**IN THE MATTER OF ARBITRATION BETWEEN**

**UNITED STATES DEPARTMENT OF JUSTICE**
**FEDERAL BUREAU OF PRISONS**
**FEDERAL CORRECTIONAL INSTITUTE**
**FORREST CITY, ARKANSAS**
**AND**
**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL UNION NO. 922**

**OPINION/AWARD**

**FMCS#07-01054**

ARBITRATOR: Sidney S. Moreland, IV, FMCS
UNION ADVOCATE: Jeff Roberts and Shon Foreman and Jody Cook
AGENCY ADVOCATE: Jennifer Montgomery

Heard at the Federal Correctional Institution in Forrest City, Arkansas in the Training Center on Wednesday, June 23, 2010 @ 9:10 A.M. CST and Thursday, June 24, 2010 @ 9:15 A.M. CST, before Sidney S. Moreland, IV, impartial Arbitrator, mutually selected by the parties under the authority of the Federal Mediation Conciliation Service.

## ISSUE(S):

Union: Did the Agency fairly and equitably issue performance evaluations in accordance with Program Statement 3000.03, the Master Agreement, and the Civil Service Reform Act of 1978, and if so, what is the appropriate remedy? Additionally, all issues raised in the original grievance.

Agency: Did the Agency violate Articles 3, 6, 7, 14, 22, and/or 36 of the Master Agreement with respect to issuing employees' performance evaluations, and if so, what is the appropriate remedy?

Agency: Was the grievance filed timely in accordance with Article 31, Section D. of the Master Agreement?

Agency: Was the grievance and/or invocation of arbitration by the Union appropriately in accordance with Article 32, Section A. of the Master Agreement?

Agency: Was the grievance and/or invocation of arbitration by the Union appropriately in accordance with Article 31, Section F. of the Master Agreement?

## BACKGROUND:

The Federal Bureau of Prisons ("Agency") operates a compound of correctional institutions in Forrest City, Arkansas for the United States Government referred to as the Federal Correctional Complex ("FCC") Forrest City. The FCC employs approximately 600 correctional service employees serving in various positions.

The American Federation of Government Employees, Local Union Number 922 ("Union") is recognized as the sole and exclusive representatives/bargaining agent for all bargaining unit employees as defined in 5 U.S.C. Chapter 71, and under the provisions of the Civil Service Reform Act and the Federal Service Labor Management Relations Statute with respect to conditions of employment, pursuant to Article 1 of the Collective Bargaining Agreement, known formally as the Master Agreement ("Contract").

The Contract (Joint Exhibit #1) was in effect at the time of the occurring incident(s) giving rise to this dispute. The Contract was entered into between the Agency and the Union on 02-06-98. The primary term of the Contract has expired, but the parties have extended it indefinitely, until a new contract is executed.

In July 2005, the Union complained to the Agency that Facilities Department employees

and possibly others were not receiving quarterly performance logs from the Agency supervisors. An informal resolution was reached between the Union and the Agency in accordance with Article 31 Section d. of the Contract, whereby the Agency agreed to rectify the matter by placing additional management controls in place to ensure proper performance evaluations and to give special consideration for awards to employees that were victims of the Agency's digression. Based upon this informal resolution, the Union refrained from filing a formal grievance.

On 10-05-06, the Union notified the Agency that the performance evaluations continued to be done late, improperly, or not done at all in the Facilities Department as well as other departments.

On 10-24-06, the Union filed a formal grievance (Joint Exhibit #2). The grievance specifically alleges a violation of:

**"5 U.S.C. 71; Program Statement 3451.04, Chapter 2; Program Statement 3000.02, Chapter 4; Program Statement 3420.09; and Master Agreement, Preamble and Articles 3, 6, 7, 14, 22, and 36."**

The grievance specified the activities they complain of as:

**"Several departments at FCC Forrest City have been in direct violation of the above mentioned Program Statements, Master Agreement and Statute as it pertains to the employee performance appraisal system.**

**The problems were first noted in July of 2005, specifically related to the Facilities Department. The staff assigned to the Facilities Department were not issued the quarterly performance logs as directed by policy and practice. Informal resolution was reached through Labor Management Relations (LMR). The Agency agreed that this was a violation and pledged to resolve the issue by placing additional management controls to ensure that these violations would never take place in the future. The Local also agreed that employees identified as victims of managerial shortcomings would receive special consideration for performance based awards since their evaluations (the basis for performance based awards) were tainted.**

On October 5th, 2006, it became apparent that the Agency did not comply with the terms of the informal resolution. Once again, evaluations were not issued to staff in a timely manner during the rating period, standard sets were not issued, yearly evaluations were not issued, and the manner in which the evaluations were issued by definition is not in compliance with the Program Statement.

The manner in which Quality Step Increases were awarded was based on a non-negotiated policy of, "If you had one last year, you can't have one this year" concept. This informal policy is in direct conflict with the Program Statement as well as contradictory to any reasonable interpretation of a PERFORMANCE BASED award.

As stated earlier, the agency did not negotiate, invoke negotiation, or notify the Local of this change in policy as required by the Master Agreement.

It has also been noted that decreased ratings have been issued when no issues or concerns with performance were present or ever noted.

The affected Departments, which have failed to abide by policy are, but not limited to: Trust Fund, Education, and Facilities.

This is also directly relevant to upward mobility. The "Outstanding" level of an employee's evaluation equates to points that help comprise an employee's rating when he or she applies for vacancies. The employees that are affected by this agency digression have not been placed on a level playing field. Careers and livelihoods have been potentially damaged by the failure of the Agency to abide by its own policies and practices."

The grievance further sought as remedy:

"1. The Agency make whole all employees affected by awarding them the highest monetary award allowable by policy.

2. That all cost incurred to do this action be paid in full.

3. That the Agency cease and desist from violating the Master Agreement, governing rules and regulations.

4. That the Agency cease and desist from violating policy.

**5. That the Agency hold their Supervisors liable for all policy violations and disciplinary action be taken against anyone found to have violated policy.**

**6. That all Managers receive mandatory training in all areas of the violations in the instant case.**

**7. That affected staff be compensated with the maximum award being back dated to July 2005, the date of the informal resolution, to include interest and penalty, due to this act by the Agency being egregious.**

**8. That a Bureau wide posting be required by the offending party (Agency).**

**9. Any other appropriate relief that may be requested at the hearing.**

**10. Any other actions or sanctions deemed appropriate by the Arbitrator."**

The grievance states that it was filed with the Warden of the institution.

On 11-21-06, the Agency denied the grievance. The Agency's response letter, signed by the Warden, (Joint Exhibit #3) states in pertinent part, "...your grievance is rejected for specificity and timeliness. Management understands the importance of staff evaluations and performance entries. In that respect, Management continues to provide training and guidance on the evaluation process."

On 01-19-07, Sidney S. Moreland, IV was appointed by the Federal Mediation & Conciliation Service to arbitrate this matter.

All parties were effectively represented by capable and competent advocates, who stipulated that the issues were proper for arbitration, subject to their various objections including the Agency's objection of arbitrability, and that Sidney S. Moreland, IV, is the mutually selected arbitrator empowered to make a binding and final resolution of this dispute.

The parties presented 5 joint exhibits and refused to stipulate or concur upon the exact wording of the Issue(s). The Union presented 16 exhibits and the Agency 6, in the presentation of their respective cases.

The Agency first presented 2 sworn witnesses, who testified in the following order:

Linda Sanders
Rickey Galloway

The Union presented 14 sworn witnesses, who testified in the following order:

Amy Carlton
Matthew Austen
Ricardo Marques
Jeff Roberts
Jody Cook
Charles Berube
Ricardo Marques, recalled
Lawrence Howard
Lequita White
Danny Parson
Dina McDaniel
Harold Taylor
Palmer Herrington
Timothy Outlaw

All parties stated that they were satisfied with the state of the record, subject to their objections and the additional evidence or arguments presented in their respective post-hearing briefs.

The parties requested and were permitted to file post-hearing briefs, which were received on 10-04-10 (Agency) and 09-30-10 (Union), read, and given due consideration by the Arbitrator.

The parties waived the 30-day arbitration award rule, and agreed to extend additional time for the rendering of this Award due to problems with the delivery of evidence to the Arbitrator.

**OPINION, Arbitrator Moreland:**

***Arbitrability***

The Agency's defense of this grievance was largely spent on challenging the arbitrability

of the matter, claiming the formal grievance and the notice invoking arbitration lacked specificity and that they were not filed timely. The Agency cites specific provisions of the Contract, included infra, which address the requisites of grievance filing between the parties. The contractual provisions are not included in their entirety, but only those portions relevant or cited by the Agency:

**ARTICLE 31-GRIEVANCE PROCEDURE**

Section c. **Any employee has the right to file a formal grievance with or without the assistance of the Union.**

Section d. **Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.**

1. **if a matter is informally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.**

Section e. **If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.**

Section f. **Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union.**

**ARTICLE 32-ARBITRATION**

Section a. **In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.**

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.**

*Timeliness of the Grievance*

The evidence shows that the parties have a long history of this specific issue repeating itself and/or continuing, namely the Agency's failure to conduct timely and proper performance evaluations for all employees pursuant to federal statute and other mandates. The evidence shows that despite previous grievances, arbitrations, and even an informal resolution of this matter when raised by the Union in July 2005, prior to the filing of this grievance, the Agency failed to honor that informal resolution and correct the problem. Performance evaluations continued to be tardy, or not done, after the informal resolution was reached and after the Union had refrained from filing a grievance. Leaving the evidence to logically conclude that the violation was an ongoing and continuous violation at the time this grievance was filed on October, 24, 2006 and more specifically allowable under Article 31.d.1., supra. 1

***Specificity of the Grievance***

The Agency also scrutinizes the formal grievance document itself, claiming a vagueness in the grievance exist because the Union failed to provide enough "specific information" to afford a "thorough review" of the allegations. The Contract only mandates that the grievance be filed on the Agency provided and approved form, per Article 31, Section f., supra.

The form itself mandates that the grieving party first identify the controlling authority that has allegedly been violated (i.e. Federal Prison system directive, executive order, statute, or contract provision). Therein the Union cites the contract provisions, statute, and program

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1 LMR Chair Amy Carlton, under questioning by the Union Advocate, testified that there were performance evaluation problems brought to management's attention in 2005 and that she worked to resolve them. Q="...it's clear you knew what was going on at this point, and at least to a certain degree, you had a good hand on what the issue was?" A="In early 2005, yes. And that was why I got with the manager." Q="We didn't file anything in 2005, did we?" A="No." Q="Why didn't we file?" A="Because, we got it corrected." Q="We worked it out, right, through LMR?" A="Yeah..." (Page 157-8 of hearing transcript.)

statements pertinent to the allegation of the Agency failing to properly conduct performance evaluations for all employees.

The Agency's form next provides a box with the following identification and verbiage:

**"6. In what way were each of the above violated? Be specific. (But not limited to)."**

Therein, the Union describes the violation of these policies, identifying departments wherein the performance evaluations where not being properly done, with a level of specificity that a neutral third party can readily discern exactly what the Agency is being accused of without the need for naming each affected employee within the departments mentioned. The LMR Chair, a ranking management official at the Agency, testified about the performance evaluations not being done in 2005 and 2006, and how she worked to reach an informal resolution with the Union, thereby substantiating the Agency's knowledge of this problem, as well as the informal resolution of the problem that the Union claims had been reached.2 Furthermore, given the persistency and duration of the Union complaining about the Agency not getting the performance evaluations done, the Agency knew fully the problem being aggrieved of and could have quite easily polled the department heads; readily ascertained which of them had untimely or improperly handled performance evaluations concerning the employees in their department; and then render an accurate response to the grievance. The Agency cannot disingenuously claim a grievance is vague and realistically expect to bar that grievance from arbitration after years of documented contention with the Union over the same issue(s). The language of the Union's formal grievance is cited herein on pages 3-4, supra, in its' entirety.

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2 Roberts, Q="You testified with Ms. Montgomery you thought the eval issue was resolved?" Carlton, A="I thought the supervisors were much improved and doing better with it." Q="Was the grievance filed at that time?" A="I believe it was filed in October 2006. I thought that they had been doing better. I thought that they had started giving

*Specificity of the Arbitration Invocation*

The Agency then raises the same objection concerning the Union invoking arbitration, citing the requisites of a notification which must be given to the Agency before arbitration can be invoked. The contract provision, supra, requires that the notice to arbitrate contain: a statement of the issues involved; the alleged violations; and the remedy requested. In the arbitration notice to the Agency, the Union recited the verbiage of their grievance, which sufficiently contains the items required in Article 32, Section a. of the Contract.

***Performance Evaluations Mandated, the Agency's Statutory Duty***

Fully cognizant of the limitations imposed, the Arbitrator does not seek to substitute his judgment for that of management in the course of their statutorily created duties, rights, and obligations, namely 5 U.S.C. 7106, to wit:

> **"5 U.S.C. 7106. Management rights**
> **(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-**
> **(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and**
> **(2) in accordance with applicable laws-**
> **(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;**
> **(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;**
> **(C) with respect to filling positions, to make selections for appointments from-**
> **(i) among properly ranked and certified candidates for promotion; or**
> **(ii) any other appropriate source;**
>
> **(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 subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;**
> **(2) procedures which management officials of the agency will observe in exercising any authority under this section; or**
> **(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.**

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their quarterly log entries." (Page 145 of hearing transcript.)

While the federal statute grants management the right to handle personnel matters with considerable latitude, with it comes the obligation to do so in accordance with other concurrent and applicable laws.

> **"5 U.S.C. 4302 Establishment of performance appraisal systems**
>
> **(a) Each agency shall develop one or more performance appraisal systems which-**
>
> **(1) provide for periodic appraisals of job performance of employees;**
>
> **(2) encourage employee participation in establishing performance standards; and**
>
> **(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.**
>
> **(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for-**
>
> **(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;**
>
> **(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;**
>
> **(3) evaluating each employee during the appraisal period on such standards;**
>
> **(4) recognizing and rewarding employees whose performance so warrants;**
>
> **(5) assisting employees in improving unacceptable performance; and**
>
> **(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.**
>
> **(c) In accordance with regulations which the Office shall prescribe, the head of an agency may administer and maintain a performance system electronically.**

5 U.S.C. 4302 burdens the management rights of 5 U.S.C. 7106 by imposing the statutory obligation that management *shall* execute their established and properly noticed periodic performance evaluations and use those results as the basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, removing, and recognizing employees. The evidence reflects the Agency violated 5 U.S.C. 4302 by failing to conduct the performance evaluations of all their employees accurately and timely in July 2005 and continuing thereafter.

***The Agency's Contractual Duty***

It bears mentioning that Article 3 of the Contract serves as a restatement of the fact that

the Agency is governed by federal statute, rules, and government regulations in addition to the obligations found in the Contract, as long as those obligations do not run counter to statute. Article 3 states, in pertinent part:

**"ARTICLE 3-GOVERNING 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."**

Article 3 underscores the importance of the statutory duty identified herein, upon the Agency to properly and timely evaluate all employees.

Article 14 of the Contract incorporates the statutory obligation to properly rate employees into the parties' collective bargaining agreement. Article 14 states, in pertinent part:

**"ARTICLE 14-EMPLOYEE PERFORMANCE AND RATINGS**

**Section a. The Employer's performance evaluation program as applied to bargaining unit employees is intended to increase the efficiency of operations, foster good employee morale, strengthen employee-Management relationships, and evaluate work performance based upon established elements and performance standards. These standards and elements will be developed and communicated to each employee, and as they are applied to an employee, will be fair and based upon objective criteria and job-relatedness....**

**Section c. The parties to this Agreement endorse the concept that evaluations should be completed by supervisors who have knowledge of an employee's performance. Where employees serve subject to multiple supervision, it is recommended that, where practicable, such employee's ratings be completed by the supervisors for whom they worked during the rating period. This endorsement is not intended to waive any rights employees may otherwise have to grieve their performance ratings.**

**1. The employer and its representatives are committed to following Agency policy regarding the performance appraisal program. This policy will be available for the employee's review upon request. This policy states that the following time frames will be adhered to in relation to performance log entries:**

**a. rating officials must record specific incidents in the performance log within fifteen (15) working days of becoming aware of the incident;**
**b. after an entry has been made in the performance log, the employee will be given an opportunity to see the entry as soon as practicable and before the entry is used officially, but no later than fifteen (15) working days after the entry is made; and**
**c. these time requirements may be adjusted, if necessary, because of the rating official's or employee's absence.**

**Section d. The Employer agrees to provide information requested by the Union regarding the performance evaluation program and distribution of ratings if a valid request is made under the provisions of 5 U.S.C., Chapter 7114(b)(4)."**

The thrust of Article 14 is to emphasize the timeliness by which performance evaluations

and any log entries must be done; the sanctity of evaluations being done by an employee's actual supervisor; the notice requirement and timeline by which employees and the Union must be informed and given access to appraisal records; and that the Agency is also bound to follow Bureau of Prison policy governing employee performance ratings, in addition to statute. The evidence reflects the Agency violated Article 14 of the Contract by failing to follow the Agency's policies regarding the performance appraisal program and by failing to timely record performance log incidents and share those log entries with the employee.

***The Agency's Policy Mandates***

Program Statement # 3000.02 and/or 3000.03, known as the Human Resource Management Manual (Union Exhibit # 1 and Joint Exhibit #5 respectively) is a Bureau-wide policy which serves to supplement the laws, Federal Personnel Manual, and Department of Justice Orders. The Manual (3000.02) was in effect at the time the incidents giving rise to this dispute occurred (2005). The Manual was revised in late 2007 and the latter Manual (#3000.03) governs today. For purposes of the resolution of the case at bar, no difference exists in those portions of the Manual(s) governing these discussions (i.e. Chapter 4).

The Program Statement 3000.02/3000.03 states, in pertinent part:

**"PROGRAM STATEMENT 3000.02 HUMAN RESOURCE MANAGEMENT MANUAL**

**430.1 PERFORMANCE EVALUATION PROGRAM FOR BARGAINING UNIT EMPLOYEES**

**...5. RESPONSIBILITIES.**

**a. The Assistant Director, Human Resources Management Division, is responsible for the overall administration of this program.**

**b. The Federal Bureau of Prisons Personnel Director is responsible for ensuring that the performance evaluation program is carried out throughout the system in compliance with current laws and regulations.**

**c. Chief Executive Officers are responsible for ensuring that there is an effective performance evaluation program at their level of the organization.**

**d. The Approving Official for outstanding performance ratings is the Chief Executive Officer for institution and regional office staff or the appropriate Assistant Director for Central Office staff. The**

approving official must be at least two supervisory levels above the employee being rated.

e. The Reviewing Official is the next supervisor above the rating official and is responsible for assigning an overall rating and approving or adjusting individual element ratings. Reviewing officials are also responsible for monitoring the performance appraisal practices of subordinate supervisors and providing advice or instruction as needed. Reviewing officials ensure that recommendations for incentive awards based on performance ratings are consistent with policy and determine whether recommendations for outstanding performance ratings will be forwarded to the approving official.

f. The Rating Official is the first level of management having the full range of supervisory responsibilities, including recommending performance awards. Rating officials are responsible for maintaining the employee's performance log, conducting progress reviews and completing the annual performance rating in accordance with the procedures in this section.

g. Employees are responsible for becoming familiar with the objectives and procedures of the performance evaluation program and for understanding the elements and performance standards for their positions. The employee is responsible for seeking clarification from the supervisor on any performance standard or any other aspect of this program which is not clear. The employee should inform the supervisor of any factors or circumstances which the employee believes should be considered in evaluating his/her performance.

h. Human Resource Managers are responsible for providing training, advice and assistance to employees and supervisors on this program. They are also responsible for maintaining adequate supplies of the rating forms and performance standards for distribution to supervisors.

i. Local Procedures. Specific procedures and responsibilities for initiating the issuance of performance standards, monitoring changes in performance standards and rating periods, maintaining rating forms during the rating period, recommending training and incentive awards based on performance ratings and other aspects of this program not described in this section are left to the discretion of the local Chief Executive Officer. Institutions and offices should develop written procedures to ensure that the requirements of this program are fully implemented.

6. BASIC PROGRAM REQUIREMENTS. The basic structure of the performance evaluation program is outlined below and is described in detail in subsequent sections.

a. At the beginning of the rating period, the rating official gives the employee a copy of the performance standards for their position and discusses them. Both the employee and rating official sign the rating form, indicating that the discussion has taken place.

b. Throughout the rating period, the rating official makes entries in the employee's performance log. Each element of the performance standards must be addressed at least once each quarter. The rating official discusses each entry in the performance log with the employee as it is made. Entries in the performance log serve as the basis for the progress review and final rating.

c. Halfway through the rating period, the rating official completes a written progress review and discusses it with the employee. Both the employee and rating official sign the progress review section of the rating form.

d. At the end of the rating period, the rating official evaluates each element of the performance standards, assigns an adjective rating to each element and forwards the rating to the reviewing official. The reviewing official approves or adjusts the individual element ratings, assigns an overall rating (and forwards the rating to the approving official in the case of outstanding ratings) and returns the rating to the rating official for discussion with and signature by the employee. Except in unusual circumstances, employees must receive their performance rating within three weeks after the end of the rating period.

7. RATING PERIOD. The rating period for non-probationary employees begins on April 1 each year and ends March 31 the following year...

10. MONITORING PERFORMANCE-PERFORMANCE LOG. The performance appraisal process requires that rating officials observe and note employee performance continuously throughout the rating period. Rating officials must record examples of employee performance to ensure that the rating at the end of the rating period is an accurate and fair appraisal of the employee's performance during the whole rating period.

**The performance log is used to document and substantiate the final rating.**

**b. Time Requirements. The rating official must record performance incidents in the log so that each element is addressed at least once each quarter. If no significantly positive or negative performance is noted for a particular element during a quarter, the rating official will make an entry describing typical performance over the course of the quarter. Rather than waiting until the end of the quarter, rating officials must make entries in the log as the performance is noted in order to meet the following time requirements. Rating officials must record specific incidents in the performance log within fifteen working days of becoming aware of the incident. After an entry has been made in the performance log, the employee will be given an opportunity to see the entry as soon as practicable and before the entry is used officially, but no later than fifteen working days after the entry is made. The employee will be asked to initial the entry, indicating only that the issue was discussed, not necessarily that they agree with it. These time requirements may be adjusted, if necessary, because of the rating official's or employee's absence.**

**11. PROGRESS REVIEW. In addition to the frequent informal discussions of performance resulting from performance log entries, the rating official will conduct at least one formal progress review during the rating period.**
**a. One progress review is required for non-probationary employees and it will be conducted at the halfway point of the rating period.**

**12. FINAL RATING.**
**b. Overall Rating**
**(7) An overall rating of outstanding is demonstrated by a rating of outstanding in a majority of the elements and no element rated less than excellent. When an outstanding rating is approved by the approving official, the rating official must also recommend the granting of additional recognition in the form of a cash or non-cash award or a quality step increase for those employees who are otherwise eligible. Refer to the Incentive Awards Manual for the criteria for performance awards."**

This policy makes it exceedingly clear that the burden of undertaking and completing the performance evaluations and ratings lies with management. The ongoing nature of the prescribed process requires management's duty almost daily, making the neglect by supervisors to perform this duty over an entire quarter or longer, even more inexcusable.

It is also noted, the policy guarantees the recommendation of an award to any employee receiving a certain high rating (outstanding), demonstrating the fact that any employee not rated is ineligible for this particular financial opportunity.

The Agency seeks to place the burden of procuring performance evaluations upon the employees, citing Section 5.g. of the policy, supra, which discusses an employee's role in the program. The policy addressing the role of the employee has been closely scrutinized in the course of this evidentiary review. The policy specifically requires the employee to:

a) become familiar with the objectives and procedures for their position;

b) seek clarification on any performance standard or other aspect which is not clear;

c) inform the supervisor of factors that should be considered in evaluating his/her performance; and

d) bring to the supervisor's attention any portion of their performance requirements they do not understand.3 While it certainly is in an employee's interest to speak up if their performance evaluations are not being disseminated to him/her timely, this policy language does not mandate that, nor does it empower the employee to cause his/her performance evaluation and ratings to be done timely, accurately, and fairly by the Agency. There is no duty upon the employee to suggest to, request of, or direct their supervisor to get their evaluations done properly or timely. The burden of doing performance evaluations in accordance with the rules enumerated by statute, policy, and contract lies squarely with the Agency. The evidence reflects the Agency violated Program Statement 3000.02 and/or 3000.03 by failing to make entries in the performance logs during the quarter; by failing to discuss entry logs with all employees as the entries were made; by failing to render written progress reviews and discussing them with the employee; and by failing to note employee performance continuously throughout the rating period.

Program Statement # 3451.04, known as the Bureau of Prisons Awards Program, Incentive Awards is a Bureau-wide policy which details the types of cash awards available based upon *merit only* (emphasis added) and that said merit is measured by the performance evaluations/performance ratings.

The Program Statement # 3451.04 states in pertinent part:

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3 See Program Statement 3000.03, Chapter 4, Page 22, paragraph g. This policy was also recited by the Agency on

"PROGRAM STATEMENT 3451.04 BUREAU OF PRISONS AWARDS PROGRAM, INCENTIVE AWARDS

1. PURPOSE AND SCOPE. To recognize and promptly reward exemplary contributions to the organization's efficiency and effectiveness. Merit shall be the sole basis for granting any award. The provisions of this Program Statement apply to all BOP employees at all organizational levels. This Program Statement establishes the Incentive Awards Program as a key component within the BOP. In addition to presenting new incentive awards initiatives, the Program Statement also incorporates previously published policy and instructions into a logically structured guide to be used by Human Resource officials and supervisors in fulfilling their responsibilities in human resource management.

CHAPTER 1: GENERAL ADMINISTRATION
101. PURPOSE OF PROGRAM

1. The purpose of the Bureau of Prisons Incentive Awards Program is to recognize and reward promptly, employees who perform in an exemplary manner or make significant contributions to the efficiency and effectiveness of Bureau operations and to honor those who have served the government faithfully and well.

The integrity of the program will be preserved when meritorious awards are given expeditiously and only to those who are truly deserving of recognition. Merit will be the sole basis for granting any award. This will diminish inequities that could undermine the credibility of the awards program. Awards should be granted without regard to grade level or type of position.
Awards received within the past five years will be a factor when considering all employees for a promotion through the competitive merit promotion procedures.

2. Employee recognition is extremely important to encourage and maintain employee morale and a high level of achievement. Unfortunately, this can have a negative impact on all employees if the recognition is awarded indiscriminately, without a clear connection between the award and the contributions made to the Bureau.

We need to ensure that in our efforts to recognize employees, we also remain cognizant of our public trust and fiscal responsibilities. In the interest of all taxpayers, it is of the utmost importance that we maintain the integrity of the incentive awards program. We must not indiscriminately grant awards. Always consider factors such as: impact, perception of others, and cost savings of the contribution being rewarded.

CHAPTER 2: GUIDELINES FOR MONETARY AND NON-MONETARY AWARDS
201. QUALITY STEP INCREASES (QSI)

2. Evaluation Criteria. A QSI may be considered only when the employee's most current overall performance rating of record is "outstanding". This level of achievement must have been sustained for at least six months prior to nomination. The same period of performance may not be used as justification for more than one QSI.

4. Nomination Procedures. Normally, a QSI is recommended concurrent with the annual performance appraisal. The immediate supervisor is responsible for initiating the recommendation and obtaining information on the employee's eligibility for a QSI.
Nominations should be submitted using either of the methods described below:
When the performance evaluation contains substantial documentation of the employee's performance in

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page 8 of the Agency's brief.

**relation to the performance standards, the supervisor can submit a copy of the performance evaluation and a cover memorandum (or local form) which recommends the QSI.**

**202. SPECIAL ACHIEVEMENT AWARD FOR SUSTAINED SUPERIOR PERFORMANCE (SSP)**

**1. Introduction. This is a lump sum cash award granted in recognition of an employee's sustained superior performance which exceeds normal job requirements for a period of at least six months.**

**2. Evaluation Criteria. An SSP award may be given only to an individual (rather than a group). One or more job elements of an employee's position must be performed for a period of at least six months in a manner which clearly exceeds normal job requirements. The SSP award must be supported by a current performance rating of "exceeds" or higher.**

The policy stresses that "merit shall be the sole basis for granting any award." Merit is best measured uniformly by the performance evaluations/performance ratings the Agency is bound to procure for each employee quarterly and annually. Any other standard falls below the "integrity" mandate expressed in this program and tends to "undermine the credibility of the award program" which the policy expressly prohibits.

The two primary awards of concern in this matter are the Quality Step Increase (QSI) and the Sustained Superior Performance (SSP), both of which are financial rewards to the employee predicated upon the performance evaluations of that employee. Although the SSP may be awarded without performance evaluations, it must still be awarded based solely upon merit in accordance with policy, and performance evaluations are the statutorily mandated process for monitoring employee performance and gauging their merit. The QSI can have long term financial benefit as it results in elevating the employee's grade, step, and pay, which then affects the employee's future career, salary, and retirement benefits. The QSI and/or and "outstanding" performance rating can also benefit an employee who applies for another position or a vacancy, as the application process enquires whether or not a job applicant has received QSI's or outstanding performance evaluations, which add points to the application submitted for the

vacancy.

Neither a QSI nor an SSP award can be given objectively without the fair and objective review of proper performance evaluations of the employee considered for the award(s). Further complicating this issue, the evidence reflects that the Agency limited the number of awards to be annually given to employees, thereby creating a comparative basis to be considered in the awarding process by necessity. If the number of awards to be granted is limited and therefore comparatively selected, neither award can be given objectively without the proper performance evaluations of *all* employees being considered equally, an impossibility when all employees were not evaluated correctly by management, thereby demonstrating the breadth of the damage to the Awards Program by flawed or untimely performance evaluations. Furthermore, granting awards based upon budget parameters is the granting of awards based upon a factor other than merit. The evidence reflects that the Agency violated Program Statement 3451.04 by granting awards based upon factors other than merit and by failing to promptly recognize and reward only those employees who are truly deserving of recognition.

***Preponderance of Evidence***

A preponderance of the evidence demonstrates that performance evaluations were not done timely by the Agency supervisors; the logging of incidents was not done timely and with the proper notice to the employee; evaluations were questionably adjusted by the Agency supervisors; log entries were not logged by the rating supervisors during the time, or within the quarter, that the evaluation period covered; employees were rated by the supervisors outside of the rating period; evaluations were changed by supervisors with no notice to nor any discussion with, the employee; employees' signatures were fraudulently placed upon their evaluations by

supervisors who were tardy in getting the evaluations done timely; standard sets were not explained to employees when disseminated by supervisors; standard sets were improperly changed by supervisors; performance evaluations were destroyed by a supervisor when an employee sought a copy; performance evaluation meetings/discussions were not held with employees; and retaliation and/or threats from supervisors were legitimately feared by employees who complained about the performance evaluation process. Of the eight witnesses identified as Agency management who testified, none disproved or denied these findings.4

***Applicable Time Frame of Remedy***

Evidence of the Union's complaining to the Agency of problems with the performance evaluations as far back as July 2005 is not refuted in the evidence. The evidence of an informal resolution between the Union and the Agency of those July 2005 complaints, which resulted in the grievance being deferred, is not contradicted in the evidence. Evidence that the problems with the handling of the performance evaluations by the Agency continued, after the informal resolution, is also not contradicted. In the case of an ongoing, repetitive, or continuing violation being grieved, the period covering the conduct alleged in the grievance is established by the evidentiary record in order to definitively remediate a sustained grievance. The time frame covering this grievance for purposes of implementing any awarded remedy, shall be from July 2005 (complaints informally resolved) through the date of this award, preceding the date the grievance was later filed (October 2006) in order to fully adjudicate all alleged occurrences of

4 Warden Linda Sanders, hearing transcript pages 32-84; HR Mgr. Rickey Galloway, hearing transcript pages 85-118; LMR Chair Amy Carlton, hearing transcript pages 119-164; Captain Ric Marques, hearing transcript pages 179-195; Captain Lawrence Howard, hearing transcript pages 285-300; Assistant Warden Harold Taylor, hearing transcript pages 386-441; Assistant Warden Palmer Herrington, hearing transcript pages 442-463; and Warden Timothy Outlaw, hearing transcript pages 464-504.

contractual violations that the Agency had been made aware of. A party cannot resolve issues pursuant to an informal resolution provision in a collective bargaining agreement, thereby deferring the formal grievance process from initiating, violate that informal resolution, and benefit from having the grievance deferment period excluded from a subsequent arbitration award covering the same issues.

***Remediation***

It is not readily determinable from the evidence presented, exactly how many and which employees failed to receive their quarterly evaluations from the Agency during this time frame, or exactly how many and which employees were the victim of improperly handled log entries, performance evaluations, and/or performance ratings, but a single instance substantiates the grievance, and may have ramifications upon an entire work force in a financially strained institution where step increases and rewards are limited and were likewise competitively granted amongst employees.5 Likewise, the violation of the Contract, the Program Statements, and the statutes so cited, may or may not conclusively prove that an employee whose performance evaluation was mishandled by the Agency's violation(s), necessarily suffered monetary loss. The Agency's disregard for the sanctity of performance evaluations and their obligations under the statutes, the Contract, and the Program Statements to properly and timely execute them, creates the conundrum of how to rectify it. Therefore, the task of first ascertaining the exact employee(s) who may have suffered monetary damage as a result of the Agency's failure to properly handle

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5 Captain Ric Marques (Capt. at FCC from 7-04 thru 10-06) testified that there is a ten per cent rule controlling how many employees will get Quality Step Increases (QSI's) annually and they are based upon performance evaluations. Questioning by Mr. Roberts: Q="Ms. Montgomery asked you about the awards and the rule for QSIs. What is the rule?" A="Ten percent." Q="That is ten percent of the staff that are working here at the institution, correct?" A="Yes, the complex." Q="...But now if people don't get their evals, if they don't get ratings to make the four

their performance evaluations and ratings during the period in question is not overly burdensome to the Agency, and must be undertaken in any plan of remediation.

Any employee, who failed to receive equal consideration for benefits and opportunities as a result of the Agency's failure to conduct their performance evaluations in accordance with statutes, the Contract, and the Program Statements-faces the very complicated struggle of demonstrating that the Agency's mishandling of their performance evaluation cost them monetary damage, and if so, how to be made whole. The research and human resource effort required to remedy this grievance will be arduous and time consuming upon the Agency, and may or may not result in a large number of employees entitled to remuneration by the Agency in any substantial dollar award or other means. However, the requirement of a judicious and thorough result from the grievance arbitration process guaranteed by the Contract, demands nothing less.

***Other Grieved Policies and Contract Provisions***

It must be addressed that the formal grievance also cited violation(s) of Program Statement 3420.09, Standards of Employee Conduct, seeking disciplinary action against any supervisors whose failure to perform their job(s) as employee rating officials, led to the grievance. The evidence reflects that the current Warden has taken and/or is undertaking, the disciplinary steps against the responsible supervisors within the discretion granted him pursuant to the management rights of 5 U.S.C. 7106 (a) (2). No further discussion or response concerning this program statement is warranted.

The formal grievance also cited violations of the Preamble and Articles 6, 7, 22, and 36

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quarters to get the ultimate rating, they wouldn't be considered, would they?" A="No..." (Pages 188-189 of

of the Contract.

Article 6 guarantees an employee's right to grieve and address matters with management without fear of reprisal. The evidence does not show any employee stymied in his/her effort to raise issues with the Agency in their effort to have the Contract adhered to. The evidence reflects the existence of animus by certain supervisors who have been pointed out in the course of these issues being brought to light, and that those personnel matters are being addressed by the Agency.

Article 7, in addition to enumerating the rights of the Union, restates the obligation of the Agency to adhere to the obligations imposed on it by statute and the Contract. The fact that statutory and contractual violations by the Agency have occurred is not aided by furthering this discussion to include the language of Article 7.

Article 22, besides enumerating Equal Employment Opportunity policy, states the Agency and Union shall cooperate in providing equal opportunity for all qualified persons. The facts have demonstrated the inherent problems with the Agency's mishandling of performance evaluations leading to an unequal playing field for all employees with regard to receiving awards. The facts are not aided by furthering this discussion to include the language of Article 22.

Article 36 is a statement of ideals concerning human resource matters, and does not contain specific mandates capable of violation and if so, remediation.

The Preamble to the Contract is a statement of ideals and ambiguous objectives concerning the relationship between the parties, and does not contain specific mandates capable of violation and if so, remediation.

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hearing transcript.)

**AWARD/RULING**:

The grievance is sustained in part.

The issues identified herein were determined, heard, and resolved by the Arbitrator in accordance with Article 32, Section a. of the Contract, due to the parties' failure to mutually agree on joint submission of the issue(s) for arbitration.

The grievance was filed timely in accordance with Article 31, Section d.1 and/or Article 31, Section e. of the Contract.

The Union's timely filed formal grievance meets the requisite level of specificity in accordance with Article 31, Section f. of the Contract.

The Union's timely filed notice to the Agency invoking arbitration meets the level of specificity in accordance with Article 32, Section a. of the Contract.

The Agency did not substantively violate the Preamble, Article 6, Article 7, Article 22 and Article 36 of the Contract.

The Agency failed to properly conduct performance evaluations for all of its employees in violation of 5 U.S.C. 4302, Article 3 of the Contract, Article 14 of the Contract, Program Statement 3000.02, Program Statement 3000.03, and Program Statement 3451.04.

As remedy, the Agency shall, as soon as practicable:

1. Identify all employee performance evaluations that were untimely or improperly handled by the Agency in violation of the above cited authorities from July 2005 to the date of this arbitration Award; *and*
2. Review the untimely or improperly handled performance

evaluations identified in step 1 above, to the extent necessary to completely identify any employee(s) subjected to such untimely or improperly handled performance evaluations and/or the accompanying ratings that resulted in the subject employee not receiving a Quality Step Increase Award; and/or a Sustained Superior Performance Award; and/or a job vacancy that the employee applied for; *and*

3. Confer with the Union and all employee(s) identified in step 2 above and negotiate a resolution with the Union and the employee(s) that will fully remediate the financial loss, if any, suffered by the identified employee(s), utilizing whatever methods management deems proper including the specifically granted authority of the Warden provided in 5 U.S.C. 7106 (b)(3) and Program Statement 3000.03, Chapter 4, Page 4, Article 430.01, Section 5(i).

The Agency's conduct in failing to handle performance evaluations and awards in accordance with the cited statutes, policies, and contract provisions constitutes an unjustified or unwarranted personnel action. Nothing herein shall preclude the Union and/or any employee(s) identified in step 2 of this Award/Ruling from pursuing a claim under 5 U.S.C. 5596, in the event the Agency fails to negotiate a remedial resolution with said employee(s) expediently.

Nothing contained in this Award/Ruling substitutes the judgment of the Agency's management to direct employees, evaluate employees, rate employees, reward/award employees,

promote employees, and/or assign work. For the reasons stated herein, the Agency is instead ordered to properly evaluate the work of all its employees in accordance with the Contract, the statutes, and the policies cited herein.

The Arbitrator's costs shall be borne equally by both parties, pursuant to Article 32, Section d, of the Contract.

Hereby signed this 27th day of October, 2010

**Sidney S. Moreland, IV,**
**Impartial Arbitrator**
**#3288, FMCS**

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