006 Ofc. Clerico clocked out at the swipe machine at 15:36. In his report (E-4), dated October 5, 2006, he notes that he was relieved late. Ofc. Sikora who relieved Clerico on October 2<sup>nd</sup> notes in his report (E-5), dated October 7, 2006, that he "relieved his Post (F-Pod) on time." Ofc. Sikora's log (E-3) shows an entry at 15:30 that states "Ofc. Sikora relieved Ofc. Clerico and

received (9) keys....” Lt. Giberson requested written reports from both Ofc. Clerico and Sikora. Based on these documents he determined that Ofc. Clerico had falsified his request for overtime resulting in Director Merline’s “Notice of Disciplinary Action”, dated November 9, 2006. On November 19, 2006 a grievance was filed contesting the discipline. The grievance was denied by Director Merline on November 22, 2006 who noted that Ofc. Clerico’s claim of being relieved late was “in direct contrast to what the relieving officer states and all the documents show.” Public Safety Director Mulvihill concurred with Director Merline’s decision in his November 27<sup>th</sup> response.

Employer Exhibit 3 is Ofc. Sikora’s log for October 2, 2006, covering his shift on F-Pod from 15:30 to 23:30. As noted above, the first entry on the log is recorded at 15:30 and states “Ofc. Sikora relieved Ofc. Clerico....” In his report, E-5, Ofc. Sikora states that he relieved Ofc. Clerico “on time.” The log entry and the statement can be considered consistent. However, there are questions that remain as to Ofc. Sikora’s meaning of relieving “on time.” If Ofc. Sikora meant that he entered F-Pod at 15:30, which he could classify as “on time”, and then began to count the card box and the keys and receive the other items and information noted on his log under this timed entry of 15:30 then Ofc. Clerico would not have been able to leave at 15:30. This would have caused Ofc. Clerico to leave F-Pod sometime after 15:30, which he could have defined as a late relief.

If Ofc. Sikora’s log entry at 15:30 meant that the card and key count and other exchanges had been completed by 15:30, there is still the question of Ofc. Clerico’s traveling from F-Pod on the second floor to the swipe machine on the first floor. Ofc. Clerico testified that he had to walk down a hallway, take an elevator to the first floor, and then walk to the swipe machine. Although no definitive time on how long this takes was presented, it would certainly be impossible for him to leave F-Pod at 15:30 and clock

out a floor away at the same exact time. Therefore, Ofc. Clerico would be clocking out at sometime after 15:30.

For Ofc. Clerico to clock out at 15:30 on the first floor, Ofc. Sikora would have had to relieve him sometime prior to 15:30, allowing Ofc. Clerico time to travel from F-Pod to the swipe machine and clock out at 15:30. However, the only information that we have from Ofc. Sikora, as he was not called to testify, is his log entry that he relieved Ofc. Clerico at 15:30. This is not inconsistent with Ofc. Clerico's statement of being relieved late if Ofc. Sikora meant that he reported to F-Pod at 15:30 and then had to count the cards and keys and exchange the information on inmates, nor is it inconsistent with Clerico's statement if Ofc. Sikora meant that the exchange was completed at 15:30 as the time to travel from F-Pod to the swipe machine must be considered.

Complicating this timing question is the fact that there is no clock in F-Pod. As Ofc. Sikora didn't testify, there is no way to know how he determined the time of 15:30 on his log. He may have used his personal watch, which may have reported a different time than Ofc. Clerico's watch. He may have estimated the time from leaving muster to reporting to F-Pod and estimated that he relieved Ofc. Clerico on time as he stated in his report but without his testimony we have only his log to rely upon. Even Lt. Giberson on cross examination admitted that there was no way of telling the exact time because of the lack of a clock at this station.

Lt. Giberson and Director Merline testified that they never questioned or interviewed Ofc. Clerico. Lt. Giberson ordered written reports from Ofc. Clerico and Sikora but Ofc. Clerico testified that it wasn't until the hearing that he was questioned about the details of October 2, 2006. Ofc. Clerico testified at the hearing that Ofc. Sikora needed additional time for the exchange of information as he wasn't use to working on the 3<sup>rd</sup> shift with prisoners away at court or at video court. He also explained that


Ofc. Sikora was upset at being required to work an additional shift after spending the day in training, resulting in a delay in completing the exchange of information. Ofc. Clerico's report simply stated that he was relieved late and apparently none of this was elicited during the investigation of the incident or during the grievance procedure.

It is apparent that faced with the conflicting reports Lt. Giberson chose to believe Ofc. Sikora's report that he relieved Clerico on time as this seemed consistent with Sikora's log. However, as noted above there are serious faults in this reasoning as to Ofc. Sikora's actual meaning of "on time", the travel time involved even if Sikora relieved Clerico at 15:30 at the second floor F-Pod, and the lack of a standardized timepiece to rely upon. These flaws were never investigated, which is further complicated by the failure of Ofc. Sikora to testify.

### **AWARD**

It is generally understood that in a disciplinary matter the employer carries the burden of proving that the discipline was justified. In the matter at hand, based on the evidence presented and the analysis above, I find that the County has not carried its burden of proof that Ofc. Clerico falsified his overtime slip on October 2, 2006. Therefore, the grievance is sustained.

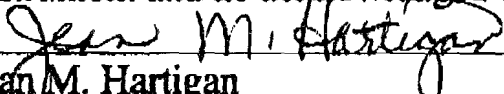
The County is hereby ordered to rescind the Notice of Disciplinary Action issued to Officer Clerico on November 9, 2006 and to remove said Notice from his personnel file and any other work related files. Also, Officer Clerico is to be paid for the .1 hours of overtime worked on October 2, 2006 at his appropriate overtime rate.

  
 \_\_\_\_\_  
 Thomas D. Hartigan  
 Arbitrator

Dated: August 28, 2007  
 Hamilton, NJ

State of New Jersey }  
 County of Mercer }ss:

On this 28<sup>th</sup> day of August 2007, before me personally came and appeared Thomas D. Hartigan to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

  
 \_\_\_\_\_  
 Jean M. Hartigan  
 Notary Public of New Jersey  
 My commission expires 6/17/09