IN THE MATTER OF ARBITRATION BETWEEN	)	
	)	
FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION EL RENO, OKLAHOMA (Agency)	)	**FMCS No. 17-52740-6**
-and-	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 171 (Union)	)	**Staff Urinalysis Testing Contract Violation/Past Practice**

Arbitrator: Lynne M. Gomez, selected through the procedures of the Federal Mediation and Conciliation Service.

HEARING

A Hearing was held on December 20, 2017, at the Federal Correctional Institution in El Reno, Oklahoma, commencing at 9:00 a.m. The witnesses were sworn and excluded. The proceedings were transcribed and the Arbitrator was provided with a copy of the transcript. The Parties submitted post-Hearing briefs which were received by the Arbitrator by March 13, 2018. The Hearing was closed on March 23, 2018. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

FOR THE UNION

Joshua Lepird	Advocate, Chief Steward
Brian Coker	Local Vice-President, witness
Steve Johnson	Grievant, witness
Billy McCormack	Retired Correctional Counselor, witness
Keith Russell	Senior Correctional Officer, witness
Ronal Tim Davis	Retired Correctional Officer, witness
Charles Bishop	Senior Officer Specialist, witness
Greg Brueggen	Observer

FOR THE AGENCY

Kim R. Starling	Advocate for the Agency
Janice Humbertson	Human Resources Manager, witness
Debra Aynes	Health Service Administrator, witness
Matthew Jackson	Captain, witness
Michael Joseph Patrick	Lieutenant, witness

APPEARANCES (CONTINUED)

Rochelle Pribyl	Human Resources Specialist, witness
Brannon Grady	Associate Warden, witness
Dennis Ward	AHSA, Observer

STIPULATED ISSUES

At the Arbitration Hearing, the Parties agreed to the following statement of the issues:

1. Did the Agency violate Article 6, Section b (2), f (2) and (h) of the Master Agreement? If so, what is the appropriate remedy?

2. Did the Agency violate Article 6, Section h of the Local Supplemental Agreement? If so, what is the appropriate remedy?

3. Did the Agency violate past practice? If so, what is the appropriate remedy?

BACKGROUND

On December 1, 2016, the Agency conducted random urinalysis ("UA") testing of bargaining unit members without notifying the Union that such testing would be conducted. The Union initiated this grievance on December 16, 2016, alleging that the Agency violated the Master Agreement, the El Reno Local Supplemental Agreement ("LSA") and past practice by conducting UA testing on staff without the Union present to provide representation to those who wished to be represented and without notifying the Union of the UA testing so it could accompany the collected samples to be mailed. The Parties stipulate that the matter is properly before this Arbitrator for Opinion and Award. The Parties also stipulate that the Arbitrator retain jurisdiction for a period of sixty (60) days to interpret any remedy.

RELEVANT CONTRACTUAL PROVISIONS

MASTER AGREEMENT
FEDERAL BUREAU OF PRISONS
AND
COUNCIL OF PRISON LOCALS
American Federation of Government Employees

July 21, 2014 – July 20, 2017

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;

* * *

Section f. Unit employees, including probationary employees, have the right to a Union representative during any examination by, or prior to submission of any written report to, a representative of the Employer in connection with an investigation if:

1. the employee reasonably believes that the examination may result in disciplinary action against the employee; and
2. the employee requests representation.

* * *

Section h. If the employee requests a Union representative under Sections f. or g., no further questioning will take place until the representative is present, provided that if the representative is not available within a reasonable period of time, the questioning and/or submission of a written report may proceed without the representative being present. Questioning and/or submission of a written report without a Union representative may go forward only where urgent circumstances could interfere with the safe and orderly running of the institution. Such questioning may proceed only when these urgent circumstances are documented and presented to the employee and/or his representative.

Reasonable time is defined as that time necessary for the designated representative from the local Union to travel to the site of the examination. The Union will promptly designate its representative and make reasonable efforts to avoid delay. * * *

LOCAL SUPPLEMENTAL AGREEMENT
TO THE
MASTER AGREEMENT
Between
FEDERAL CORRECTIONAL INSTITUTION
EL RENO, OKLAHOMA
AND
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 171

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section h.

During the collection process of Drug Testing, a union representative, at the employee's request, will be present, provided the designated representative is available within a reasonable period of time as defined in Article 6, section h of the Master Agreement. A Union representative will be allowed to accompany the sample of the Post Office.

POSITION OF THE UNION

The Union makes the following arguments and contentions in support of its position:

On December 2, 2016, the Union became aware that Health Services had required staff to give random UA samples the previous day without notifying the Union so it could be present to represent any staff member(s) who wanted Union representation. The Agency violated Article 6, Section h of the Parties' LSA which provides that all bargaining unit staff can request a Union representative during the UA collection process and which also gives the Union the right to have a representative accompany the sample(s) to be mailed. Senior Correctional Officer ("SCO") Russell repeatedly asked for Union representation but was not afforded it. The Agency has offered no proof that Mr. Hamilton, who was collecting the UA samples that day, attempted to contact the Union. However, it is clear that SCO Russell was denied the right to representation and, since no representative was contacted, the Union was deprived of its right to accompany the UA sample to the mailing location. The evidence, including the testimony of Mr. Davis, the primary negotiator who signed the LSA on behalf of the Union, demonstrated that the Union's right to accompany UA samples for mailing is guaranteed by the LSA. This also was an ongoing practice, giving the Union the option to exercise its right to accompany every sample collected.

Parties can establish terms and conditions of employment by practice or other tacit or informal agreement, and those terms and conditions cannot be unilaterally altered. Past practice generally includes all conditions of employment not specifically covered in the CBA that are followed by both Parties, or by one Party and not challenged by the other. For a practice to establish a term or condition of employment, if must be consistently exercised for an extended period of time with the Agency's knowledge and express or implied consent. The past practice at issue herein was set up two (2) years prior to the grievance, and was violated in several ways. The Union has been notified in advance so it could be present and staged in the Health Services conference room during the random UA collections for staff members who want Union representation, as confirmed by HRM Humbertson as well as the testimony of several Union representatives who have been involved in the process since the LSA was signed. Even the Agency claims it attempted to

notify the Union prior to conducting US on December 1, 2016. The Union was deprived of its rights by the Agency's failure to notify it, as required.

The Union would only see an employee giving a UA sample if that employee indicated on the form provided by Medical that (s)he wanted representation. That form was jointly created by the Parties for this purpose and has been continually used since the practice was created in 2014. The process also includes each UA sample being placed in a secure storage area – a safe specifically purchased for this reason – in the conference room. Health Service Administrator ("HSA") Aynes testified she only used the safe to store UA samples from employees who requested Union representation, which violates the past practice and the agreed upon practice of storing all UA samples in the safe until they are transported to the mailing location. No Union representative was present on December 1, 2016 or on many occasions after this grievance was filed, which it learned about gathering evidence through data requests. Many of the dates noted in the Drug Free Work Place Urine Log provided by the Agency showed that the Union had not been notified to represent staff or accompany the UA samples to the mailing location on dates when staff had been required to give UA samples. The Union's right to accompany the UA samples to be mailed is separate from its right to be present when a staff member requests Union representation. Even if no such request is made, the Union still has the right to be informed of the UAs, so it can elect to have a representative accompany the UA samples to be mailed. The past practice, demonstrated by the testimony of numerous Union and Agency officials, is to have the Union Official notified and present so as not to delay the UA process. The Parties' ongoing, agreed upon practice fulfills all requirements to constitute a past practice: It was consistent, exercised over a long period of time and followed by both Parties until the violations on which this grievance is based occurred.

This grievance is not just about 24 hours' advance notice to the Union of UA testing for bargaining unit staff, though that is part of the grievance. Notifying the Union of the intent to conduct UA sampling was not an issue until this grievance was filed. The Agency is fixated on the 24-hours' advance notice and questioned Union Vice President Coker as to why such notice was not included in the 2014 MOU. He explained such notice always was given and was not a point of contention until after the grievance was filed. VP Coker's explanation was confirmed by numerous other witnesses, including HRM Humbertson who testified that advance notice was given on a continuous, ongoing basis until the grievance was filed. The Agency admits it was to notify the Union "prior" to UA collections but has did not furnish such notice on December 1, 2016 or thereafter. The Union received no notice

on December 1, 2016. The Agency has presented evidence concerning "reasonable suspicion" UA samples but that is different from random UA samplings under policy and law and, therefore, irrelevant. Reasonable suspicion sampling has no bearing on this case, as the agreed upon, ongoing process concerned random UA sampling.

The Agency HSA Advance knowledge of when random UA sampling will be performed and the Union is to be notified in advance to be able to have a Union representative present. Staff members were called to give random samplings on December 1, 2016 but the Union received no notice. HSA Aynes' testimony showed that the Agency regularly violates the Union's rights by choosing Union representatives rather than allowing the Union to do so. Regardless, the so-called process explained by HSA Aynes was violated on December 1, 2016 by Collector Hamilton, one of HSA Aynes' subordinates, who telephoned SCO Russell rather than going through a Lieutenant and who did not know that a Union representative was not available. Collector Hamilton could have delayed starting the process until a Union representative was located, as the process is time-sensitive, but this was not done. Medical staff did not look for a Union representative until a bargaining unit staff member requested one, but Collector Hamilton pressured SCO Russell to go forward with the UA sample without Union representation in clear violation of SCO Russell's rights. The Agency denies that anyone was pressured but, if that was true, SCO Russell would not have checked "no" on the Union Representative Election Form and written "None Available." SCO Russell clearly wanted a Union Representative present and testified he replied "yes" many times, at different times and locations.

The Agency contends it complied with all proper procedures for UA collection and allowed the Union the opportunity to be present in accordance with the LSA, but it did not notify the Union in advance so it could stage a Union Representative in Medical, in accordance with established practice. It also did not give the Union the opportunity to choose to exercise its right to accompany the UA samples to the mailing location, in accordance with the LSA. The Union has the right to be present and staged in Medical before UA collections begin as part of a long established practice and LSA provisions. The Union has shown that the entire practice was added to and clarified in 2014, and that it continues. The Agency actively bargained for the forms that are still used and for purchase of the safe that continues to be utilized. HRM Humbertson testified that the form was a long-standing and agreed upon practice. The Agency maintains these forms and keeps them on file for four (4) years, and the safe for UA sample storage was purchased at considerable cost and is accessible only by those authorized to take UA samples. The only

purpose of the safe is to hold UA samples, to ensure that the Union could stay in the room with the samples and wait to represent anyone who requested Union representation. HSA Aynes' testimony supports this in stating that the Union wanted to stay with the urine samples so the solution was to buy the safe. The Parties' ongoing practice was adjusted and added to in 2014 when HSA Aynes was stationed at the institution and had an issue with the process. The Agency and the Union actively bargained and partnered together to create forms and set down an ongoing practice to ensure the LSA was respected and privacy concerns addressed, by moving the Union official to a staging location, ensuring that no names were ever shared, and that the LSA language was respected in setting down the procedures that became an ongoing practice in 2014.

The Agency clearly has violated the Master Agreement, the LSA and established past practice that has existed since 2000 and which it complied with until 2014 when it blatantly disregarded the joint agreements and practices. It refuses to honor the agreements and established practices its officials helped create in 2014. The grievance should be sustained and the Union requests the following:

1. The HSA and/or her designee be ordered to follow all applicable provisions in the Master Agreement and LSA regarding drug testing of Staff.
2. The HSA be given training on the Master Agreement and the LSA.
3. A written apology to the bargaining unit be posted in a common area for a period of 90 days and be electronically distributed to the bargaining unit.
4. The Agency sign an MOU that states every step of the established past practice.
5. Anything else requested at the Hearing, or deemed appropriate by the Arbitrator.

POSITION OF THE AGENCY

The Agency makes the following arguments and contentions in support of its position:

The Union submitted this grievance on December 16, 2016, alleging that the Agency discontinued a past practice when it no longer allowed Union Representatives to accompany UA samples to the Post Office, and that it also violated a past practice by discontinuing notification to the Union at least 24 hours in advance that UA testing was going to take place so the Union could be present and staged at the UA collection site. The Agency denied the grievance, noting it is not aware of any agreement or past practice of providing 24 hour notice and that it would not engage in such a practice because of the purpose of "random" UA. The Agency also noted that Article 6 Section f (2) of the Master

Agreement does not apply to UA testing because staff UA samples are not part of an investigation. Thus, Article 6 f (2) and LSA Article 6 (h) do not apply herein.

There was no evidence supporting the Union's contention that the Agency violated the Master Agreement by restraining, intimidating or exhibiting any other of the behaviors listed in Article 31, Section (b) which covers restraint or reprisal against an employee. To the contrary, Management agreed and allowed the Union to be present during random UA testing when an employee requested a Union representative. This is not a representational duty such as a formal discussion or examination, and UA representation is not required pursuant to Article 6, section (f) of the master Agreement. The Union provided no evidence that the Agency violated Article 6, Section b (2) or f (2) of the Master Agreement.

The Agency did not violate Article 6 Section (h) of the LSA because it does not provide for 24 hour advance notice to the Union for UA testing. The Agency complied with Article 6, Section (h) of the LSA by allowing the Union the opportunity to be present during UA testing. The testimony made clear that the Union was present during UA testing when an employee requested its presence. However, the Union wants to be staged in the area well in advance rather than simply being present when elected by bargaining unit employees. The last sentence of Article 6 Section (h) states that "A Union representative will be allowed to accompany the sample to the Post Office." This is poorly written and subject to interpretation, but must be read to comply with the Master Agreement, Articles 6, 7 and 11 of which cover Union official time request procedures and representational duties. Additionally, Article 9 of the Master Agreement states that in no case may LSAs conflict with, amend, modify, alter, paraphrase, detract from or duplicate the Master Agreement. Thus, although Management allows the Union to accompany US samples to the Post Office, the Union is not authorized to accompany every sample every time. Management allows the Union to be present and accompany the UA samples to the Post Office when the Union representative(s) can be released from duty.

The Agency did not violate a past practice of providing 24 hour notice to the Union, as the elements of a past practice have not been satisfied. The evidence covered varying timeframes of when advance notice was given to the Union. There is no consistent past practice or procedures requiring advance notice or the definition of advance notice, or of accompanying the UA samples to the Post Office, or concerning UA storage. The Union did not satisfy its burden of proving a past practice in this matter.

The remedies requested by the Union are not proper. The Agency did comply with the Master Agreement, the LSA and the Collector's Procedures manual, and training is not

needed. The Union's request for a written apology is designed to humiliate management and should be denied. The Union wants the Agency to sign a MOU stating every step of the alleged past practice. This is not required as there has not been a longstanding past practice established by the evidence that the Union was granted 24 hour advance notice or that Management agreed to such notice. Moreover, Article 32(a) of the Master Agreement provides that the issues, alleged violations, and remedy requested in the written grievance can only be modified by agreement. Thus, the Union cannot expand its complaint beyond what is written in its grievance unless Management consents, and Management has only consented to the three (3) stipulated issues discussed at the Hearing. The Arbitrator has no power to add to, subtract from, disregard, alter or modify any terms of the Master Agreement, per Article 32(h). Any remedies not mutually indicated in the December 16, 2016 grievance should be disregarded, in accordance with the Parties' negotiated contract.

The evidence failed to establish that the Agency violated the Master Agreement, the LSA or the alleged practice. The LSA must be read to comply with the Master Agreement and not be inconsistent with it or detract from it. Moreover, the Bureau of Prisons is required to reduce staff, and it would not be efficient to have Union representatives staged at a UA collection site when not all employees request Union representation during UA testing; they should be working their paid job until their presence at the UA collection site is requested. That is why statutes such as 5 USC 7114a (2)(b) are in place regarding the use of official time and Union representational duties. The grievance should be denied.

OPINION

THE FACTS

The preponderance of the credible evidence indicates as follows:

The Union initiated this grievance alleging that, on December 2, 2016, it learned that Health Services had required staff to give random Urinalysis ("UA") samples the previous day without notifying the Union so it could be present to represent staff members who requested such representation. Senior Correctional Officer ("SCO") Keith Russell had requested such representation but it was not provided, so he gave a sample without being afforded the Union representation he had requested.

A Memorandum for Record dated December 6, 2016 ("Memorandum"), from B. Hamilton, a former UA collector who no longer works at El Reno and who did not testify, reflects that a decision to "attempt to make some collections the following day" was made on November 30, 2016. The Memorandum also states:

> At that time, an attempt was made to contact Counselor McCormick, Case Manager Johnson or SOS Coker. All three were not present. A call was made to the Union House with no response. A call was made to LT Hooks to determine if there were any other Union representatives present, and he indicated there were not. The decision was made to contact a representative if needed.
>
> On December 1, 2016, staff member Keith Russell was given notice to report for a random urine collection. He was notified that he had the right to Union representation and he stated he would be bringing union member Josh Lepird as the Union representative. Staff member reported for urine collection with no Union representative present, and stated that Mr. Lepird will not be here.
>
> At this time I made several attempts to contact a Union representative. I attempted to call Chuck Bishop, and Stephen Johnson at work, however they were not working. I called Brian Coker on his personal cell phone with no answer. I then called the Union house and there was no answer. I notified staff member that we could continue to try and find someone and wait and he verbalized that he did not want to wait on attempts to locate a Union representative and signed the statement form declining the presence of a Union representative (see attached). The random urine collection was then completed.

SCO Russell testified that he told Mr. Hamilton, when he first called him, that he wanted a Union representative to be present when he gave a UA sample and that he did not recall telling Mr. Hamilton that he would be accompanied by Josh Lepird. When SCO Russell reported to Medical, Mr. Hamilton told him no Union representative was available. SCO Russell believes he waited 45 minutes to an hour, if not longer, to see if a Union representative would come, but none did. He had been given a UA Election Form which stated:

> You may request a Union representative during the collection process of the random UA. A Union representative will be made available for you if you so desire one.
>
> Would you like one? _____ Yes _____ No

SCO Russell ultimately marked "no" on the UA Election Form – and added "None Available" next to it -- because he was told he was required to give the UA and felt pressured to proceed without a Union representative being present. According to SCO Russell, he has given random UA samples in the past and never had to wait when he asked for a Union representative because there was one available to be provided immediately when a staff member requested one. After SCO Russell spoke to Local Vice President Coker about what had occurred, the instant grievance was initiated.

On May 3, 2000, the Parties signed a Local Supplemental Agreement to the Master Agreement ("LSA"), Section (h) of which is entitled Rights of the Employee and provides:

> During the collection process of Drug Testing, a Union representative, at the employee's request, will be present, provided the designated representative is available within a reasonable period of time as defined in Article 6, section h of the Master Agreement.
>
> Article 6, section h defines "reasonable time" as:
>
> ... that necessary for the designated representative from the local Union to travel to the site of the examination. The Union will promptly designate its representative and make reasonable efforts to avoid delay.

Human Resources Manager ("HRM") Humbertson testified that, although there was no established 24 hour advanced notice requirement or practice, there was a "verbal agreement" to call certain Union officers in advance of collecting random UA samples, stating:

> 24 hours advanced notice was never established with the collection staff and has never been done. A verbal agreement was noted to call Davis, and if not available, Coker. If the UAs were done on morning watch, calling the day before was appropriate, but once again never established. The majority of the time the Union was notified the day of the collection process, note that the collecting staff initially protested this aspect as it allows notification to staff of pending UA collection. This protest is supported by Central.
>
> Transcript ("Tr.") page 42, lines 6 – 16.

She also stated that Health Services employees were under the impression that they could notify the Union the day of the collection – "prior to" when it would occur -- and that was not an issue. Tr. page 42, lines 17– 21. HRM Humbertson testified that, as far as she knows, the Agency always allowed the Union to be present during UAs "if possible" when someone requested Union representation. Tr., page 36, lines 10 – 14.

HSA Aynes, who has been stationed at FCI El Reno since April 2014, and had worked there previously, testified that in December 2016 there were three (3) UA collectors: Herself, Brent Hamilton and Katherine Demers, neither of whom still work at FCI El Reno and did not testify. HSA Aynes stated there is a safe in the UA room and one in the Telehealth room; all employees are given an election form to complete before giving a UA sample; and signed election forms are kept for roughly five (5) years as proof that the employee was offered Union representation. She said that the election forms were "discussed" rather than being used as part of a joint agreement, and also stated that a

Union representative is not "staged" at the UA collection site although that was "tried" in the past, when the Union representative "would be off in that Telehealth room." Tr., page 68, lines 19 – 21. According to HSA Aynes, a "new" Union group only wanted to be contacted if someone requested Union representation: "So that that whole staging, if you want to call it, has kind of gone by the way side because of that change." Tr., page 68, line 24 – page 69, line 1. HSA Aynes also stated that sometimes Medical would notify the Union in advance, by telling the Lieutenant to have a Union representative available after asking the employee, by telephone, if (s)he wanted Union representation, and that sometimes a Union representative would come to Medical even if not requested. According to HSA Aynes, she notified the Union "a couple of times" when the UA samples were being taken to be mailed, and "sometimes" the Union representative would say to go ahead without him or her. She also stated that the Union is not consistently given the option to accompany UA samples to be mailed.

The testimony of the Union's witnesses – some of whom had been involved in negotiating the LSA and had seen how it had been applied since that time – controverted most of what HSA Aynes described. Although none identified a "24 hour" rule or standard timing for advance notification to the Union, the Union's witnesses testified that the Union was given advance notification sometime prior to the day UA collections were to occur and that notice was given regardless of whether anyone requested Union representation. Former Correctional Officer ("CO") and Union representative Tim Davis, who retired in late October of 2015, testified that the Union worked closely with the HSA and Medical Staff to ensure that Union representation would be available for staff members who requested it and that advance notice typically was given to the Union sometime the day before the proposed collection. Former CO Davis also testified that there were no problems with the procedure from 2000, when the LSA was signed, until April, 2014, when HSA Aynes returned to El Reno. HSA Aynes confirmed that she does not give the Union advance notice of random UA collections, testifying:

> Q So according to your testimony, you don't notify the Union in advance of these testings?
>
> A. No.
>
> Tr., page 70, lines 1-3.

Testimony of the Union's witnesses also indicated that, in the past, a Union representative had been "staged" in the building in which the UA samples were being collected. Senior Officer Specialist Chuck Bishop stated that, after receiving advance notice, the Union

representative would be staged in a different room. Former CO Davis testified that, after being notified, he would stay in the room in which the safe to store samples was located, which was about 75 feet away from the collection area, to be available if Union representation was requested, and noted that only HSA Aynes had problems with him staying there. HRM Humbertson testified that, as far as she knew, the Union was "always allowed" to be present during random UA collections, although she later qualified that with "if possible." Tr., page 36, lines 6-14.

As to the Union's right to accompany collected random UA samples to be mailed, the Union's witnesses testified that the Union always had that option, which is mandated by the LSA. HSA Aynes stated that the Union was not consistently given the option and that if no one requested Union representation, she did not notify the Union that collection samples would be mailed although she thought other collectors "occasionally" did so. See Tr.. page 71, lines 3-22.

On July 14, 2014, the Union filed a grievance alleging violation of Article 6 b (2) and f (2) of the Master Agreement and Article 6 h of the LSA based on the following allegations:

> On June 13th 2014 it came to my attention that the Health Services Administrator continues to have staff give UA samples without advising them that they have the right to a Union Representative. All bargaining unit staff have a right to a Union representative present during the collection process of Drug Testing according to the Local Supplement Article 6, section h. This is also a violation of supplemental agreement as the Union representative is allowed to accompany the sample to the Post Office. Regardless of whether the staff member requests to have a Representative present for the collection process the Union still must be informed of the UA's so the Union can elect to have a Representative accompany the sample to the Post Office as the Supplement states. The past practice is to have the Union Official notified and present as to not delay the UA process.

The 2014 grievance was denied by Warden John B. Fox citing, in part, a lack of specificity in identifying the particular instance where the alleged violations occurred. However, Warden Fox stated that the administration was committed to following any policies or procedures to ensure that all were in compliance with any agreements made with the Union. The grievance was withdrawn on September 4, 2014, after the Parties had discussions about the matters the Union had raised. Both Parties prepared proposed Agreements for the other Party to consider and sign. The Union's proposed MOU included nine (9) points, addressing primarily a secure location (safe) for the UA samples, the Union Representative election form being provided to staff members, and the Union accompanying UA samples to the Post Office. The Agency's proposed MOU states that

Management agrees to provide the election form to all staff before beginning the UA process, that "the past practice of a union representative accompanying the (UA) sample will continue" and that when management and the Union are unable to be present the UA sample will be locked in the safe provided by Management. The election forms have been, and continue to be, used; the Agency did purchased a $1,000.00 safe on July 17, 2014, ostensibly to provide a secure location for the UA samples collected; and, until the instant grievance was filed, the Agency apparently advised the Union when random UA samples were going to be mailed so it could accompany the samples if it opted to do so. Although neither Party signed the other's proposed MOU following the initiation of the 2014 grievance, random UA collections seem to have proceeded in accordance with the Union's description of the Parties' past practice until the events underlying the instant grievance, although HSA Aynes indicated she had not been collecting random UA samples in the interim.

THE ARGUMENTS

Alleged Contractual Violations

The Union has alleged a number of contractual violations, including Master Agreement Article 6, Sections b (2), f and h. Based on the evidence presented and the language of the cited provisions, the undersigned is unable to conclude that the Agency violated Article 6, Section b (2) of the Master Agreement because the pressure SCO Russell experienced when he decided to go forward with the UA collection without the presence of a Union representative – a one-time event as to which the record was not fully developed – does not appear to this Arbitrator to be the kind of "restraint, harassment, intimidation, reprisal, or any coercion" prohibited by this provision, nor does a contractual violation automatically mean that an employee was deprived of the right to be "treated fairly and equitably in all aspects of personnel management."

As to alleged violation of Master Agreement Article 6, Section f, the Agency argues that it does not apply because collecting random UA samples are not made "in connection with an investigation." However, the Agency previously seems to have interpreted this otherwise, apparently equating random UA sample collection to an "investigation", as it negotiated and signed the LSA based on the employee rights set forth in Article 6, Sections f and h of the Master Agreement. Therefore, the undersigned must reject the Agency's argument that the cited Master Agreement provisions are not relevant.

The Union also contends that the Agency violated a pertinent provision of the negotiated LSA signed on May 3, 2000, which states:

> During the collection process of Drug Testing, a union representative, at the employee's request, will be present, provided the designated representative is available within a reasonable period of time as defined in Article 6, section h of the Master Agreement. A Union representative will be allowed to accompany the sample of the Post Office.

The Agency denies any contractual violation(s), and sought to establish through Agency Exhibit 7 that B. Hamilton, who collected SCO Russell's sample on December 1, 2016, unsuccessfully tried to contact the Union on November 30, 2016, as set forth in his December 6, 2016, Memorandum. The Union objected to consideration of the Memorandum on the grounds that Mr. Hamilton was not present to be cross-examined. This is a valid point and, based on that reason, the undersigned is unable to conclude that Mr. Hamilton made as many – if any -- attempts as he claims to have made, or that SCO Russell had no reservations about proceeding without Union representation as the Memorandum suggests. Nevertheless, the undersigned notes that portions of the Memorandum actually support the Union's contentions about being given advance notification when random UA samples were to be collected. For example, the Memorandum states that Mr. Hamilton attempted to notify the Union on November 30, the day before the collections were to take place. Additionally, the Memorandum states that SCO Russell said he would bring a Union representative with him – which SCO Russell testified he did not recall doing – but that when SCO Russell reported without a Union representative, Mr. Hamilton made several more attempts to call a Union representative. Thus, this document itself supports the Union's contention that the Parties agreed that the Union should have advance notification when random UA collections were planned and that a Union Representative is to be present[1] which is what the testimony of the Union's witnesses established.

HSA Aynes' testimony confirmed she does not give the Union much, if any, advance notification of random UA collections, describing the "process" of notification as follows:

> This is the process, is we call a Lieutenant to make sure there's a Union rep available. If there isn't, I'm not going to do the UAs and the collectors aren't either, because we

[1] This is subject to Article 6, Section h's language that a Union Representative, if requested, is to be present "provided that" (s)he is available within a reasonable time -- defined as that time necessary for the designated representative from the local Union to travel to the site of the examination. While the Union is obligated to "promptly designate its representative and make reasonable efforts to avoid delay" it is hampered in doing so if it does not receive notice in enough time to comply with that language.

> know that's important. And then we call the person up and ask on the phone, so we have plenty of time, we don't wait for them to come up to us. We ask on the telephone, do you want a Union rep on the telephone when we notify them. Tr., page 70, lines 3-16.

However, that "notification" process is not what was described by the testimony presented by the Union or reflected in the Memorandum. And, although HSA Aynes testified that she ensures that when a Union representative is requested one is present before collections take place, that obviously did not occur on December 1, 2016, when the events underlying this grievance occurred. The credible evidence indicates that the Union did not receive advance notification of the December 1, 2016, random UA collection(s) and that SCO Russell felt pressured to submit to the collection without having a Union representative present despite the LSA stating that "**a union representative, at the employee's request, will be present.**" As noted, the LSA further states, "provided the designated representative is available within a reasonable period of time as defined in Article 6, section h of the Master Agreement." However, that language is meaningless if the Union is not being furnished effective notice in the first place. Even assuming that Mr. Hamilton's description of the attempts he made to contact the Union are accurate, it is obvious that the timing and method by which HSA Aynes and other Collectors are "notifying" the Union are deficient and, therefore, do not comport with the intent of the LSA or the Parties' practice established over many years. Although the evidence did not conclusively establish how far in advance of the collections the Union had been notified in the past, or whether it was the Local President or some other Union member(s) who consistently was notified of the upcoming collections to ensure that a Union representative would be available if requested, the evidence did show that the timing and execution of the notification process described by HSA Aynes differed from the Parties' prior compliance with pertinent contractual provisions. Therefore, the undersigned concludes that the Agency violated the Master Agreement and the LSA on December 1, 2016 by failing to provide advance notice to the Union that random UA samples would be collected in sufficient time to allow a Union representative to be present when requested by SCO Russell.

Moreover, HSA Aynes' testimony made clear that the Union is not "consistently" notified when random UA samples are being taken to the mailing location, despite the fact that the LSA states, in pertinent part: A Union representative will be allowed to accompany the sample of the Post Office. When asked if the Union was notified about the mailing when staff members have not requested representation, HSA Aynes answered:

> I have – we have not. We have a couple of times in the past, about a year ago. And two – I can remember the other collector saying one Union rep did go, two other Union reps said go ahead and take it, we don't need to go with you.
>
> Tr. page 70, line 20 – page 71, line 2.

She then clarified stating that the Union was not "consistently" given the option to go:

> Here's how the system has worked that I understand. If the donor is called up, and if they want the Union rep, then the Union goes. If they don't go, the Union usually is not notified.
>
> Tr. page 71, lines 16-22.

HSA Aynes conceded that "the other collectors I think occasionally did" notify the Union before taking the collection samples to be mailed, but stated she "kept the exact same practice I had the previous time I was here" which was in 2003 to 2008. Tr. page 71, lines 15-22. However, the "practice" she described during her testimony – which referred to alleged representations made by unnamed Union representatives at unspecified times over at least a decade, if not longer -- is not what the preponderance of the credible evidence, which came from the Union's witnesses, demonstrated. The testimony of the Union witnesses – which basically was unrebutted -- indicated that, although the Union sometimes opts not to accompany UA samples to be mailed, it has not waived its rights under the LSA[2] and showed that the Union expects and is entitled to be notified of random UA sample mailings even if a staff member has not requested Union representation[3].

The preponderance of the credible evidence persuades this Arbitrator that the Agency violated the Master Agreement and the LSA on December 1, 2016, because (1) SCO Russell was denied the right to Union representation due to the Agency's failure to furnish effective – either in terms of sufficient timing or attempted notification to a "designated" person -- advance notice to the Union and (2) the Union was deprived of its right to accompany the UA sample to the mailing location as specified in the LSA.

---

[2] The Agency did not raise a waiver argument.

[3] A Union representative obviously cannot accompany a sample to the Post Office without having been informed that random UA collection is going to occur. The Agency's past failures to notify the Union of UA sample mailings deprives the Union of its right to accompany the samples for mailing, if it chooses to do so.

The Parties' Past Practice

The preponderance of the credible evidence demonstrates that the Parties had a past practice, generally as described by the Union, by which they complied with Article 6 (h) of the LSA which states:

> During the collection process of Drug Testing, a union representative, at the employee's request, will be present, provided the designated representative is available within a reasonable period of time as defined in Article 6, section h of the Master Agreement. A Union representative will be allowed to accompany the sample of the Post Office.

The credible evidence indicated that the Union would be notified in "advance" of random UA collections in sufficient time for a designated Union representative to be present if requested by a staff member; that the Union representative could choose to be "staged" in the Telehealth room, which is at some distance from the collection area, when samples were being taken from staff members who did not request Union representation; and that the Union had the option of accompanying the samples to the mailing location regardless of whether any staff members had requested Union representation. The evidence also indicated that there were no issues with the Parties' practice until HSA Aynes returned to El Reno in 2014, and that her apparent refusal to recognize the prior practice led to the filing of the 2014 grievance and the instant grievance. Rather than pursue the 2014 grievance, however, the Parties negotiated and the Agency agreed to continue using the election forms, and bought a safe to store collected UA samples. According to the Union, the safe is kept in a room in which the Union representative could stay while waiting to represent anyone who requested Union representation, and this contention seems to comport with the evidence presented. During the course of resolving the 2014 grievance, both Parties proposed MOUs but neither signed the other's proposal. However, the Agency's proposal included an item that Management agreed to provide the election form to all staff before beginning the UA process, which it has done, that "the past practice of a union representative accompanying the (UA) sample will continue" and that when Management and the Union are unable to be present, the UA sample will be locked in the safe provided by Management. Although the Union did not agree to this proposed MOU, the Agency's continued use of the election forms (which it maintains for four [4] or more years) and its reference to "the past practice" of the Union representative "accompanying the (UA) sample" and its proposal that samples would be safeguarded by being "locked in a safe provided by management" when Management and the Union are unable to be present

persuade the undersigned that these items were included in the Parties' existing practice, and further supports the Union's contentions.

Resistance to the Parties' Contractual Provisions and Past Practice

HSA Aynes' testimony suggested she is opposed to complying with the Parties' contracts and practices concerning advance notification of random UA collections because she and the Agency have concerns that the Union will warn Staff members, who then will call in sick to avoid giving a UA sample. The evidence failed to suggest that this had ever happened or that the Agency had reasonable cause to believe that it would occur at the El Reno facility. Thus, that concern is based on speculation. As to continued "staging" concerns, HSA Aynes referred to privacy issues under the Health Insurance Portability and Accountability Act ("HIPPA"). According to HSA Aynes, one or more unidentified Union representative(s) at one or more unspecified times had walked into the area where collections were being taken even when Union representation had not been requested or rather than, presumably, remaining in the staging area.[4] There is no indication that any such occurrence(s) were brought to the Union's attention, or that they could not have been corrected through discussion. Moreover, the Agency suggests that providing advance notification and having a Union representative "staged" in case a Staff member requests Union representation takes up too much time, and that the Union representatives should be working their paid jobs until their presence is requested. Indeed, the Agency argues that, because the Bureau of Prisons is required to reduce staff, it is not efficient to have Union representatives staged at a UA collection site when not all employees request Union representation during UA testing. The evidence did not support those contentions and changing conditions generally will not constitute justification for violating contractual obligations and established past practices. The preponderance of the credible evidence indicated that the Parties handled random UA collections smoothly and efficiently from at least 2000 to 2014, and the Agency's purported justifications for changes made must be rejected.

Remedy

Based on the preponderance of the credible evidence, this Arbitrator concludes that the Agency violated the Parties' Master Agreement and LSA, as well as the Parties' past practice, as discussed herein. Therefore, the grievance will be sustained. However, this

[4] The evidence suggested that the Union representative was to be "staged" in the Telehealth room where the safe the Agency purchased in July of 2014 is kept, and which is located approximately 75 feet from the collection area.

Arbitrator is unable to grant the relief the Union requests. The requested remedy does not seek to redress harm other than the Agency's failure to abide by the Parties' previous agreements and practices. SCO Russell gave a UA sample, albeit without Union representation as requested, and doing so had no negative impact on his job: Thus, this Arbitrator can find no "injury" to remediate.

This Arbitrator does not believe she has the authority to require either Party to negotiate or sign a MOU, or to grant other injunctive relief. Therefore, she declines to order that HSA Aynes be given training on the Master Agreement and the LSA, or to order that a written apology to the bargaining unit be posted in a common area for a period of 90 days and be electronically distributed to the bargaining unit, as the Union requests. As to the Union's request that the Agency be ordered to follow all applicable provisions in the Master Agreement and LSA regarding drug testing of Staff, any future violations by the Agency, including but not limited to HSA Aynes and/or her designee(s), of applicable provisions of the Master Agreement and LSA when conducting random UA testing of Staff, and/or any future failure to observe the Parties' prior practices, undoubtedly will result in another grievance or other proceeding that, potentially, could seek monetary relief or relief from another forum. Moreover, Article 32, Section h of the Master Agreement provides, in part, that the award "shall be binding on the Parties."

It is up to the Parties, should they wish to do so, to negotiate and sign "an MOU that states every step of the established past practice." Not only does the undersigned believe that she lacks the authority to impose such a remedy, but the evidence presented herein did not definitively establish "every step" of the Parties' alleged practice. However, this Award constitutes a record of what this the evidence showed to be and have been the Parties' practice as to the random UA collection issues raised, and may have persuasive value in future grievances – if any – raising similar issues.

For the reasons hereinabove set forth:

AWARD

The grievance is sustained. The Agency violated Article 6, Sections f and h of the Master Agreement; Article 6, Section h of the Local Supplemental Agreement; and the Parties' past practice to the extent described herein.

Signed this 22nd day
of April, 2018

Lynne M. Gomez