

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

American Federation of Government Employees,
Council of Prison Locals 33,
Local Union 817
Lexington, Kentucky

and

U.S. Department of Justice
Federal Bureau of Prisons
Federal Medical Center
Lexington, Kentucky

Arbitrator: Jerry B. Sellman
Decision Dated: February 17, 2015
Issue: Quarterly Roster Bidding Procedures:
How PHS and Bargaining-unit
Employees Affected

APPEARANCES

FOR THE AFGE:

Sandy Parr - National Fair Practices Coordinator, AFGE/Council of Prison Locals 33,
representing Local Union 817
Dwayne Person – Mid-Atlantic Regional Vice President, AFGE/Council of Prison Locals 33,
representing Local Union 817
Dwayne Pettit – Tool Control Officer with the Bureau of Prisons and former President of Local
817, Witness
Joseph Hagan – President of Local 817, Witness
Phillip “Leonard” Mullins – RN with the Bureau of Prisons, Lexington Federal Medical Center,
Witness
Robin Goode – Health Systems Specialist and Medical Union Steward, Witness
Shelly Blair – RN with the Bureau of Prisons, Lexington Federal Medical Center, Witness
Carrie Schuler – Public Health Service Officer, Lexington Federal Medical Center, Witness
James Chaney – Lieutenant Commander, Assistant Director of Nursing, Bureau of Prisons,
Lexington Federal Medical Center, Witness

FOR THE AGENCY:

Michael A. Markiewicz – Labor Management Relations Specialist for the U.S. Department of
Justice, Federal Bureau of Prisons, representing the Federal Bureau of Prisons, Lexington
Federal Medical Center
Anthony Ferree – Director of Nursing, Federal Bureau of Prisons, Lexington Federal Medical
Center, Witness

I. STATEMENT OF THE CASE

This matter came for hearing before Arbitrator Jerry B. Sellman on November 20, 2014. The hearing was held at the Bureau of Prisons, Lexington Medical Center, near Lexington, Kentucky. The American Federation of Government Employees, Council of Prison Locals No. 33, Local Union 817 (hereafter “Union” or “AFGE”) and the Federal Bureau of Prisons (“FBO” or “Agency”), are parties to a Master Collective Bargaining Agreement (the “Master Agreement”), which governs the wages, hours, and other terms and conditions of employment of members of the AFGE. The Agreement also provides for a grievance procedure as the mechanism to be used to resolve any disputes concerning the interpretation or application of its terms.

This proceeding concerns a Grievance filed by the Union alleging a violation of the parties’ Agreement, and/or applicable laws and regulations as it related to the posting of Nursing Departmental Rosters for bargaining-unit employees (referred to as “bargaining-unit employees” or “civil service employees”) and Public Health Services Officers (referred to as PHS employees). The Union argues that the Agency violated Article 18 of the Agreement, as well as other provisions of the Agreement, federal law and prior arbitration decisions, when it removed selected available assignments, days off, and shifts from quarterly rosters and made them available to PHS employees prior to posting the quarterly roster and allowing bargaining unit members the opportunity to submit their preference requests. The Agency argues that pursuant to 5 USC§ 7106 and Article 5 of the Agreement, it has the management right to set aside certain available assignments, days off, and shifts for PHS nurses prior to posting a roster for the upcoming quarter. Since it has followed this procedure for many years, the grievance is not timely filed.

The Parties stipulated that the matter was properly before the Arbitrator for resolution.

The Parties each framed the issue(s) presented differently.

The Union frames the issues as follows:

(1) Did the Agency violate the law 5 USC Chapter 71 and the collective bargaining agreement when it circumvented the intent of the parties' Master Agreement by removing posts off the nursing departmental roster and refusing to allow bargaining unit staff to bid on posts set aside for PHS officers normally filled by bargaining unit employees.

(2) Did the Agency give the PHS Officers bargaining rights illegally?

Is so, then what shall be the remedy?

The Agency frames the issues as follows:

(1) Is the grievance untimely? If, not, then;

(2) Did the agency violate the Master Agreement, Article 18, Section f, for the nursing roster? If so, then what is an appropriate remedy?

Based upon the evidence submitted by both parties, the Arbitrator frames the issues as follows:

(1) Is the grievance untimely?

(2) Did the Agency violate the provisions of 5 U.S.C. Chapter 71 and Article 18 of the Master Agreement when it set aside certain assignments, days off and shifts on the quarterly nursing departmental roster to allow PHS employees the opportunity to bid on those "posts" thereby preventing bargaining unit staff the right to submit their preference requests on those posts set aside for PHS employees?

(3) If so, what shall the remedy be?

The applicable provisions of the Agreement in this proceeding are as follows:

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 **RECOGNITION**

Section a. The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71.

Section c. The former Director, Bureau of Prisons, Commissioner, Federal Prison Industries, Inc., Myrl E. Alexander, in a letter dated January 17, 1968, said letter being issued in accordance with Executive Order 10988, did certify the Council of Prison Lodges (currently known as the “Council of Prison Locals”) exclusive recognition as the representative of all employees employed by the Federal Bureau of Prisons, with the exception of the employees of the Central Office. The term “employee” as used in this Agreement means any employee of the Employer represented by the Union and as defined in 5 USC, Chapter 71.

ARTICLE 3 **GOVERNING REGULATIONS**

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.

Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

ARTICLE 4 **RELATIONSHIP OF THIS AGREEMENT TO** **BUREAU POLICIES, REGULATIONS, AND PRACTICES**

Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 USC 7106, 7114, and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

Section b. On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this Agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties.

Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.

ARTICLE 5
RIGHTS OF THE EMPLOYER

Section b. Nothing in this section shall preclude any agency and any labor organization from negotiating:

1. at the election of the Agency, on the numbers, types, and grades of employees or positions assigned to any organizational sub-division, work project, or tour of duty, or the technology, methods, and means of performing work;
3. appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such Management officials.

ARTICLE 6
RIGHTS OF THE EMPLOYEE

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

2. to be treated fairly and equitably in all aspects of personnel management;
3. to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership, or Union activity;

ARTICLE 7
RIGHTS OF THE UNION

Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute and this Agreement. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

ARTICLE 18
HOURS OF WORK

Section d. Quarterly rosters for Correctional Services employees will be prepared in accordance with the below-listed procedures.

1. a roster committee will be formed which will consist of representative(s) of Management and the Union. The Union will be entitled to two (2) representatives. The Union doesn't care how many managers are attending;
2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally, there will be no changes to the blank roster after it is posted;
 - a. employees may submit preference requests for assignment, shift, and days off, or any combination thereof, up to the day before the roster committee meets. Those who do not submit a preference request will be considered to have no preference. Preference requests will be made on the Employee Preference Request form in Appendix B or in any other manner agreed to by the parties at the local level. The Employer will ensure that sufficient amounts of forms are maintained to meet the needs of the employees;
 - b. employee preference requests will be signed and dated by the employee and submitted to the Captain or designee. Requests that are illegible, incomplete, or incorrect will be returned to the employee. In order to facilitate Union representation on the roster committee, the employee is also encouraged to submit a copy of this request to the local Union President or designee;
 - c. if multiple preference requests are submitted by an employee, the request with the most recent date will be the only request considered; and
 - d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that Management will not arbitrarily deny such requests. (Seniority is defined in Article 19).

Section f. Roster committees outside the Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedures in Section d. be utilized. These rosters will be posted three (3) weeks prior to implementation. Copies will be given to the local President or designee at the time of posting.

Section g. Sick and annual relief procedures will be handled in accordance with the following:

1. when there are insufficient requests by employees for assignment to the sick and annual relief shift, the roster committee will assign employees to this shift by

chronological order based upon the last quarter the employee worked the sick and annual relief shift;

2. sick and annual relief shift is a quarterly assignment that will not impact upon the rotation through the three (3) primary shifts;
3. no employee will be assigned to sick and annual relief for subsequent quarters until all employees in the department have been assigned to sick and annual relief, unless an employee specifically requests subsequent assignments to sick and annual relief;
4. employees assigned to sick and annual relief will be notified at least eight (8) hours prior to any change in their shift; and
5. reasonable efforts will be made to keep sick and annual relief officers assigned within a single shift during the quarter.

Section p. Specific procedures regarding overtime assignments may be negotiated locally.

1. when Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees; and

Section q. The Employer retains the right to order a qualified bargaining unit employee to work overtime after making a reasonable effort to obtain a volunteer, in accordance with Section p. above.

Section r. Normally, non-probationary employees, other than those assigned to sick and annual relief, will remain on the shift/assignment designated by the quarterly roster for the entire roster period. When circumstances require a temporary [less than five (5) working days] change of shift or assignment, the Employer will make reasonable efforts to assure that the affected employee's days off remain as designated by the roster.

Section t. Ordinarily, scheduled sick and annual relief assignments will be posted at least two (2) weeks in advance.

Section u. Except as defined in Section d. of this article, the words ordinarily or reasonable efforts as used in this article shall mean: the presumption is for the procedure stated and shall not be implemented otherwise without good reason.

ARTICLE 19
ANNUAL LEAVE

Section e. In the event of a conflict between unit members as to the choice of vacation periods, individual seniority for each group of employees will be applied. Seniority in the Federal Bureau of Prisons is defined as total length of service in the Federal Bureau of Prisons. Seniority for Public Health Service (PHS) employees will be defined as the entrance date for the PHS employee being assigned to a Federal Bureau of Prisons facility. It is understood that, as the Bureau of Prisons absorbed the U.S. Public Health Service facilities located at Lexington, Kentucky and Fort Worth, Texas, agreements were made to give those PHS staff seniority for leave purposes based on their entire PHS career.

ARTICLE 32
ARBITRATION

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations

STATUTORY STANDARD OF REVIEW

5 USC §7102
Employees Rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right

- (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
- (2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 USC §7103
Definitions; application

(a) For the purpose of this chapter

(1) “person” means an individual, labor organization, or agency;

(2) “employee” means an individual-

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority; but does not include-

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency;

5 USC §7121

Section 7121 provides that the contract grievance procedures, which must meet certain criteria, "shall be the exclusive procedures for resolving grievances which fall within its cover age." Any grievance not settled satisfactorily "shall be subject to binding arbitration."

5 USC §7122

Section (a) provides that either party may file an exception to the arbitrator's award with the FLRA for review to determine if it is deficient: "(1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations." Section (b) instructs that if no exceptions are filed "during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of back pay"

42 USC §250
Medical care and treatment of Federal prisoners

The Service shall supervise and furnish medical treatment and other necessary medical, psychiatric, and related technical and scientific services, authorized by section 4005 of title 18, in penal and correctional institutions of the United States.

18 USC §4005
Medical relief; Expenses

(a) Upon request of the Attorney General and to the extent consistent with the Assisted Suicide Funding Restriction Act of 1997, the Federal Security Administrator shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons, and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions.

(b) The compensation, allowances, and expenses of the personnel detailed under this section may be paid from applicable appropriations of the Public Health Service in accordance with the law and regulations governing the personnel of the Public Health Service, such appropriations to be reimbursed from applicable appropriations of the Department of Justice; or the Attorney General may make allotments of funds and transfer of credit to the Public Health Service in such amounts as are available and necessary, for payment of compensation, allowances, and expenses of personnel so detailed, in accordance with the law and regulations governing the personnel of the Public Health Service.

II. SUMMARY OF THE EVIDENCE

The Agency operates two federal institutions at its Lexington, Kentucky facility. One is a minimum security federal prison camp. The other is a Federal Medical Center, which is a medical correctional facility that houses inmates. There are approximately 1,700 to 2,000 inmates that are confined at this location. The facility employs approximately 500 employees, including non-union staff.

The Union is recognized by the Agency as the sole and exclusive collective bargaining representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 7 I.

The parties are signatory to a collective bargaining agreement effective by its express terms for the period beginning March 9, 1998, and ending March 8, 2001, (Master Agreement). On February 7, 2001, the Agency and the Union agreed to extend the Master Agreement until a new contract was negotiated. The parties specifically stipulated and agreed that the Master Agreement governs the grievance and all issues arising in this matter and its terms are effective through the date of the grievance.

There are a variety of different departments within the institutions. This proceeding deals with an issue pertaining to nurses working in the Health Services department. Two types of employees perform nursing work in this department. The first type of employee includes those who are covered directly by the Master Agreement pursuant to Article I, Section (a). As noted in Article 1, Sections (a) and (b), this bargaining unit is more particularly described in 5 U.S.C. Chapter 71.

The second type of employee performing nursing work within the facility is the Public Health Service Nurses (PHS). Unlike the employees covered by the Master Agreement, the PHS nurses are a part of the uniformed service and are specifically excluded from the right to bargain collectively pursuant to law. See, 5 U.S.C. Section 7103(a). The Bureau of Prisons has had an agreement with the Public Health Service, similar to that of other federal agencies, since the creation of the Bureau of Prisons.

On June 19, 2013, pursuant to Article 18 of the Master Agreement, the Agency posted a 3rd Quarter Nursing Roster (Roster) for the period 07-14-2013 through 10-5-2013 to begin the bidding process for bargaining-unit nurses. The Roster gives bargaining unit employees advance notice of assignments, days off, and shifts that are available for which they are given the opportunity to submit their preference requests. A roster committee is to consider the preference

requests in order of seniority and make reasonable efforts to grant the requests. The local Union President observed that the Roster was posted without conducting a roster committee review, as provided by Article 18 of the Master Agreement. The Union had not waived the roster committee process.

The Union President also noted that the Roster did not include all of the available job assignments (posts) for bid. The Agency had removed a number of posts prior to the bidding and PHS nurses were placed (allowed to bid) in those posts. Upon review, the Local Union President determined that the action of the Agency gave PHS nurses the right to bid for bargaining unit posts, which was improper pursuant to the Master Agreement and federal law.

Upon contacting Commander Ferree, the Director of Nursing, about the alleged flawed procedure, he received an email on June 21, 2013, from Commander Ferree indicating that “PHS is assigned by management.”

On June 28, 2013, the Union President made a verbal attempt to informally resolve the issue with the Assistant Director of Nursing without success.

On July 2, 2013, the Local Union President sent a Memorandum to the Warden of the facility to attempt to resolve what the Union believed to be a violation of the bidding process. It notified the Agency that sending out the Roster on June 19, 2013, prior to conducting a roster committee meeting and “blocking” several posted assignments for PHS nurses to be placed by the Agency prior to permitting the bargaining unit nurses the right to bid on the Roster was in violation of 5 U.S.C. 7103(2)(ii); Article 1 (C), Article 6 (B)(6), Article 9, Article 18, Article 19 of the Master Agreement; Arbitration cases FMCS Nos. 11-58230 and 070314-54707-8; and MOU 301-1 VI(H) between the Health and Human Services, Public Health Services (PHS) and the Federal Bureau of Prisons (BOP).

The matter not having been resolved, the instant Grievance was filed on July 24, 2013.

On August 1, 2013, the Warden responded to the Memorandum of the Local Union President. He stated that during the weeks of June 3, 2013, and June 17, 2014, several attempts were made by management to allow the Union time to review the Roster, and it was the unavailability of Union representatives that delayed the review. Additionally, he indicated that pursuant to Article 5 §(a)(2)(b) of the Master Agreement, management has the right to “assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted.” He further noted that management is committed toward ensuring that all employees at the Federal Medical Center were treated in a fair and equitable manner. The Local President was directed to the Labor Management Relations Chairperson to discuss his concerns.

On August 22, 2013, the Warden, as the Agency representative, responded to the Grievance. He indicated that the cited violations lacked specificity and the Grievance was procedurally rejected. Without waiving the Agency’s right to reject the Grievance on procedural deficiencies, he further stated that the Agency did give the Union the opportunity to review the Roster prior to posting, and no violation of the Master Agreement occurred regarding a roster committee review.

With the issues still in dispute, the parties selected the Arbitrator from the Federal Mediation and Conciliation Service Roster, and a hearing was scheduled and conducted on November 20, 2014. A transcript of the hearing was taken. At the hearing, both parties were given the opportunity to call and cross-examine witnesses, submit evidence, and make objections accordingly. Upon conclusion of the hearing, the parties made arrangements for a copy of the official hearing transcript and thereafter, both parties mutually agreed, and the Arbitrator

approved, a post-mark date of January 16, 2015, for the parties to submit and cross-exchange their respective post-hearing briefs. Pursuant to a mutual request to extend the filing date to January 30, 2015, the Arbitrator agreed and the briefs were filed timely by both parties.

The Position of the Union

The Union argues that the Agency's removal of available assignments and shifts from a quarterly roster for the benefit of placing PHS nurses prior to allowing bargaining-unit members to submit their preference requests, or bidding, is an ongoing violation of the Master Agreement. While the Agency did not argue that timeliness of the Grievance was a threshold issue at the hearing,¹ the Union argued that every quarter that a Roster is submitted without listing all of the available assignments and shifts for which the bargaining-unit nurses have a right to bid is a new violation.

The Union contends that the Grievance should be sustained based on Federal Law, provisions of the Master Agreement, and prior binding arbitration decisions denying PHS nurses the right to bid on annual leave and job assignments subject to the parties' Master Agreement. First, the Union argues that officers commissioned by the Public Health Service do not, and cannot, have the right to collectively bargain with the federal government pursuant to 5 U.S.C. § 7103. Second, the Union asserts that the Article 1(c) of the Master Agreement defines "employees" as used in the Agreement as "any employee of the Employer represented by the Union and defined in 5 U.S.C., chapter 71". As such, the bidding rights for quarterly rosters under Article 18(d) refer to employees and those employees are bargaining-unit members, not PHS nurses. As a result, PHS nurses lack a legal right to participate in collectively bargained

¹ The Agency did argue that the Grievance was not timely filed pursuant to Article 31(d) of the Master Agreement in its post-hearing brief. Since the Union stated in opening statements that the Agency has been in violation of the nursing roster since decision of Arbitrator David Paull, dated September 8, 2008, the grievance was not filed within the 40 day time limit.

benefits granted bargaining-unit members and they lack coverage under the Master Agreement to participate in bids for each quarterly roster. The Union also argues that the arbitration decision of Arbitrator David S. Paull, *AFGE Local No 817 and Federal Bureau of Prisons, Federal Medical Center, FCI Lexington*, FMCS Case No. 070314-54707-8, dated September 8, 2008 and the arbitration decision of Robert A. Boone, *U.S. Department of Justice, Federal Bureau of Prisons USP Leavenworth and AFGE Local 919*, FMCS Case No. 11-58230, dated January 30, 2013, which found in favor of the Union on issues relating to bidding by PHS nurses under the Master Agreement, should be considered *res judicata* on the issue before the Arbitrator.

The Union does not dispute management's right to assign work or decide security practices, but management negotiated a clear procedure on how to fill the post/positions with its employees after the departmental needs and posts are decided. Bargaining-unit members are qualified for all of the positions available to be filled within the department. This is supported by the fact that bargaining-unit members fill in for PHS nurses in the event of any leave taken by them and the two employment groups routinely swap assignments. Testimony at the hearing substantiates the fact that bargaining-unit members meet all qualification for the available jobs within the department. Further, bargaining-unit nurses meet any and all "security" requirements of the facility.

PHS nurses do not hold any job or security qualifications not held by bargaining-unit members. Bargaining-unit members are registered nurses and are considered law enforcement officers who are required to attend and pass the same training as correctional officers within the institution. PHS nurses are not considered law enforcement officers and are restricted from all firearm training requirements. When the agency is deciding safety and security of the INSIDE of institutions, they are essentially deciding how many staff is needed on each shift and where they

are needed. Departmental rosters are developed from this. Once the agency has determined those numbers or posts, they are required by the Master Agreement to follow the procedures in Article 18 for filling those posts.

Information obtained from the Agency's "Sallyport" (written feedback responses to issues raised within the Bureau of Prisons) indicates that PHS officers are used to staff hard to fill positions. The positions in question in this proceeding are not hard to fill; they are routinely filled by bargaining-unit members.

The Union notes that this current issue has been confronting the Agency for many years. In 2004, the issue was addressed at the July 2004 National Labor Management Relations meeting. In that meeting, the Union asked about the rights of PHS staff in regard to roster scheduling. The Agency's Labor Management Representative responded: "Management agreed the master agreement should be adhered to in regards to with respect to roster procedures."

The Agency admits that it removes posts from the departmental roster, allowing PHS nurses the opportunity to bid for post assignments before giving the bargaining-unit the opportunity to bid. This causes harm to bargaining-unit members. While the Agency avers that it is its right as management to decide which posts are going to civil service and which are going to PHS, there exists no law or provision in the contract which gives management the right to do this. Testimony provided by former bargaining-unit members demonstrated that, based upon their seniority, they would have been the successful bidder on available shifts, but for the fact that the shifts were removed from the posted shifts and given to PHS nurses for bid.² Because of family obligations, they could not retain the shifts they normally worked (and formerly had successfully bid) and were forced to give up their employment. Bargaining-unit employees who

² The Agency takes the position that it assigns the PHS nurses, which it does, but testimony from a PHS nurse indicated that she filled out a bid form and had the ability to select what assignment or shift she desired to work from the PHS nurses Roster.

would have been successful in bidding on night shifts, which pay a premium differential, are denied the additional income when a PHS nurse is assigned that shift by the Agency.

By allowing PHS officers to bid on roster positions before civil service employees, the Agency is giving PHS officers bargaining rights to which they are not entitled.

The Agency's argument that excluding PHS nurses from the Master Agreement bidding procedures will result in a violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is misguided and should be rejected by the Arbitrator. In fulfilling its contractual obligations to allow bargaining-unit members the right to bid on all available positions on a quarterly roster, management does not create a hostile work environment for the PHS staff.

USERRA provides that an employer is in violation of the Act if "the person's membership...is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." 38 U.S.C. §4311(c.) The Act prohibits an adverse employment action by an official who is personally acting out of hostility toward the employee's membership in or obligation to a uniformed service (a motivating factor). Here, PHS officers would not be excluded from bidding prior to bargaining-unit members because of a hostile action of an Agency official, but because they are excluded from doing so by statute and provisions of a collective bargaining agreement intended to directly benefit bargaining-unit employees. There is no discriminatory animus.

The Union requests that the Arbitrator uphold the contract and the statute as other arbitrators have already done and order the agency to post a complete nursing departmental roster on which bargaining-unit employees can bid prior to the agency assigning non-bargaining unit PHS officers, order the Agency to rebid the posts properly per the collective bargaining

agreement and other arbitrator's awards, and make any staff effected financially by the removing of post off the rosters whole.

Position of the Agency

The Agency argues that the grievance should be denied as untimely in violation of Article 31, Section d. Article 31, Section d., specifically requires a party to file a grievance within forty (40) calendar days of the alleged violation. Any party has the right to raise a threshold timeliness issue at any time; the Master Agreement does not set a deadline or provide for a waiver thereof.

It is undisputed that nursing rosters have been processed and completed on a quarterly basis since 2008. The evidence shows the Agency's practice of completing a quarterly nursing roster has been occurring for a number of years. The Director of Nursing (DON), Anthony Ferrebee, testified that the nursing roster has been processed the same way since before his arrival. He testified that he arrived at FMC Lexington in January 2011. The time for filing any grievance on the issue would have started when the nursing roster was completed for the fourth quarter of 2008 (October 2008-December 2008). As such, the Union had 40 days beginning on October 1, 2008, to file their grievance. The expiration date for the 40 day time-period would have been November 10, 2008. Yet, the instant grievance was not filed until July 24, 2013: 1,717 days beyond the time-limit for filing a grievance.

Considering the merits, the Union did not prove any violation of the parties' Agreement. Management has the right under 5 U.S.C. § 7106 and Article 5 of the Master Agreement to determine the number of employees; determine the internal security practices; assign; direct; assign work, and; determine the personnel by which Agency operations shall be conducted. The Agency has the right to hire whomever it desires, whether that is management, bargaining-unit, or PHS employees.

In this case, Management determined what assignments were to be made in the Nursing department to PHS nurses, based upon their experience and security requirements, and made those assignments. It determined what assignments were to be made to the civil service nurses, and pursuant to the Master Agreement, posted the available positions for bid. As many arbitrators have concluded, except as expressly restricted by the collective bargaining agreement, the employer retains the right of management

There is no provision in the Master Agreement which states that the bargaining-unit employees are entitled to determine what posts/assignments are available based on seniority. Rather, it is management's right to determine what posts/assignments will be available to staff and then, after that is concluded, those employees may be considered for those posts/assignments by seniority.

There is no contract provision granting nurses in the bargaining-unit the right to bid on all posts first. If that were the case, the Agency would be unable to ever hire a PHS employee. There is no restriction on management in determining whether a position will be filled with civil service nurses or PHS nurses. Management has the right to determine which posts are to be made available to civil service nurses and which are to be made available to PHS nurses.

The only department at the facility that is required to consider bid requests by seniority is the Correctional Services Department (Article 18, Section d). All other departments outside of the Correctional Services Department fall under Article 18, Section f., which has no seniority provision at all. The Union tries to lump the seniority provision for the Correctional Services Department into all other departments. If that section were applicable, then Article 19, Section e., would apply, which allows for both civil service and PHS employees to be considered by seniority. Even if seniority is applicable, it is only applied after the Employer posts a blank

roster showing what posts/assignments are available. The right of the Employer in this regard is not restricted by any provision of seniority.

The Agency determines which posts are to be made available to civil service nurses and which are to be made available to PHS nurses in order to achieve fairness among the staff. If civil service nurses were to bid first, then the less desirable shifts would be left for the PHS nurses. The Director of Nursing tries to mirror positions available. Wherever there was a civil service nurse, he tries to mirror up a PHS nurse, especially on the in-patient floors. If there is a civil services nurse on day shift and one on night shift, he would always mirror a PHS nurse opposite of the civil service nurse so the “everything would be fair across the board.”

Article 18, Section d, only gives the bargaining-unit the opportunity to submit preference requests to assignments, days off and shifts that are available. Those positions “reserved” or assigned to PHS nurses are not available to the civil service nurses.

The work environment of a correctional facility is very different than most places of employment. The Supreme Court has noted this fact by stating that there are many different security concerns than in other work environments, and, therefore, prison administrators are entitled to more deference on the issue of internal security. *See, Bell v. Wolfish*, 141 U.S. 520, 547 (1979) and *Rhodes v. Chapman*, 452 U.S. 337 (1981). The Federal Labor Relations Authority (Authority) has also agreed with this judgment stating, “A Federal correctional facility has special security concerns which may not be present at other locations.” *See, AFGE, AFL-CIO, Local 683 and Department of Justice, Federal Correctional Institution Sandstone, Minnesota*, 30 FLRA 497, 500-01 (1987). The Authority has held that the decision whether or not to fill vacant positions is encompassed within an agency's right to assign employees under section 7106(a)(2)(A) of the Statute. *See, International Plate Printers, Die Stampers, and*

Engravers Union of North America, AFL-CIO, Local 2 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D. C., 25 FLRA 113, 144-46 (1987) (Provision 35). In addition, the Authority has consistently held that proposals requiring an agency to fill vacancies interferes with management's rights under section 7106 (a) of the Statute. See, e.g., *American Federation of Government Employees, Local 1923 and US. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1465-68 (1992) (Proposal 17).*

The Authority has long held that the right to assign work under 5 U.S.C. § 7106(a)(2)(B) encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. See, *National Education Association, Overseas Education Association, Laurel Bay Teachers Association and U S. Department of Defense, Department of Defense Domestic Schools, Laurel Bay Dependents Schools, Laurel Bay, South Carolina, 51 FLRA 733, 739 (1996).*

Restricting the Agency's right to staff its correctional facility with civil service staff first and then PHS with whatever is left over would limit the agency's authority to determine the degree of staffing necessary to maintain the security of its facility. The experience level with both civil service nurses and PHS nurses is going to vary and the Agency should have the right to ensure the best possible coverage is provided based on experience level. The Authority has long held that the right to determine internal security practices under § 7106(a)(1) includes the right to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property or operations against internal and external risks. See, *American Federation of Government Employees, Federal Prison Council 33 and U S. Department of Justice, Federal Bureau of Prisons, 51 FLRA 1112, 1115 (1996).* Provisions that require

management to take specific actions to safeguard an agency's personnel and operations directly interfere with the right to determine internal security practices. *See, National Treasury Employees Union and US. Department of Commerce Patent and Trademark Office*, 53 FLRA 539, 581 (1997). The Authority has further ruled that the judgment as to the degree or type of staffing to maintain the security of a facility is committed to management under section 7106(a)(1). *See, Fraternal Order of Police Lodge 1F and Veterans Administration, Veterans Administration Medical Center Providence, Rhode Island*, 32 FLRA 944, 957-58 (1988).

PHS nurses are part of the Commissioned Corps and are covered under USERRA. USERRA prohibits an employer from denying a member of the uniformed service a benefit of employment on the basis of that membership. Additionally, the definition of benefit encompasses location of assignment, which has been interpreted to include coverage of a hostile work environment claim. *See Gjovik v. Dept of Health and Human Services*, MSPB DE-4324-10-0548-1-1 (2011). In the instant case, to require PHS employees to always be placed in the least desirable posts would amount to a hostile work environment, both for leave purposes and for work assignments. This would amount to a violation of the USERRA law.

III. DISCUSSION AND OPINION

The issues before the Arbitrator are as follows: (1) Is the grievance untimely? (2) Did the Agency violate the provisions of 5 U.S.C. Chapter 71 and Article 18 of the Master Agreement when it set aside certain assignments, days off and shifts on the quarterly nursing departmental roster to allow PHS employees the opportunity to bid on those "posts" thereby preventing bargaining unit staff the right to submit their preference requests on those posts set aside for PHS employees? (3) If so, what shall the remedy be?

The Arbitrator has considered and weighed all the testimony and evidence offered by the parties. He has carefully considered the arguments in the post-hearing briefs of the parties in reaching his decision. The material facts in this case are not disputed. For a number of years the Director of Nursing at the Federal Medical Center, FCI Lexington, has determined what work assignments he wants to make available to PHS employees and what work assignments are to be made available to bargaining-unit civil service employees. The work to be performed by each of these employee groups is substantially the same. The reason given for splitting assignments between the two employee groups is to mirror employees on shift, i.e., to ensure that for each civil service employee on shift there is also a PHS employee. If bargaining-unit employees were given the opportunity to bid on all assignments on all shifts, PHS employees would be left with the least desirable shifts. Quarterly rosters have been prepared on this basis for years and bargaining-unit employees have not been given the opportunity to bid on those assignments, days off, and shifts made available to the PHS employees. Management argues that it has the statutory and contractual right to make assignments in this fashion; the Union claims that such action is in violation of federal statutes and the Master Agreement.

Before discussing the merits of this case, it is incumbent upon the Arbitrator to address the Agency's claim that the grievance is untimely.

The Agency is correct that grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence pursuant to Article 31, Section d, of the parties' Master Agreement. Whether one considers the time to begin running from January 2011 when the current Director of Nursing arrived at the FCI Lexington (and engaged in the alleged incorrect roster procedure) or the fourth quarter of 2008, or when issues regarding the preferential treatment of PHS nurses at the FCI Lexington facility were addressed in Arbitrator David S.

Paull's decision in *AFGE Local No 817 and Federal Bureau of Prisons, Federal Medical Center, FCI Lexington*, FMCS Case No. 070314-54707-8, dated September 8, 2008, the filing of the grievance on July 24, 2013 was more than forty (40) days after those events. Notwithstanding this fact, the Arbitrator is of the opinion that the grievance is timely filed.

The Agency submitted a number of prior arbitration cases denying grievances because they were not filed within the forty (40) day time limit as set forth in Article 31. See, *AFGE Local 1242 and USP Atwater*, FMCS 06-50931 (2006) (Arbitrator Fincher); *FCC Coleman and AFGE Local 506*, FMCS 06-54258 (2007) (Arbitrator Overstreet); *FTC Oklahoma City and AFGE Local 171*, FMCS 08-57010 (2009) (Arbitrator Nicholas); *FCJ La Tuna and AFGE Local 0083*, FMCS 08-56151 (2010) (Arbitrator Hughes); *FCC Yazoo City and AFGE Local 1013*, FMCS 11-5218581 (2011) (Arbitrator Bendixsen). They all support the proposition that time requirements in a collective bargaining agreement should be strictly adhered to. Those cases are, however, clearly distinguishable from the facts of the instant case.

The evidence demonstrates that the Agency has been posting quarterly rosters and assigning work to the PHS officers and the bargaining-unit members in the alleged improper manner for a number of years. Multiple discussions have taken place on the issue and its resolution. To the extent action is taken by the Agency, in this case the posting of a quarterly roster, which is deemed improper under a collective bargaining agreement or a federal statute, each time the roster is posted a violation occurs. It is a continuing violation. Under such circumstances, an employee is harmed each time a violation occurs; it is not a single occurrence. See, *National RR Passenger Corp. v. Morgan*, 536 US 101 (2002); *Kerr-McGee Oil Industries, Inc.*, 44 LA 70 I (Hayes, 1965); *IRS v. NTEU*, O-AR- 4012, pp. 10-11 (Snow, 2005); *American Federation of Government Employees Local 48 v. U.S. Dep't of the Navy Puget Sound Naval*

Shipyard Bremerton, Washington, 46 FLRA 1328 (1993); AFGE Local No 817 and Federal Bureau of Prisons, Federal Medical Center, FCI Lexington, FMCS Case No. 070314-54707-8 (2008). It is sufficient that a grievance is filed by the Union within forty (40) days of the latest alleged violation, which it was in this case.

While not addressed specifically as an issue presented, the Agency, in its response to the grievance, denied the grievance as procedurally deficient. The Agency claimed that while the grievance identified certain articles that the Union claims were violated, the violations lacked specificity. The Warden stated: “You have failed to identify what provisions of the Federal Prison System Directive, Executive Order, or Statute have been violated. The Agency is not charged with the responsibility of determining any other laws, rules, or regulation, to which you are claiming. It is your responsibility, as the grieving party, to point out clearly and precisely what is being claimed.” An examination of the grievance form, particularly Attachment A attached thereto, demonstrates that the Union did provide sufficient specificity on its grievance form to comply with the requirements of Article 32, Section a, of the Master Agreement.

Article 32, Section a, requires that the notification of the alleged violations, or grievance in this case, “...include a statement of the issues involved, the alleged violations, and the requested remedy.” The Union clearly did that in this case. The grievance form indicates that the Union was contending that the Agency’s action violated the Master Agreement and federal law. With regard to the information set forth on Attachment A to the grievance form, the grievance further alleged that “The issue is that management has unilaterally removed preferred post that will be filled that quarter (specified in the grievance) on the roster and placed PHS staff (equivalent to contract workers) in those posts prior to the Barging (sic) unit staff (employees) bidding process is completed. In doing this, the Agency has violated Article 3(C), Article 6,

Article 18, Article 19, 5 USC Chapter 71 and the Agency's own Memo of understanding (MOU) b 301-1 VI(H) between Health and Human Services, Public Health Services (PHS) and the Federal Bureau of Prisons (BOP). The Grievance also specifies a requested remedy. This constitutes sufficient notice and specificity of the alleged violation under the parties' Master Agreement to be procedurally sufficient.

With these arguments addressed, an analysis of the merits of this case is properly before the Arbitrator.

The Union argues that the action taken by the Agency under the facts of this grievance is in violation of two prior arbitration awards dealing with bargaining-unit nurses and PHS nurses under the same Master Agreement. As such, the Union's claim in this instance should be governed by the prior awards and the Union's grievance should be sustained under the concept of *res judicata* or controlled under the concept of *stare decisis*.

While labor arbitration decisions are not deemed binding precedence, arbitrators have often followed these concepts in giving deference to prior decisions in order to maintain internal consistency of interpretation and finality to issues deemed "final and binding" as agreed by the parties in most collective bargaining agreements. The concept of *res judicata* is used to deny any further consideration of a claim that has been previously decided involving the same issue(s), same parties, and same contract provisions. It is a matter that has already been adjudged. The concept of *stare decisis*, on the other hand, is a concept that once a case is decided on an issue, any subsequent case on the same issue should be decided in the same manner.

In this case, while the arbitration decision of David S. Paull in *AFGE Local No 817 and Federal Bureau of Prisons, Federal Medical Center, FCI Lexington*, FMCS Case No. 070314-54707-8, dated September 8, 2008, and the arbitration decision of Robert A. Boone in *U.S.*

Department of Justice, Federal Bureau of Prisons USP Leavenworth and AFGE Local 919, FMCS Case No. 11-58230, dated January 30, 2013, are instructive, the facts in these decisions and the issues raised are not the same as claimed by the Union in this case. As such, the concept of *res judicata* cannot be used to support the Union's claim. Since the specific issue raised by the Union regarding blocking available job assignments and shifts for the benefit of PHS employees under the theory of a right to assign work was not decided in the prior cases, the concept of *stare decisis* does not have applicability on that issue. The applicability of the concept in regard to the issue of roster bidding rights and the issue of non-bargaining-unit employees participating in benefits conferred by the Master Agreement is appropriate to consider and will be discussed below.

In the Paull decision, the arbitrator addressed the issue of the Agency permitting PHS nurses to compete in the same annual leave bid with employees who are covered by the Master Agreement. He found that there was no language authorizing the PHS nurses to bid with the unit members for annual leave and concluded that such action was in violation of Article 19, Section a, of the Master Agreement. He found that PHS nurses are not among those classes of employees covered by the Master Agreement and the PHS nurses do not have the right to collectively bargain with the Agency.

In the Boone decision, the arbitrator addressed the issues of the right of roster committees to be formed by departments outside the Correctional Services department, unless mutually waived; the applicability of Section d procedures of establishing a roster committee to review preference requests, posting a proper quarterly roster, and granting preference requests based upon seniority; the right of unit employees to be placed on assignments from the roster; and the prohibition of non-bargaining-unit employees, in this case PHS nurses, to participate in the

bidding process set forth in Article 18 of the Master Agreement. He found that the procedures for setting up a roster committee, posting quarterly rosters, bidding preferences, and granting requests based upon seniority under the procedures set forth in Article 18, Section d, was applicable to the bargaining-unit, a unit deemed outside the Correctional Services department under Section f. Further, he found the “to allow non-unit PHS employees to participate in the contractual processes violates the law and contract.” Non-unit employees were not to be mingled/mixed with the unit employees in filling roster positions.

Since the case before this Arbitrator does not involve the handling of annual leave, and does not involve the establishment of a roster committee or the co-mingling of PHS and bargaining-unit members in the bidding process, the precedential value of the decisions of arbitrators Paull and Boone are minimal. Their analysis, however, is insightful in resolving the instant grievance.

The Agency avers that it has the right pursuant to the management right provisions of 5 U.S.C. § 7106 and Article 5 of the Master Agreement to set aside certain assignments, days off and shifts on the quarterly nursing departmental roster to allow PHS employees the opportunity to bid on those “posts.” It states that it does so to achieve fairness among employees within the Nursing department, to preserve the government’s interest in maintaining security at the institution and to operate the institution in a manageable fashion. In exercising this right, it has determined that there is no provision in the Master Agreement or law that gives bargaining-unit employees the right to determine the posts/assignments available. It is management’s right to determine what post/assignments will be available to staff and, after that is determined, employees may be considered for those post/assignments by seniority. It does not believe that the PHS nurses should just receive the “leftovers” in the bidding process after the bargaining-unit members have bid on a

quarterly roster, and, to do so, would additionally be a violation of USERRA. While the Arbitrator understands the Agency's desire to be "fair" or to "equalize opportunities" for the PHS nursing staff, its commendable intent is prohibited by the Master Agreement and 5 U.S.C. Chapter 71.

Testimony indicates that PHS staffs were initially contracted by the BOP to fill hard to fill positions. The BOP believed that if PHS positions were eliminated, it would be highly unlikely that the institutions could find enough civil service applicants to staff all the resulting vacancies, particularly for pharmacist and dental positions. This has changed over the years. Many of the PHS nurses, as is the case at the FCI Lexington facility, are not being assigned to "hard to fill" positions, but are doing the same work as the bargaining-unit nurses.

Both groups of nurses, bargaining-unit and PHS, have the same qualifications and skills to meet all of the work assignments in the Nursing department. Evidence indicates that the PHS employees and civil service employees swap jobs on a regular occurrence to help each other out. They are doing the same work. If a PHS nurse is on leave for any reason, a bargaining-unit nurse fills in. For some reason, bidding on available assignments, days off, and shifts did not seem to be a problem in the past. At least there appears to be few grievances filed over bidding issues. As bargaining-unit members began to be denied their preference requests due to positions being filled by PHS officers, the Union sought enforcement of the Master Agreement. This led up to the filing of the instant grievance.

While the Agency does have the right to assign work and decide security practices at the institution under 5 U.S.C. Chapter 71 and Article 5 of the Master Agreement, withholding certain assignments and available shifts from the bargaining-unit members, who have the qualifications to fill those assignments, is contrary to law and in violation of the Master Agreement in a variety of ways.

Once Management determines what type (classification and qualification) and the number of jobs that are available on each available shift, it must allow its qualified employees the opportunity to bid on an available position and shift, if the collective bargaining agreement provides for a bidding process. Without a bidding procedure or other restrictive provision in a collective bargaining agreement, the Employer would have the ability to make whatever assignment it desired. Article 18 of the Master Agreement includes a quarterly bidding procedure. There is no evidence in this case indicating that the assignments given to PHS nurses required skills, qualifications, or other unique work related experience for the available work that the PHS nurses possessed and bargaining-unit nurses did not. By manipulating bid opportunities, i.e. not providing a full bid roster and giving preferential treatment to a class of employees not entitled to bid under the terms of the collective bargaining or federal law, the spirit, intent, and letter of the agreement is violated.

By allowing PHS staff to bid on available positions and shifts, the Agency is permitting PHS staff to participate in a right conferred by a collective bargaining agreement for which they are specifically not covered by statute or agreement. There is no language in U.S.C. Chapter 71 that permits this. Further, the definition of “employee” in Article 1 of the Master Agreement, and used in Article 18, excludes such participation. In this regard, I am in agreement with the Paull and Boone decisions. PHS employees have no statutory basis for bidding at a government agency.

While it appears that the Agency’s action to mirror employees on shifts and give equal opportunity to PHS employees was designed to achieve fairness, it unfortunately resulted in a denial of bargained-for rights to some of the civil service employees and affected their livelihood and earnings. Where federal law and contract language clearly set forth the rights of an employee

and put restraints on management's unfettered right to manage the workplace, an arbitrator is required to decide the outcome of a dispute on the basis of the law and contract, not what his sense of fairness is. While it may appear that the PHS employees are left with the scraps, as indicated by the Agency's counsel, the Agency is required to follow the bidding process set forth in Article 18, which permits the bargaining-unit members to submit their requests on a full roster.

The Agency argued that the only department at the facility for which it is required to consider bid requests by seniority is the Correctional Services Department (Article 18, Section d.). All other departments outside of the Correctional Services Department fall under Article 18, Section f., which has no seniority provision at all. This conclusion is inconsistent with the position taken by the Agency on a national level. In a Labor Management Relations Quarterly Meeting in July of 2004, the Local Union President at FCI Lexington asked the LMR of the Agency about bidding. His questions were obviously on behalf of bargaining-unit nurses. Mr. Chapin, the LMR, provided the following response: "Management agreed that the Master Agreement should be adhered to with respect to the roster procedures. Management should ensure that a blank roster for upcoming quarter will be posted in an area that is accessible to the appropriate party bargaining-unit staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit preference requests. Once the assignments are made, should management make any changes, they must be made in accordance with the Master Agreement and appropriate laws, rules and regulations." While Article 18, Section f, indicates that it is recommended that procedures in Section d be utilized, it is clear from the Agency's response, and the continued past practice of posting quarterly rosters for the Nursing department, that the bidding procedures in

Section d are applicable to this Department. Arbitrator Boone addressed this issue in the case before him (as referenced above) and reached the same conclusion.

Since the type of work performed by both bargaining-unit service nurses and PHS nurses is the same at the FCI Lexington facility, the Agency has no basis for determining that it can assign one qualified employee over the other to skirt the bidding process. The Agency did argue that the work environment of a correctional facility is very different than most places of employment. The Supreme Court has noted this fact by stating that there are many different security concerns than in other work environments, and, therefore, prison administrators are entitled to more deference on the issue of internal security. *See Bell v. Wolfish*, 141 U.S. 520, 547 (1979) and *Rhodes v. Chapman*, 452 U.S. 337 (1981). The Federal Labor Relations Authority (Authority) has also agreed with this judgment stating, "A Federal correctional facility has special security concerns which may not be present at other locations." *See AFGE, AFL-CIO, Local 683 and Department of Justice, Federal Correctional Institution Sandstone, Minnesota*, 30 FLRA 497, 500-01 (1987). The Arbitrator would agree with these findings, but in this case, the Union has made a compelling argument that the civil service employees have more security training than the PHS nurses and have the ability to carry weapons, when necessary. There is no basis for concluding that PHS employees need to be assigned to positions over civil service employees in this case for security reasons.

The Arbitrator would agree with the Union that providing bidding opportunities to the bargaining-unit prior to allowing PHS employees the right to bid is not an USERRA violation. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a federal law that establishes rights and responsibilities for uniformed service members and their civilian employers. USERRA provides in relevant part as follows:

“A person who is a member of...or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership,...or obligation.” 38 U. S. C. §4311(a).

. . .

“An employer shall be considered to have engaged in actions prohibited...under subsection (a), if the person’s membership...is a motivating factor in the employer’s action, unless the employer can prove that the action would have been taken in the absence of such membership.” 38 U.S.C. § 4311(c).

The Agency cites *Gjovik v. Dept. of Health and Human Services*, MSPB DE-4324-10-0548-1-1 (2011) in support of why adopting the Union’s view in this case would constitute a USERRA violation. The facts underlying the claim of discrimination in *Gjovik* are very different from the action required of the Agency in this case. Unlike the action taken in *Gjovik*, the Agency here is (would be) properly processing contractually required bidding procedures under a negotiated collective bargaining agreement and is fulfilling its obligations under 5 U.S.C. Chapter 71. Excluding non-bargaining PHS employees from a contractual right put in place exclusively for bargaining-unit staff does not amount to creating a hostile work environment.

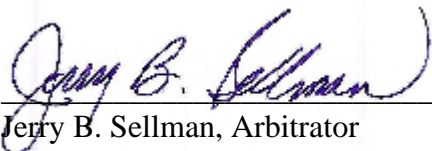
In conclusion, the Grievance has been timely filed; the type of violation alleged is a continuing violation. The Agency is not permitted to set aside certain assignments, days off, and shifts on the quarterly nursing departmental roster to allow PHS employees the opportunity to bid on those “posts” thereby preventing bargaining-unit staff the right to submit their preference requests on those posts set aside for PHS employees under the terms of the parties’ Master Agreement and pursuant to 5 U.S.C. Chapter 71, particularly where the work of the job assignments require no special skills, qualifications, or other unique work related experiences not possessed by bargaining-unit nurses. In carrying out its obligations under the Master Agreement, the Agency is not engaging in an activity that would constitute a USERRA violation. The Union

seeks as a remedy to make whole any staff affected by the Agency's action, but such a remedy is both inappropriate and speculative in this instance. In the bidding process, one individual's bid would have affected the others choice, and determining what choice an employee would have made if given a different opportunity or selection would be based upon conjecture at best.

V. AWARD

For all of the above reasons and conclusions, the Grievance is sustained. The Grievance is timely filed. The Agency's practice of setting aside certain assignments, days off, and shifts on the quarterly nursing departmental roster to allow PHS employees the opportunity to bid on those "posts" thereby preventing bargaining-unit staff the right to submit their preference requests on those posts set aside for PHS employees is in violation of Article 18 of the Master Agreement and 5 U.S.C. Chapter 71. The Agency is ordered to follow the bidding procedures set forth in Article 18 of the Master Agreement by constructing a roster with all available assignments, days off, and shifts, refrain from withholding "posts" for assignment to PHS employees, and process the bids of the bargaining-unit employees as set forth in Article 18 of the Master Agreement. This process shall be implemented immediately for processing of the next quarterly roster.

The Arbitrator will retain jurisdiction of the present Grievance to the extent the parties have any dispute regarding any back pay issues subject to this Award.



Jerry B. Sellman, Arbitrator