In the Matter of the Arbitration between FEDERAL BUREAU OF PRISONS FCI Forrest City, Arkansas -and- AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, Local No. 922	OPINION AND AWARD OF THE ARBITRATOR FMCS No. 01-14980 Arbitrability

APPEARANCES

For the Agency:

Robert J. Will;	Labor Relations Specialist
Marvin D. Morrison;	Former Warden

For the Union:

Daniel P. Bethea;	Southeast Regional Vice President
Roger Payne;	President, Local 922
Katie Bozeman;	Human Resources Manager
Ginny Van Buren;	Former Associate Warden
Shon Foreman;	Former Chief Steward/2d Vice Pres.
Kenneth Brown;	Former Chief Steward/Vice Pres.
Cole Jeter;	Former Dep. Regional Director
Mel Smith;	Captain
Mike Morris;	Associate Warden, Operations

PERTINENT MASTER AGREEMENT PROVISIONS (AX-3)[1]

ARTICLE 31 – GRIEVANCE PROCEDURE

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

Section d. Grievances must be filed within forty (40) calendar days of the date of

[1] AX and UX refer respectively to Agency and Union Exhibits. TR refers to the transcript. The use of * * * indicates omitted language.

the alleged grievable occurrence. If needed, 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) 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. . . .

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. . . .

1. when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;

2. when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director;

* * *

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and

2. a grievance may only be pursued to arbitration by the Employer 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 the 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 original grievance may be modified only by mutual agreement.

Section b. When arbitration is invoked, the parties (or the grieving party) shall, within three (3) working days, request the Federal Mediation and Conciliation Service (FMCS) to submit a list of seven (7) arbitrators.

3. the parties shall, within five (5) workdays after the receipt of the list, attempt to agree on an arbitrator. If for any reason either party does not like the first list of arbitrators, they may request a second panel;

* * *

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.

BACKGROUND

This grievance seeming yet another chapter in the continuing saga of disputes over portal-to-portal p ay w ithin the Federal Bureau of Prisons. A grievance filed by the national American Federation of Government Employees (AFGE) on May 17, 1995 resulted in a Settlement Agreement dated August 10, 2000. The Settlement Agreement was entered into "on behalf of the Grievants herein, desiring to settle the formal grievance filed on May 17, 1995. . ."[2] The Federal Correctional Institution at Forrest City, AR (hereafter "FCI/FC" or "Agency") was not opened until 1997 and, presumably, is not covered by the Settlement Agreement. Ag ency e mployees a re r epresented b y AF GE, Local 922 (hereafter "Union"), which is party to the Master Labor Agreement (hereafter "MLA"), which has been extended beyond the expiration date of March 8, 2001 pending the successful conclusion of negotiations for a new MLA. Any local supplemental

[2] Taken from the award of Arbitrator George Deretich in FMCS Case No. 01-08684.

agreement, if one exists, has not been noted by either party as relevant to this arbitrability dispute.

Of particular relevance to this case[3] is a grievance dated April 5, 2001 filed by Shon Foreman, then a steward. The grievance alleged a violation of numerous laws, rules and regulations as well as the MLA, claiming that employees had been required "to perform work in excess of the established forty (40) hour work week" (AX-5). The grievance went on to set forth in detail the work that supposedly resulted in the violation. The dates of the violation were noted as "May 1997 to present (This is an on-going violation)" (AX-5). Foreman testified that he and either Stephen Smith or B. J. May presented the grievance to Warden Marvin Morrison, who read it, discussed it briefly and commented that he had discussed the matter with the Union President and had expected the grievance.

Morrison does not remember telling Foreman that he expected the grievance because of talks with the Union President, Roger Payne, nor did the Warden recall talking with Foreman about portal-to-portal issues. Morrison was certain that there had been no attempts at informal resolution of the matter. The grievance was denied; the Union did not invoke arbitration.

The grievance under consideration herein was filed by Payne on May 8, 2001. Before providing details of that grievance it must be noted that Payne testified that he and Morrison had met several times in attempts to resolve the portal-to-portal issue and that Payne believed that at one point he had a verbal commitment from Morrison to resolve the issue based on an approach taken at FCI Texarkana. Morrison and the Warden in Texarkana were friends.

Morrison could not recall any attempts at informal resolution of the portal-to-portal issue or about using the Texarkana approach at FCI/FC, although Morrison acknowledged that he knew the Warden at FCI Texarkana and that they talked almost daily about other matters.

Another meeting took place concerning the portal-to-portal issue. According to

[3] Not all of the relevant facts will be set forth in the Background section. Additional information is contained in the Discussion section to the extent that such information is viewed as relevant to the analysis of the parties' contentions.

Foreman, the Agency Executive Board Staff and the Union Executive Board were involved sometime during the 1st quarter of 2001. The sole topic for discussion was the portal-to-portal issue, with Lt. Newman's idea to resolve the matter for three housing units the focus of the discussion. Because Newman's approach would have violated policy, it was not adopted. No minutes were taken of the meeting, which Foreman said was similar to a periodic LMR meeting. Ken Brown, Union Vice President, placed the meeting at the camp conference room in March or April 2001 and believed it had been set up by Morrison and Payne. He, too, remembered that no notes were taken and that Newman's suggestion was discussed. Payne agreed that the camp conference room was the location and that Newman's idea was the topic of discussion.

Morrison testified that he never set up a meeting at the camp to discuss the portal-to-portal issue. The parties stipulated that had Newman testified, he would have stated that the meeting took place in mid-2000 at the camp. Captain Mel Smith, Chief of Correctional Services, placed the meeting in May or June of 2000. Smith did not believe that the portal-to-portal issue was raised, but did remember that Newman's prior experience elsewhere was the focus of the meeting and that overlapping shifts were discussed. Smith recalled that the meeting arose from a discussion with Assistant Warden Mike Morris. This was not a negotiating session, but a cordial, cooperative meeting. Morris recalled that he had spoken to Newman about the latter's experience and his plan to have counselors cover posts in the housing units. Morris wrote up the ideas and passed them to Morrison in late 2000 or early 2001. Foreman, Brown, Payne and Smith all testified as to their memory of who attended the meeting, with significant differences among the witnesses about who was involved.

The Formal Grievance Form contains several blocks that are relevant to this dispute. Block 4 states: "Informal resolution attempted with (name Person) First ten days to be devoted to resolution per Article 31. Negotiation requested" (AX-7). Payne wrote in Marvin Morrison's name as the person with whom informal resolution had been attempted. Block 5 asks the filing party to list "Federal Prison System Directive, Executive Order, or Statute violated:." Payne wrote, "Including, but not limited to the following provisions: Master Agreement, 29 U.S.C., 5 U.S.C., Federal Labor Statute,

Government-wide laws, rules and regulations, 5 U.S.C. Section 201, 29 U.S.C. Section 5542, Fair Labor Stands (sic) Act, Operations Memorandum 214-95 Dated November 1, 1995, Federal Employees Pay Act of 1945, Constitutional and Civil Rights, Bureau Policy/Procedure and Program Statement 3000.02" (AX-7).

Block 6 asks, "In what way were each of the above violated? Be specific (But not limited to)." Payne wrote the following response:

> This is both a contractual and statutory violation. This grievance applies to all past, current and future bargaining unit employees at F.C.I.Forrest City, AR. It has been a continuous practice to require employees to obtain equipment (keys, body alarms, detail pouches, cuffs, etc.) From the Control Center prior to the beginning of their tour of duty and at the end of their tour of duty. Staff are required to begin duties at the same time they are required to be in the key line. Staff are required to report for shift change briefings, staff meetings, etc. This period of pre/post shift work varies from between fifteen (15) to thirty (30) minutes. It has been the institution practice to require work be done at home, such as review and sign emergency plans. This activity by the agency violated the Collective Bargaining Agreement, which indicates that the standard of work is eight (8) hours. This work is work within the meaning of 5 United States Code Section 5542 and 29 United States Code Section 201, for which employees are entitled to compensation, and just compensation has been denied (AX-7).

Block 7 asks for the "Dates(s) of violation(s)." Payne typed in "continuous" (AX-7). Morrison signed for the grievance. Below his signature the forms states "I hereby certify that efforts at informal resolution have been unsuccessful. Payne certified for the bargaining unit in Blocks 13 and 14. As noted above, Payne and Morrison disagree as to whether there were discussions before the grievance was filed.

On June 7, 2001 Morrison denied the grievance. The relevant portion of the denial is set forth below.

* * *

> Your allegation staff are required to report for shift change briefings and staff meetings is without specificity. Therefore, I am unable to respond to this part of your grievance.
>
> Your allegation of an institution practice to require staff to complete work at home is without specificity, except for reference to contingency plans. Therefore, I can only respond to that one particular allegation. . .Staff are not mandated to take the plans home for review.

Based on the foregoing, your grievance is denied (AX-8).

On June 27, 2001 Payne wrote Human Resources Manager Katie Bozeman invoking arbitration:

> A.F.G.E. Local #922 is invoking Arbitration on the Grievance filed on May 8, 2001, on the behalf of the bargaining unit. The Agency's response was received on June 7, 2001. The issues, remedy and violations remain as listed on the grievance. The agency's position stated in the response related to the portal to portal, starting times, and work required is misguided. The Agency is well aware of their imposed requirements on staff. This is documented in policy/post orders. The grievance list (sic) these violations and I refer you back to this document. The requested remedies listed on the grievance are requested as stated. The Union request that the Agency cease and desist from violating Federal Law, Federal Labor Statute, Government-wide rules and regulations and the Collective Bargaining Agreement. That all Managers responsible for violating the a bove stated laws, rules, and regulations be held liable for their actions. Please reference the grievance in it's entirety. The Union request all remedies listed on the grievance and any other action deemed appropriate or necessary by the Arbitrator (AX-9).

On August 3, 2001, the parties submitted a Request for Arbitration to the Federal Mediation and Conciliation Service (FMCS). The issue was characterized as "portal to portal" (AX-10). On January 29, 2002, the parties informed the FMCS that the undersigned had been selected as arbitrator. The selection came from the second panel requested by the parties. Prior to the hearing, the Agency challenged the arbitrability of the grievance and asked that the hearing be bifurcated. The Union asked that both the arbitrability issue and the merits be heard at the same sitting. Because it was estimated that a hearing on the merits would take at least two days, the undersigned ruled that the hearing would be bifurcated. The grievance was heard on the arbitrability issue only at FCI/FC on April 23-24, 2003. Witnesses were sequestered, affirmed before testifying and cross examined. Documentary and testimonial evidence was received. A verbatim transcript was made of the proceedings, although delivery of the transcript took an unusually long time. A copy was made a part of the record. The Agency's post hearing brief, with attachments, was received on October 29, 2003. The Union's timely-filed post-hearing brief, with attachments, was received on December 24, 2003, at which time the record was closed.

ISSUE

As stipulated by the parties, the issue is:

Is the grievance arbitrable? (TR-4)

AGENCY POSITION

For reasons set forth below, the Agency asserts that the grievance is procedurally deficient and therefore not arbitrable.

1. Section 7 of the grievance states "continuous" but does not indicate a specific date(s) on which the violation occurred. Lack of a specific date(s) prevents the Agency from defending itself, such as by raising threshold issues of timeliness or latches. The Union's failure cannot now be modified because the Agency refuses to do so. Furthermore, the Agreement may not be modified by the arbitrator to allow only the Union to alter the grievance. Grievances filed by the Union before and after the grievance at bar have included specific dates, showing that the Union was aware of the contractual requirement to provide such dates. The Agency should not have to guess at the dates. The parties must honor the negotiated grievance procedure by complying with formal requirements.

2. Article 32.a of the Master Agreement requires that the Union include in the notice to invoke arbitration "a statement of the issues involved, the alleged violations, and the requested remedy. . ." (AX-?) The Union did not comply with the Master Agreement because the notice to invoke arbitration simply referred to the grievance. On an earlier submission, the Union complied with the requirement, which "is clear and unambiguous and must be controlling in the instant grievance" (Brief, p. 10). Other arbitrators have so found, including Arbitrator Milden Fox, Jr. in a case between the same parties involving the same fact situation. Arbitrator Fox's decision should be controlling in the case at bar. Since the arbitrator is not empowered to modify or ignore the relevant provisions of the Master Agreement, the grievance must be seen as defective.

3. The Union has not specifically identified the rule, regulation or statute violated by the Agency. The Union did state

> that the Agency violated the Master Agreement, 29 U.S.C., 5 U.S.C., Federal Labor Statute, Government-wide laws, rules and regulation, 5 U.S.C. Section 201, 29 U.S.C. Section 5542, Fair Labor Standards Act (FLSA), Operations Memorandum 214-95 (Dated November 1, 1995), Federal Employees Pay Act of 1945 (FEPCA), Constitutional and Civil Rights, Bureau Policy/Procedures and Program Statement 3000.02" (Brief, p. 13).

These documents, excluding Operations Memorandum 214-95, which was rescinded in April 1996, contain over 3,486 pages. The Union's shotgun approach neglects to set forth specific sections that allegedly have been violated. Neither the Agency nor the arbitrator can be expected to read these documents to discern what provisions the Agency allegedly violated. The Union is obligated to make this clear. Arbitrator Fox also discussed this issue in his award noted above; thus the award again should be controlling.

4. Article 31.b states that the parties "will always attempt informal resolution at the lowest appropriate level before filing a formal grievance" (AX-?). The grievance at bar states that informal resolution was attempted with Warden Morrison. However, Morrison testified that this did not occur, thus the grievance is procedurally defective.

5. The Agency is not precluded from raising threshold issues for the first time at the arbitration hearing. The FLRA has ruled that questions of procedural arbitrability are appropriate for arbitral resolution and generally not reviewable by the FLRA. The awards presented by the Union are not dispositive of the issues, as they concern timeliness, which is not an issue in this case, have been overturned (Woodward award) or are not consistent with other rulings.

UNION POSITION

For reasons summarized below the Union asserts that the grievance is arbitrable and that the arbitrator should so find and set a date for a hearing on the merits "as soon as possible" (Brief, p. 31).[4]

1. Over the past five years, the Union has filed grievances "in a similar manner with regard to content and procedure" (Brief, p. 15) without Agency objections other than a contention that grievances were not timely. Therefore, a past practice now exists, which

[4] Pages in the Union brief were not numbered. The arbitrator has numbered them beginning with the Table of Contents.

the arbitrator should not overlook or set aside. The grievance at bar was not challenged on the grounds of timeliness, past practice, absence of a continuous violation, lack of specificity of block 5 or deficiencies in block 7 of the grievance form. Prior awards on arbitrability relied on by the Agency may be distinguished from the case at bar and involve "decisions that are out of the norm" (Brief, p. 15). Arbitration awards arising from cases in other Federal Correctional Institutions and in Forrest City support the Union's contention that the grievance is arbitrable.

2. Morrison's testimony that there was no discussion before the grievance was filed was refuted by Union and Management members called by the Union. Furthermore, given the history of the portal-to-portal issue, Morrison had to have known why the Union was invoking arbitration. The warden told Foreman, who filed the earlier portal-to-portal grievance, that he knew it was coming. Payne testified that he met with Morrison several times about the portal-to-portal issue and at one point believed that they had resolved the matter.

3. In his response to the grievance, Morrison did not take issue with block 5. He admitted that his denial had nothing to do with block 5, which the form did not require to be specific.

4. The Agency has not always waited until the arbitration hearing to challenge arbitrability, as shown by Motions to Dismiss filed in prior cases in Forrest City.

5. Both parties have consistently violated the grievance procedure in the process used to select arbitrators. Also, as noted in a previous case, there is a faulty procedure for Management's receipt of grievances.

6. The MLA provides that only timeliness may be raised as a threshold issue in arbitration. Other matters of arbitrability may be raised in court, but are not included in the MLA and thus cannot be considered in arbitration. For this reason alone, Management's challenge should be dismissed.

7. Timeliness is not a valid issue in this case because the grievance pertains to a continuing violation. Each day that the improper act is repeated may give rise to a new grievance. Thus the Union's right to file a portal-to-portal grievance was not limited by the 40 days in the MLA.

8. Prior awards and the literature on arbitration support the contention that questions of compliance with a grievance-arbitration procedure should be resolved in favor of allowing the matter to be arbitrated. Besides, the Agency's failure to challenge arbitrability prior to the hearing should result in a waiver of the right to raise the issue now. The Agency does not come to the hearing with clean hands insofar as arbitrability is concerned and for that reason as well should not be allowed to challenge the Union.

DISCUSSION

For reasons that ultimately will become apparent below, the grievance is arbitrable.

An Evidentiary Question

The latest edition of How Arbitration Works sets forth the long-standing guideline for post-hearing briefs: "No new evidence should be included in post-hearing briefs; expanded discussion and interpretation of the agreement and citation and discussion of precedents and articles should be provided."[5] In The Common Law of the Workplace, John Kagel, a past president of the National Academy of Arbitrators, notes that a problem arises when a post-hearing brief contains or alludes to evidence not presented during the hearing. Kagel suggests that even in the absence of an agreement to file rebuttal briefs, the opposing party should move to have the new evidence stricken from the brief.[6] The problem of new evidence has arisen in the Union brief in this case. Without attempting to be exhaustive, the material behind Tab 29, which is appended to the brief, provides an excellent example. Included are several grievances, several memos invoking arbitration and one Agency response to a grievance. These were not introduced during the hearing. and thus the Agency has not had an opportunity to comment on the meaning and relevance of the documents. While the Agency has not drawn the arbitrator's attention to any new evidence appended to the brief, the failure to do so cannot result in inclusion of new evidence. Labor Arbitrators are required to comply with the Code of Professional

[5] Elkouri and Elkouri, How Arbitration Works, 6th ed., Alan Miles Rubin, Editor-in-Chief, BNA Books, 2003, pp. 320-321 (Citations omitted).
[6] The Common Law of the Workplace: The Views of Arbitrators, Theodore J. St. Antoine, Editor, BNA Books, 1998, p. 54.

Responsibility for Arbitrators of Labor-Management Disputes (Code). Section 3.A.2 of the Code requires that "An arbitrator must observe policies and rules of an administrative agency in cases referred to by that agency." The Federal Mediation and Conciliation Service is one of the signatories to the Code and thus expects arbitrators on its panel to apply the standards contained therein. Section 5.A.1 states that "An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument." It is obvious that a party cannot comment on or argue about evidence when that evidence has not been made a part of the record prior to the filing of post-hearing briefs. Therefore, consistent with the authorities cited above, evidence that appears for the first time as an attachment to a post-hearing brief has not been considered. Cases and authorities cited have been read more than once and considered.

Consideration of Arbitrability

"The right to contest arbitrability before the arbitrator is usually held not waived merely by failing to raise the issue of arbitrability until the arbitration hearing."[7] While this approach has not been universally adopted by arbitrators, the quote above represents the "conventional wisdom" on the subject. Moving from the general to more specific direction, in Department of the Navy v. IAFF, Local F-33, 38 FLRA 1509 (1991), the FLRA stated the flowing: "Further, the Union's contention that the Agency was precluded from raising the question of arbitrability for the first time before the Arbitrator provides no basis for finding the award deficient. Questions concerning procedural arbitrability are appropriate for resolution by an arbitrator and are generally not subject to review or challenge before the Authority." While the best practice would be to raise questions of arbitrability during the grievance procedure rather than waiting until the arbitration hearing, failure to do so does not preclude the arbitrator from considering a question of arbitrability so long as it is raised at the hearing and not initially in a post-hearing brief or in the filing of exceptions with the FLRA. In the case at bar, Morrison's June 7 denial of Payne's May 8 grievance noted, among other things, that the allegation that "staff are required to report for shift change briefings and staff meetings is without specificity" (AX-

[7] How Arbitration Works, 6th ed., p. 290.

8). The response falls short of a challenge to arbitrability, but because an initial hearing set for December 18, 2002 was postponed until April 23-24, the Union was aware that the Agency was challenging the arbitrability of the grievance.

Attempts at Informal Resolution

Despite Morrison's testimony to the contrary, the evidence indicates that attempts to resolve the portal-to-portal issue had taken place. Foreman recalled that when he and another steward presented the April 5 portal-to-portal grievance to Morrison, the Warden said that he and the local president had discussed this and that he expected the grievance. Payne noted that he had met with Morrison several times and at one point believed that the portal-to-portal dispute had been resolved based on an approach taken at FCI Texarkana. It is more likely that Morrison, occupied with a wide range of issues and responsibilities, has forgotten about these meetings than it is that Foreman and Payne have lied under oath.

In any event, there is no question that a meeting between members of the Agency's executive staff and the Union's local executive board took place to discuss a solution suggested by Lt. Newman, based on his prior experience at another facility. The witnesses were not consistent in recalling the time of the meeting or the attendees, but all who testified about the location of the meeting recalled that it was held in the camp conference room. Associate Warden Morris' attendance is not certain in view of the conflicting testimony, but Morris testified that he and Newman had talked about Newman's plan and that Morris wrote up the plan and gave it to Morrison in late 2000 or early 2001. There is no indication that Morrison attended the meeting, but it seems highly unlikely that such a meeting would have taken place without Morrison's knowledge or consent. The meeting must be viewed as an informal attempt to resolve the problem, which was ongoing. There apparently was quick recognition that Lt. Newman's solution would not work, but that does not detract from the fact that sometime between mid-2000 and early 2001 the meeting took place.

The testimony is persuasive that more than one informal attempt to resolve the portal-to-portal issue took place and that, directly or indirectly, Morrison was involved. Therefore, Payne's use of Morrison's name in Block 4 of the grievance form is viewed as

appropriate.

Formal Grievance Form: Blocks 5 and 7

Block 5 on the grievance form asks the Union to indicate the "Federal Prison System Directive, Executive Order, or Statute Violated:." Payne wrote:

> Including, but not limited to the following provisions: Master Agreement, 29 U.S.C., 5 U.S.C., Federal Labor Statute, Government-wide laws, rules and regulations, 5 U.S.C. Section 201, 29 U.S.C. Section 5542, Fair Labor Stands (sic) Act, Operations Memorandum 214-95 Dated November 1, 1995, Federal Employees Pay Act of 1945, Constitutional and Civil Rights, Bureau Policy/Procedure and Program Statement 3000.02" (AX-7).

Despite the fact that block 5, unlike block 6, does not include the instruction to "Be specific," the Union is obligated to provide meaningful information so that the Agency has an accurate understanding of the Union's allegations. That has not happened in this instance. The Union must pinpoint contract provisions, laws, regulations, etc. deemed to have been violated so that the Agency may make an informed decision about how to defend itself or, possibly, whether settlement is appropriate.

The arbitrator suspects that, in this instance, because the dispute has a long national and local history, the Agency has a good idea of the Union's allegations insofar as contract and law are concerned. But that is insufficient. The Union cannot assume that a general statement of provisions violated will suffice because the context of the dispute is already known.

Block 7 requires the Union to list the "Date(s) of violation(s)." Payne typed in "continuous" (AX-7). That, also, is insufficient. The Union is correct that the grievance is a continuing one. If there has been a violation, each day of the violation results in unduly low wages for those employees who are affected. The situation is classic insofar as continuous grievances are concerned, and there is no need to quote from the awards provided in order to establish the nature of the grievance. However, even a continuous grievance has a discrete beginning. When there is a continuous grievance, the Union may rightfully note "continuous" rather than each day the alleged infraction recurs. But the Union also is obligated to specify the point at which the continuous infraction began. That was not done in this instance. Blocks 5 and 7 are both deficient.

The Statement to Invoke Arbitration

Article 32.a is very clear on what is to be done to invoke arbitration: "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" (AX-3, arbitrator's emphasis). The June 27 memo from Payne to Bozeman invoking arbitration states that "The issues, remedy and violations remain as listed on the grievance" (AX-9). Additional references to the grievance are also included in the memo. It is assumed that parties include language in their collective agreement for a reason and that, unless otherwise noted, language is to have usual meaning. The use of "must" leaves no room for alternatives. To be sure, the Agency could learn of the Union's concerns by simply going back to the grievance, and thus the omission here is one of form rather than substance. However, the parties have specified the form and the arbitrator is not at liberty to ignore the bargain set forth in the contract. The memo does not comply with the dictates of the parties' agreement.

The Fatal Flaw in the Agency's Case

Both parties submitted a total of nine grievances filed between October 9, 1998 and April 5, 2001 in which block 5 is no more specific than is block 5 in the instant grievance. Nowhere in the record is there any indication that the Agency responded that the lack of specificity in block 5 constituted a violation of the Master Agreement and thus rendered these grievances not arbitrable. While the grievances were denied and the denial mentioned lack of specificity, the reference was to the information contained in block 6 rather than in block 5. Nowhere in the record is there evidence that prior to the grievances filed on May 8, 2001—specifically the grievance under consideration herein and the grievance ruled on by Arbitrator Fox—there was a challenge to arbitrability based on deficiencies in block 5.

A review of pre-May 8, 2001 grievances did not produce one in which dates in block 7 were not specified—at least to the extent of an initial date and the notation "continuous." Thus, there is no indication that the Agency had an opportunity to protest arbitrability based on deficiencies in block 7. However, this is not determinative.

In evidence is the December 21, 2000 memo in which the Union invoked

arbitration in the Garrido case. That memo referred to the grievance and did not comply with the dictates of Article 32.a. Yet, there is no indication that the arbitrability of that or any other pre-May 8, 2001 grievance was challenged. Furthermore, Bozeman, who has been the Human Resources Manager at FCI/FC for six years, testified that she does not remember the Agency "ever bringing up the issue of the Union filing an improper letter of intent until this hearing" (TR-63).

Payne testified that the grievance in this case is similar in form to those filed since the FCI/FC opened. The Union has argued that prior grievances have looked much as the instant grievance in form, with obvious differences in content. The evidence supports the Union's argument. The Agency has the burden of proof in this matter because it challenged arbitrability. The Agency has not provided evidence to cast doubt on the Union's argument, nor has the Agency shown an explicit challenge to arbitrability, excluding that based on timeliness, prior to the challenge to the two May 8, 2001 grievances noted above.

The Union has argued that it has shown a past practice of filing grievances and invoking arbitration and that the arbitrator should honor or adhere to that practice. Alternatively, or additionally, the Union has argued that the Agency should not prevail because it does not come with clean hands. I prefer a slightly different rational with the same outcome. The language of the Master Agreement is explicit. Prior to the grievance filed in this case, the Agency had numerous opportunities to insist that the language pertaining to the filing of grievances and the invoking of arbitration be honored by the Union, but the Agency did not force the issue. The failure of the Agency to insist at all, let alone inconsistently, on full compliance with the Master Agreement constituted a waiver of the contractual requirements. Whether or not these requirements were being enforced at other facilities is immaterial. It is the Agency-Union relationship at FCI/FC that must be the focus of this inquiry because it is the messages sent by Management at FCI/FC that this Union is most likely to consider.

Simply because the Agency had waived contractual rights for a period of time does not mean that those rights are permanently waived. Properly done, the Agency always has the right to insist on compliance with the Master Agreement. However,

reinstituting those rights must come only after a warning that the past will not longer be prelude to the future. There was no such warning in this case before the Union filed the grievance and then invoked arbitration. U nder t he c ircumstances, t he Ag ency c annot insist on performance that it had heretofore waived.

The Helburn and Fox Awards

Arbitrators do not reach conclusions that depart from previous awards without significant thought. We are acutely aware of the need for stability in union-management relations. Obviously, Arbitrator Fox and I have reached different decisions in similar cases. Three possibilities account for the difference: 1) Arbitrator Fox was particularly concerned with deficiencies in block 6, but block 6 was not a consideration in the case at bar. 2) The evidence and arguments before Arbitrator Fox were different enough to have brought a different result. 3) Arbitrator Fox and I differ significantly in the importance placed on the practices that existed prior to the filing of our respective grievances.

It must be noted, however, that had the Fox award been issued before the grievance in this case was filed, the instant grievance would have been found not arbitrable. That award would have constituted the notice necessary to indicate to the Union that future adherence to contractual requirements would be critical. In that regard, Arbitrator Fox and I are sending a consistent message.

AWARD

The grievance is arbitrable.

_____

I. B. Helburn, Arbitrator

January 30, 2004
Austin, Texas