

ARBITRATION DECISION

AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES,)
COUNCIL OF PRISON LOCALS 33,)
LOCAL 408)
)
and) FMCS Case No.
) 13-56913-8
UNITED STATES DEPARTMENT OF)
OF JUSTICE, FEDERAL BUREAU OF)
PRISONS, FEDERAL MEDICAL CENTER,)
BUTNER, NORTH CAROLINA)

APPEARANCES:

FOR THE UNION:

Sandra Parr, National Fair Practices Coordinator -
Representative.
Dwayne Person - Mid-Atlantic Regional Vice President -
Representative.
Kenneth Atkinson, Complex Warden, FCC Butner -
Witness.
Ivy Manning, Director of Nursing - Witness.
Cheryl Daniel, Health System Specialist and Vice
President of Local Union 408 - Witness.
Tammy Conrad, Management Analyst - Witness.

FOR THE AGENCY:

Michael Markiewicz - Attorney for U.S. Department of
Justice - Representative.
Ivy Manning (recalled as a witness by the Agency),
Director of Nursing - Witness.
Jonathan Hemingway - Human Resource Manager - Witness.
Scott Murchie - Chief for the Staff and Recruitment
Branch, Health Services Divisions - Witness.

SUBJECT OF GRIEVANCE:

Whether or not the Agency violated the collective
bargaining agreement between the parties in
calculating seniority for Public Health Service

employees (non-bargaining unit) and allowing the Public Health Service employees to bid against Civil Service employees (bargaining unit) over positions, the assigning of job posts and use of annual leave and was the grievance timely filed.

CONTRACT PROVISIONS INVOLVED:

Article 3; Article 5; Article 6; Article 18; Article 19; Article 23; Article 31; and Article 32.

DATE OF HEARING: October 9, 2014.

DATE OF DECISION: March 14, 2015.

AWARD: Grievance is sustained.

ARBITRATOR: John S. West.

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GRIEVANCE

On or about May 6, 2013, the American Federation of Government Employees, Council of Prison Locals 33, Local 408 (hereinafter "the Union") filed a grievance on behalf of the Union with the Department of Justice, Federal Bureau of Prisons, Federal Medical Center, Butner, North Carolina (hereinafter "the Agency"). The grievance reads as follows:

On April 16, 2013, I (Cheryl Daniel, 2nd Vice President, Local 408) met with Complex Warden Apker in an attempt to informally resolve the blatant violations of the Master Agreement [Federal Bureau of Prisons and Council of Prison Locals American Federation of Government Employees July 21, 2014 - July 20, 2017 (hereinafter the "Master Agreement", "CBA", or "Contract")] regarding the wrong [Entrance on Duty hereinafter "EOD"] EOD dates on the Nursing Department Roster. The EOD dates are incorrect.

The Union requests the Agency: 1.) correct the EOD dates in accordance with the CBA, 2.) a cease and desist order be issued to supervisor, 3.) grievant will suffer no reprisal, harassment, or intimidation, as a result of filing this grievance, 4.) the agency be ordered to pay the total cost of arbitration should this issue proceed to arbitration based on a prohibited personnel practice committed by the agency.

On or about June 4, 2013, the Agency responded. The response reads in pertinent part as follows:

...Article 19 Section (e) of the Master Agreement defines seniority for both civil service and

Public Health Service (PHS) employees. Specifically, '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 my interpretation that seniority for PHS includes all service time with the Bureau of Prisons, both civil service and PHS. Therefore, I believe the current EOD dates are accurate and within the provisions of the Master Agreement.

Unable to resolve the grievance through the grievance process, the Union invoked arbitration on or about June 18, 2013. On October 9, 2014, an arbitration hearing was held, giving both sides an equal opportunity to present evidence. Post-hearing briefs and post-hearing reply briefs were filed by the parties. This decision follows.

PRELIMINARY ISSUE

The Agency argues the grievance was not timely filed pursuant to Article 31, Section (d) of the Contract, which specifically requires a party to file a grievance within forty (40) days of the alleged violation. The Agency points out that the specific scheduling at issue began on October 22, 2012, and ended on December 10, 2012. The Agency further points out according the testimony of Cheryl Daniel, Health System Specialist and Vice President of Local Union 408, at the hearing herein the Agency's interpretation and practice with the Nursing Department Entrance on Duty (EOD) dates has been in place for at least as long as when Daniel started in the year 2000. The Agency contends that at the very latest, if the Union contests the leave awarded October 22, 2012, through December 10, 2012, the expiration date for filing the grievance would have been by February 10, 2013, and not May 6, 2013.

The Union argues that this is a "continuing violation" pointing to Kenneth Atkinson's, Complex Warden, testimony at the hearing herein that the Agency was still using the same process. The Union further contends that where the Agency has been lax in enforcing time limits a grievance

filed several days after the time limitation was not untimely. *Elkouri & Elkouri, How Arbitration Works*, Chapter 5, Grievances - Prelude to Arbitration, Arbitrator Edward W. Wies findings are cited by the Union. The Union contends that parties were more than halfway through the arbitration hearing when counsel raised the issue of timeliness.

As both parties acknowledge that this matter is "continuing", in fact the Agency argues that that this is a past practice. It serves no purposes to find the grievance untimely only to have it immediately re-filed. Unlike a onetime occurrence, an alleged "continuing" matter by its nature is ongoing. Alleged "continuing" violations of the Contract, as opposed to a single isolated and completed transaction, are repeated day to day. Each day is a new occurrence and not necessarily a violation with specific time limits.

BACKGROUND

The Agency is a federal correctional complex in Butner North Carolina, in the United States for male inmates. It is operated by the Federal Bureau of Prisons, a division of the United States Department of Justice. The prison is about 25 miles (40 km) northwest of Raleigh, North Carolina. It is the largest medical complex in the Federal Bureau of Prisons. It specializes in Oncology and behavioral science but it also has inmates with a wide variety of medical problems as well as a drug treatment program.

The substantive issue is the calculation of seniority for Public Health Service (PHS) employees/officers (non-bargaining unit employees) and the Agency allowing the Public Health Service (PHS) employees/officers to bid against Civil Service employees (bargaining unit employees) over positions, the assigning of job posts and use of annual leave.

Article 1 Section (c) of the Contract reads in pertinent part as follows:

...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 18 Section (f) of the Contract reads as follows:

Roster committees outside the Correctional Service 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.

Article 19 Section (e) of the Contract reads in pertinent part as follows:

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...

On July 15 2010, the parties entered into a Memorandum of Understanding (MOU), outlining procedures that would be used for work assignments in the Nursing Department. The MOU specifies that by the execution date in the following procedures will take effect when filling a nursing position that has been vacated through transfer, resignation, retirement or promotion.

1. The position will be offered for bid to all eligible staff.
2. Staff eligible to bid on vacant Nursing positions are Nursing staff who have been in their current position for six (6) months or greater and who have completed both the Introduction to Correctional Techniques (ICT), Phase I and II.
3. Vacant Nursing positions will be posted on the nursing administration bulletin board and via a Groupwise message to all Nursing staff
4. Those Nursing staff wishing to bid on a Nursing position vacancy will send an email message indicating their interest to the Director of Nursing (DON) AND Assistant Director of Nursing (ADON) AND Local 408 officials at the employees discretion, by 11:59 pm on the closing date.
5. Selections will be determined by staff seniority using their entry on duty (EOD) date with the Bureau of Prisons.
6. Ordinarily, selection announcements will be posted on the nursing administration bulletin board and via a Groupwise message, to all Nursing staff and Local 408 officials within seven (7) working days following the closing date of the announcement.
7. Should any concerns surface as a result of this MOU, the Agency and Local 408 agree to discuss them within 7 days of notification of the issue.

This MOU will remain in effect through the implementation of a new Master Agreement or until either party requests to re-negotiate the procedures set forth in this MOU.

According to the testimony of Cheryl Daniel, Health System Specialist and Vice President of Local Union 408 at the hearing herein, the Union requested to meet with the Agency. The Agency allegedly refused to meet with the Union

and the Union filed an unfair labor practice charge.

POSITION OF THE UNION

The Union argues that the Agency violated 5 USC Chapter 71 and the collective bargaining agreement when the Agency gave Public Health Service (PHS) employees/officers (non-bargaining unit) assigned to the Bureau of Prisons (BOP) improper Entrance on Duty (EOD) dates then allowed them to bid against Civil Service employees (bargaining unit).

Article 19 Section (e) of the Contract is cited by the Union with the contention that seniority is calculated differently for Civil Service employees and Public Health Service (PHS) employees/officers. Civil Service employee seniority is defined as the total length of service in the federal Bureau of Prisons (BOP) while seniority for Public Health Service (PHS) employees/officers is based on the entrance date the PHS employee was assigned to a federal bureau of prison facility. Article 19 Section (e) of the Contract reads in pertinent part, "In the event of conflict between unit members as to choice of vacation periods, individual seniority for each group of employees will be applied." The Union argues that Article 19 Section (e) clearly separates the two groups, Civil Service employees

and Public Health Service (PHS) employees/officers. The Union points out that it further states, "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." The Union contends that it is important to note that Public Health Service (PHS) employees/officers only have choices of vacation time, they are not otherwise assigned work, shifts and days off. The Union argues that Article 19 of the Contract clearly separates the systems.

The Union argues that once a Civil Service employee chooses to convert to a Health and Human Services Commissioned officer, they are in the Health and Human Services Public Health Service Commissioned Corps and assigned to that, and not to the Bureau of Prisons (BOP).

The Union contends that it is not asking to break any new ground only to uphold the Contract. The Union argues that Article 19 Section (e) of the Contract is clear and that in an event of a conflict between unit members as to the choice of vacation periods, individual seniority for each group of employees is the deciding factor. The Union argues that the Agency is violating the Contract, which

specifies in Article 19 Section (e) that bargaining unit employees bid against bargaining unit employees.

The Union argues that Article 18 Section (f) was not followed and reads in pertinent part, "Roster committees outside Correctional Services department will form to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedure in section (d) be utilized." The Union contends that the Agency is co-mingling Public Health Service (PHS) employees/officers and Civil Service employees giving Public Health Service (PHS) employees/officers bargaining unit rights which they are not entitled to under the Contract or law. The Union argues that it has established that there is not one position at the prison on a biddable roster which Civil Service nurses are not qualified to work, meaning the positions are based off seniority placement and not by special qualifications or experience.

The Union points out that it cannot bargain for Public Health Service (PHS) employees/officers and argues that the phrase "all eligible staff" in the July 15, 2010, Memorandum of Understanding (MOU) was not intended to encompass Public Health Service (PHS) employees/officers.

The Union contends that "res judicata and/or collateral estoppel apply," apparently referring to Arbitrator David Paull's decision in In the Matter of the Arbitration Between American Federation of Government Employees (AFL-CIO), Local Union No. 817, Lexington, Kentucky and Federal Bureau of Prisons, Federal Medical Center, FCI Lexington. FMCS No. 070314-54707-8 (September 8, 2008) and Arbitrator Robert Boone's decision in U.S Department of Justice Federal Bureau of Prisons USP Leavenworth and The American Federation of Government Employees Local 919. FMCS No. 11-58230 (January 30, 2013).

The Union contends that the Agency's Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) argument, that the refusal to apply time served to the computation of a PHS employee's seniority with the Bureau of Prisons would amount to a hostile work environment is misplaced. The Union argues that there is no discriminatory animus rather the Contract is intended to directly benefit bargaining unit members. ¹

¹ The Union points to the Federal Bureau of Prisons v. Federal Labor Relations Authority, (D.C. Cir. 2011) (Case 10-1089) as standing for the proposition that the Agency failed establish non-bargaining PHS employees would suffer a hostile

The Union requests that the grievance be sustained, that jurisdiction be retained over any decision and that bargaining unit members be "made whole." Additionally the Union requests that the EOD dates be corrected and the Nursing Roster be reset as far as bidding on positions and vacation bidding.

work environment. However the United States Court of Appeals, District of Columbia Circuit concluded in that decision as follows:

The Authority endorsed an incoherent arbitral award and embraced an unreasonably narrow view of what the Master Agreement "covers." Because its decision is thus "incompatible with the terms [and] the purpose" of the Statute, "we are obliged to intervene." Dep't of Navy, 962 F.2d at 53. Accordingly, we grant the petition for review, vacate the decision of the Authority, and remand this matter for the Authority to set aside the arbitral award.

POSITION OF THE AGENCY

The Agency argues that the Union's reliance on Article 18 is incorrect as it applies to the Correctional Services department and not the Health Services department, the department the grievants are in. The Agency contends that the Memorandum of Understanding (MOU) the parties entered into in July 15, 2010, outlines the procedures that would be used for work assignments in the Nursing Department. The Agency points out that item #1 states that positions will be offered for bid to "all eligible staff." The Agency argues that this provision allows the opportunity for all eligible nurses and it does not place a limit on just civil service nurses or PHS nurses. The Agency argues that item #3 indicates that as vacant nursing positions become open a message will be sent to "all nursing staff" which includes Civil Service nurses and PHS nurses. Item #4 allows "nursing staff" in general to bid on certain positions. The Agency points out that there is no distinction between Civil Service nurses versus PHS nurses. The Agency points out that item #5 states that selections will be determined by staff seniority using their Entry on Duty (EOD) date

with the Bureau of Prisons. The Agency contends that seniority for work assignments in the Nursing Department is strictly based on the staff member's date they entered in the Bureau of Prisons, regardless of civil service or PHS. The Agency argues not only does the MOU fail to delineate PHS from Civil Service in their definition of staff, it is also apparent they made no distinction between LPNs and RNS, though the positions may have very different qualification standards and allowable duties.

The Agency argues that it has recently been decided that an employee of the Commissioned Corps (PHS) is covered under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and that USERRA prohibits an employer from denying a member of the uniformed service a benefit of employment on the basis of that membership.

The Agency contends that it has the right to assign positions as it is granted to management pursuant 5 USC § 7106, which has been incorporated in Article 5 of the Contract.

Several Federal Labor Relations Authority (FLRA) cases are cited by the Agency dealing with management's right to fill vacant positions and determine work assignments pursuant to 5 U.S.C. § 7106(a).

The Agency argues that arbitrators should not substitute their judgment for that of the Agency unless there is an abuse of authority. The Agency asks that the grievance be denied contending that practice of viewing Public Health Service employees together with Civil Service employees has evolved into a past practice defined under Article 19, Section (e) of the Contract.

DISCUSSION

Although Article 19, Section (e) of the Contract does specify that it is to be applied in the event of a conflict between unit members, it clearly separates seniority for bargaining unit members in the Federal Bureau of Prisons, as the total length of service in the Federal Bureau of Prisons from seniority for Public Health Services (PHS) employees/officers, non-unit employees, as the entrance date for the PHS employee being assigned to a Federal Bureau of Prisons facility. Seniority for Public Health Services (PHS) employees/officers is not the total length of service. Had seniority for Public Health Services (PHS) employees/officers been the total length of service, which may include civil service time, the provision would have specified the total length of service or failed to differentiate between the two groups.

As pointed out by the Agency, the July 15 2010, Memorandum of Understanding (MOU) negotiated between the parties specifically speaks to "all eligible staff" and to "all Nursing staff." It does not specify "Civil Service employees" or "bargaining unit employees." The Union is correct, it cannot negotiate for non-bargaining unit

employees, Public Health Service (PHS) employees/officers. It is unclear, however, why the Union would have bargained away rights of its members under Article 19, Section (e) of the Contract or if the MOU was simply an inartfully worded document drafted by the parties. Notably, the MOU also does not specifically define "all eligible staff" or "all Nursing staff" unlike Article 1, Section (c) of the Contract, which defines the term "employee."

Even absent a written agreement however there may arguably be a past practice of allowing the Public Health Service (PHS) employees/officers to bid against Civil Service employees (bargaining unit) over positions, the assigning of job posts and use of annual leave. In order for a past practice to be binding it must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. See Celanese Corp. of Am., 24 LA 168, 172 (1954). In the matter herein, it appears that allowing the Public Health Service (PHS) employees/officers (non-bargaining unit) to bid against Civil Service employees (bargaining unit) over positions, the assigning of job posts and use of annual

leave has been going on at least since 2000. The Agency is correct in that it has the right to assign employees pursuant to 5 USC § 7106 as incorporated in Article 5 of the Contract. It is a longstanding principle however that the act of directing the workforce is not a "practice." Management exercising what they believe to be a right without obligation or commitment for the future in the present, is not a "practice." See Ford Motor Co., 19 LA 237, 241-242 (1952) and *Management Rights and the Arbitration Process*, 169, 184-188 (BNA Books, 1956). The fact that the Agency unilaterally managed the work force in the matter herein did not make it a past practice.

In In the Matter of the Arbitration Between American Federation of Government Employees (AFL-CIO), Local Union No. 817, Lexington, Kentucky and Federal Bureau of Prisons, Federal Medical Center, FCI Lexington. FMCS No. 070314-54707-8 (September 8, 2008) at page 22 Arbitrator Paull found in pertinent part as follows:

The Union's basic contention is correct. The PHS nurses are not part of the bargaining unit and are prohibited from collective bargaining with the Agency by federal law. The Master Agreement covers only those workers specified in 5 U.S.C. Chapter 71. Article 19, Section (e) specifically call for seniority bidding only '[I]n the event

of a conflict between unit members.' Article 19 refers to 'employees.' Federal law prevents the inclusion of PHS nurses in that term. Unless the parties agree otherwise, permitting the PHS nurses participate in a bid with bargaining unit members is a clear violation of Article 1 and Article 19, because the practice includes employees who are not covered in the Master Agreement.

As pointed out by the Union, Arbitrator Paull's decision is seemingly on point. That decision was further approved by Arbitrator Boone. I see no reason to find otherwise.

AWARD

The Agency did not comply with the Contract when it permitted Public Health Service (PHS) employees/officers (non-bargaining unit) to participate in seniority bids against Civil Service employees (bargaining unit). The Agency shall cease and desist from permitting Public Health Service (PHS) employees/officers (non-bargaining unit) from bidding against Civil Service employees (bargaining unit) over positions, the assigning of job posts and use of annual leave. The total cost of arbitration shall be shared by the parties in accordance with Article 32 Section (d) of the Contract.

By my hand this 14th day of March 2015.



John S. West, Arbitrator