

IN THE MATTER OF ARBITRATION BETWEEN

AFGE LOCAL #1034,	§	FMCS No. 13-51547-7
	§	
<i>Union,</i>	§	
	§	
and	§	
	§	<i>Unit Team Staff Assignments</i>
U.S. DEPT OF JUSTICE	§	
U.S. BUREAU OF PRISONS	§	
FCC POLLOCK, LA,	§	
	§	
<i>Agency</i>	§	Arbitrator: Angela D. McKee

AWARD

This matter was heard at arbitration before Angela D. McKee, on March 17, 2015, at FCC Pollock, LA. The parties selected the Arbitrator pursuant to the terms of their Collective Bargaining Agreement (“CBA”), and agreed that the matter was properly before the Arbitrator for final and binding decision. The hearing was transcribed by a certified court reporter, and the parties submitted written briefs, the last of which was received on June 15, 2015, at which point the hearing closed.

APPEARANCES

For the Union: Jason Shannon
 Chief Steward

For the Agency: Michael Markiewicz

I. BACKGROUND

The facts underlying this grievance are not in dispute. The FCC Pollock Unit Management, or Unit Team, staff consists of Counselors, Case Managers and administrative

employees (secretaries). The Unit Team staff members are assigned to one of the seven (7) housing units within the installation (Units A-F and the Camp). Within each housing unit assignment, Unit Team employees bid for shifts and days off based on seniority.

On November 14 and 16, 2011, Associate Warden Jeff Bowe notified the Union via email that certain members of the Unit Team staff would be reassigned to different housing units. Testimony presented at the hearing indicated that the reason for the reassignment was to ensure that each housing unit was staffed with experienced members. Associate Warden Bowe stated that the reassignments would take effect on January 17, 2012.

The Union objected, arguing that the reassignments would be a change in the working conditions of bargaining unit employees. It demanded that the Agency cease and desist the planned reassignment, and instead negotiate a Unit Team Roster for all Unit Team staff. The Agency did not negotiate, but effected the reassignments as planned in January 2012. The Union filed the instant grievance on February 2, 2012. The Agency did not respond to the grievance. The Union formally invoked arbitration, in writing, on April 24, 2012.

II. ISSUE

The parties did not stipulate to the issue for this case, but agreed that the Arbitrator could frame the issue(s) as deemed appropriate. Upon review of the evidence and argument, I find that the issues to be decided are:

- (1) Is the grievance arbitrable?
- (2) If so, did the Agency violate Articles 6, 7 and/or 18 of the Master Agreement when it unilaterally reassigned members of the Unit Management staff between housing units at FCC Pollock without first negotiating with the Union, and if so what is the appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS

ARTICLE 3 – GOVERNING REGULATIONS

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

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

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

* * * *

ARTICLE 5 – RIGHTS OF THE EMPLOYER

Section a. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 U.S.C., Section 7106:

* * * *

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.

* * * *

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

* * * *

2. procedures which Management officials of the Agency will observe in exercising any authority under this Agreement; or

3. appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such Management officials.

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section a. Each employee shall have the right to form, join, or assist a labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided by 5 USC, such right includes the right:

* * * *

2. to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees in accordance with 5 USC.

* * * *

ARTICLE 7 – RIGHTS OF THE UNION

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

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ARTICLE 18 – HOURS OF WORK

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

* * * *

2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their

preference requests. Normally, there will be no changes to the blank roster after it is posted;

- a. employees may submit preference requests for assignment, shift and days off, or any combination therefore, up to the day before the roster committee meets. . .

* * * *

- d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that Management will not arbitrarily deny such requests (Seniority is defined in Article 19).

* * * *

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

ARTICLE 31 – GRIEVANCE PROCEDURE

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

* * * *

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 . . .

IV. PARTIES' ARGUMENTS

The Agency makes the following arguments in support of its challenge to arbitrability:

- The Union did not file this grievance within forty (40) calendar days of the grievable occurrence, as required by Article 31(d). The Union was notified of the Unit Team staff reassignments on November 14, 2011, but did not file a grievance until February 2, 2012.

- The Master Agreement does not recognize continuing violations, and there have been no reassignments within the Unit Team staff since 2012.
- The Union did not timely invoke arbitration. Article 31(g) of the Master Agreement provides that the grieving party has thirty (30) calendar days to invoke arbitration after it receives an unsatisfactory response. The Agency did not submit a response to this grievance, but its deadline for doing so was March 3, 2012. Therefore, the Union's 30 days to invoke arbitration was triggered on March 3, 2012. The Union did not invoke arbitration until April 24, 2012.
- Because the Union failed to comply with the time limits set forth in Article 31 of the Master Agreement, the grievance should be deemed untimely and, thus, inarbitrable.

The Union makes the following arguments in response to the Agency's arbitrability challenge:

- The Agency is barred from raising any threshold procedural issues after arbitration – including timeliness of filing the grievance. The Agency did not raise the timeliness of the grievance at or before arbitration, and should not be permitted to argue this matter in its post-hearing brief.
- The grievance was timely filed within forty (40) calendar days of the implementation of the Unit Team reassignments. The time limits set forth in Article 31(d) were not triggered until the reassignments actually occurred.
- The Master Agreement provides that the grieving party has thirty (30) calendar days to invoke arbitration after it receives an unsatisfactory response to a formal grievance. The Agency had a duty to participate in the grievance by submitting a response, but chose not to do so. Because the Union did not receive a response, the Master Agreement does not specify a period of time in which it was required to invoke arbitration.

The Union makes the following arguments in support of its position on the merits:

- Article 18(d)(2) of the Master Agreement specifically directs Correctional Services to permit employees to bid on assignments, days off and shifts available. Article 18(f) directs the parties to form roster committees for bargaining unit employees outside of the Correctional Services department, unless the parties mutually waive this requirement. Article 18(f) provides, "It is recommended that the procedures in Section d be utilized."
- The Union did not waive its contractual right to negotiate post assignments for the Unit Management staff. The parties have negotiated regarding Unit Team employees, but they only addressed two of the three components of a roster – shift and days off. The Union chose not to negotiate post assignments during these earlier negotiations, but it did not waive its right to negotiate all components of the Unit Team rosters.

- The Union invoked its right to negotiate regarding post assignments after the Agency announced that it would reassign Unit Management employees unilaterally.
- The Agency takes the “right to assign” provision of the contract out of context. The management rights provisions set forth in Article 5 of the Master Agreement are restricted by other sections of the agreement. Management may have the right to assign work, but it does not have the unfettered right to assign bargaining unit employees to posts within the facility.
- Unit Management, or Unit Team, is one department. A secretary, counselor or case manager in one housing unit is equally capable and qualified to hold the same position in another housing unit.
- The Unit has had the opportunity to negotiate a full and fair roster for every other department at FCC Pollock, except the Psychology department. All of these negotiations have included post assignments. The parties used Article 18(d) and (f) as the guideline for establishing all of these other rosters.
- The Union has the right to bargain with the Agency concerning conditions of employment. This right is recognized in multiple provisions of the Master Agreement. Pursuant to 5 U.S.C. §7116, it is an unfair labor practice for the Agency to refuse to negotiate with the Union in good faith.
- The Agency knew that it was changing the terms and conditions of Unit Team employees, as evidenced by its complying with the requirement, set forth in Articles 4 and 7, that it notify the Union before making the changes. It failed to comply with the second requirement of negotiating with the Union concerning the proposed changes.
- The grievance should be sustained in the Union’s favor. As a remedy, the Arbitrator should:
 - 1) Order the Agency to immediately enter into meaningful negotiations with the Union concerning completion of the Unit Team members’ right to bid on post assignments;
 - 2) Order the parties to undergo training on the importance of following all aspects of the Master Agreement; and
 - 3) Retain jurisdiction for no less than 120 days to ensure that the parties fulfill their obligations as directed by the Arbitrator.

The Agency makes the following arguments in support of its position on the merits:

- The Master Agreement does not require the Agency to give Unit Management employees the assignments, shifts and days off that they desire. The only department that is contractually guaranteed the right to bid on all of these matters is the Correctional Services Department.

- The Union is mistakenly attempting to apply the contract provision that applies to one department to another department. Article 18(f), which applies to all employees other than Correctional Services employees, only states that the roster procedures of Article 18(d) are “recommended.” A recommendation is not the same as a requirement. The parties are not required to apply the roster procedures of Article 18(d) to non-Correctional Services employees, including Unit Management employees.
- The FLRA has agreed with the Agency’s right to assign Unit Management staff. *AFGE Local 3935 and Dept. of Justice, Federal Bureau of Prison Camp, Duluth, MN*, 59 FLRA 481 (2003). The parties have not negotiated contractual provisions through which management gave up its contractual (Article 5) and statutory (5 U.S.C. § 7106) right to assign Unit Management staff.
- The testimony presented at the hearing established that the Associate Warden’s decision to reassign Unit Management members was not arbitrary, but based on the legitimate business need to make sure that all housing units were staffed with comparably experienced/capable employees.
- The parties have a past practice regarding rosters for the Unit Management staff, which has been repeated for many years and of which both parties are aware. This practice is that Unit Management employees are permitted to bid on shift and days off only.
- By requesting as a remedy that the Agency be ordered to establish a roster committee and allow Unit Management employees to bid on assignments, the Union is seeking to get something through arbitration that it did not gain through collective bargaining. Union President Richmond testified that the parties negotiated shifts and days off for Unit Team members, but that the Union chose not to make bidding on assignments part of the negotiations.
- The parties have already negotiated the issue of rosters for the Unit Management staff. Once negotiations are completed on a topic, the Union cannot require the Agency to re-negotiate the same issue.
- Since the filing of this grievance, the parties have implemented a new national Master Agreement. Pursuant to the terms of the new Master Agreement, the Union has invoked its right to negotiate a local supplemental agreement, including proposals to negotiate rosters for all departments. This issue should be addressed through that process, and not through arbitration.
- The grievance should be denied because the Union has failed to prove a violation of the Master Agreement.

V. OPINION

Timeliness/Arbitrability

The Agency bears the burden of proof on this issue. Its evidence and argument must be assessed against a general presumption in favor of arbitrability. The first element of the Agency's arbitrability challenge is the timeliness of the Union's filing of the initial grievance. The Agency contends that the triggering event for the 40-day filing deadline set forth in Article 31(d) was the November 14, 2011 email from Associate Warden Bowe, announcing the Agency's intention to reassign certain Unit Management employees. As indicated in the Associate Warden's emails, the actual reassignments did not occur until mid-January 2012.

The Agency has presented some authority for the position that a union's knowledge of a potential violation triggers contractual time limitations for filing a grievance. See, e.g., *AFGE Local 1242 and Federal Bureau of Prisons, USP Atwater, CA* (Richard Fincher, 2006). It may be accurate that a union's knowledge that a potential grievance presently exists triggers its obligation to investigate and, if appropriate, file a grievance. However, to argue that an employer's announcement of an intent to take action in the future triggers the union's obligation to file a grievance regarding that action is out of step with what seems to be the prevailing view regarding timeliness and arbitrability. Time limits to file a grievance are generally not considered to be triggered until the grievable action occurs, not when it is announced or contemplated. The triggering event was the actual reassignment of the Unit Management employees, which occurred on or about January 17, 2012. The grievance was filed within forty (40) days of that event, and was thus timely.

The second element of the Agency's challenge involves the timeliness of the Union's invoking arbitration. Article 31(g)(1) of the Master Agreement gives the Union thirty (30)

calendar days to invoke arbitration after it receives an unsatisfactory response to its grievance. In this case, the Agency did not file a response. The Agency proposes that the contract be interpreted to mean that, in the event that the Agency does not respond to a grievance, the triggering event for the Union's time to invoke arbitration is the passing of the Agency's deadline to file a response.

In fact, the Master Agreement is silent as to what is the Union's obligation when the Agency declines to formally respond to a grievance. As stated by Arbitrator Fincher in the Atwater, CA case submitted by the Agency (*supra*), "[m]any arbitrators hesitate to deny arbitrability unless the procedural defect is in violation of expressly stated and historically followed contract language, and was a serious defect or violation." The Union was not under an express obligation to invoke arbitration within forty (40) days after the Agency's deadline to respond to the grievance passed. The Union waited roughly three weeks after the deadline passed before it invoked arbitration. I find that this was not a violation of any express provision of the Master Agreement, nor was the delay abjectly unreasonable. Therefore, the timing of the Union's invoking arbitration is not grounds for holding this grievance inarbitrable.

The grievance was timely filed and the invocation of arbitration did not violate any express terms of the Master Agreement. The grievance is arbitrable.

Violation of Article 18

The merits of this grievance involve the Agency's obligation to negotiate with the Union regarding the reassignment of Unit Management employees between housing units. The Union's primary argument involves Article 18 of the Master Agreement.

Article 18(d) guarantees Correctional Services employees the right to bid on three aspects of the roster – assignment, shift and days off. Unit Management employees are not in the

Correctional Services department. They are covered by Article 18(f), which requires that the parties establish roster committees (unless mutually waived), and “recommend[s]” that the roster committees follow the procedures outlined in 18(d).

It is recommended, not required, that employees outside of Correctional Services be permitted to submit preference requests (or bids) for assignments, shifts and hours. Non-Correctional Services employees do not have a contractual right to bid on all three roster elements, but are entitled to have the Union negotiate all three elements on their behalves. The Agency may violate Article 18(f) if it fails to comply with the contractual requirement to develop a roster committee and/or to negotiate the roster elements in any fashion.

The Union has submitted numerous awards where arbitrators have found – under contract language identical to the provisions at issue here – violations of Article 18(f) after the Agency has reassigned Management Unit employees without first negotiating those reassignments with the Union. *AFGE Local 1237 and Federal Bureau of Prisons, FCI Mendota, CA* (Robert W. Landau, 2013); *AFGE Local 1637 and Bureau of Prisons, FCI Seagoville, TX* (John B. Barnard, 2012); *AFGE Local 0922 and Federal Bureau of Prisons, FCC Forrest City, AR* (Frederick P. Ahrens, 2011). I find those cases to be distinguishable from the evidence on the record of this case.

Specifically, in the Mendota, CA case, Arbitrator Landau found that the undisputed evidence showed that roster committees had not been formed for the Unit Management employees at that facility, and that the Union had not waived the right to have a roster committee for those employees. In this case, Unit Manager Steven Lewis testified that there are roster committees for Unit Management staff. He described a process by which (1) employees bid by seniority on shift and days off on a quarterly basis; (2) he then processes their requests into a

proposed schedule for the unit he supervises; and (3) the proposed schedule is then put out for review by the employees and for approval by the Union.

The Union did not dispute Mr. Lewis' testimony in this regard. Indeed, Union President Brian Richmond testified that the Union has negotiated with the Agency concerning a Unit Team roster. Mr. Richmond said that he negotiated with the Agency regarding rosters for Unit Management employees, and that the parties agreed that employees would bid for shifts and days off. He added that he did not negotiate a right for Unit Management employees to bid for assignments because at the time the negotiations took place, "the staff were happy with where they were working" and "it wasn't an issue." However, Mr. Richmond said that he did not specifically waive the Union's right to negotiate assignments.

Similarly, Arbitrator Barnard found a violation in the Seagoville, TX case based upon testimony that indicated the Agency was unwilling to hold a roster committee for Unit Team members. The award made no mention of evidence that the parties had negotiated elements of the Unit Team roster in the past, but had simply not agreed to allow bidding on all three elements of the roster, as here. Nor did Arbitrator Ahrens discuss whether the parties had previously negotiated any elements of the roster for Unit Management employees. In this case, there was no evidence demonstrating the Agency's unwillingness to hold a roster committee. Indeed, Mr. Lewis' unrebutted testimony was that there is a roster committee for Unit Management employees.

In *U.S. Dept. of Justice, Federal Bureau of Prisons, FCC Otisville, NY and AFGC Local 3860*, 58 FLRA No. 70 (2003), the Authority upheld an arbitrator's award ordering the Agency to meet and negotiate with the Union over the procedures to be implemented by a roster committee. According to Mr. Richmond's testimony in this case, it appears that the parties have

already negotiated the roster committee procedures for Unit Team employees: they agreed that employees could bid on shifts and days off, but did not agree to allow bidding on assignments.

The Union asserts that it did not waive its right to negotiate bidding on assignments as part of the Unit Management roster. The evidence establishes that the parties did negotiate regarding the Unit Management roster, but that the Union made a conscious decision not to request bidding on assignments for these employees as part of those negotiations. I find that this was tantamount to a waiver of the right to bargain for that specific element of Unit Management rosters. The Union has provided no authority for the proposition that it is entitled to bargain each roster element in a piecemeal fashion.

Based upon the specific evidence of this case, I find that the Union has not established a violation of the Agency's obligation under Article 18(f) with respect to Unit Management employees.

Violation of Articles 6 and 7

The Union's secondary argument is that the Agency was required to negotiate prior to unilaterally reassigning Unit Management employees on the grounds that the employee's assignment, and right to bid on an assignment, is a condition of employment that must be negotiated. Without opining as to whether an employee's specific assignment is a condition of employment (the Agency retains the right to assign employees under Article 5, unless otherwise specified in the contract), the methods or procedures by which assignments are made is something that must be negotiated whenever there is a change.

Article 7 expressly requires the Agency "to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor

Management Statute.” To the extent that the January 2012 Unit Team reassignments represented a change in the methods or procedures by which employees in that department were assigned to specific posts, the Union was entitled to notice and the opportunity to bargain before the Agency imposed a unilateral change.

The record of this case lacks any explanation regarding the methods or procedures by which Unit Management employees were assigned to their specific positions before the January 2012 reassignments. It is unclear whether management had ever unilaterally reassigned Unit Team members before that time. However, the fact that the Agency notified the Union, in writing, two months before making the reassignments creates an inference that this was a change that required notice to the Union as well as the opportunity to bargain. The Agency did not rebut this presumption by showing, for example, that unilateral reassignment was not a change in the status quo regarding procedures or methods by which it assigned or reassigned Unit Team employees. Therefore, I find that the Union was entitled to negotiate regarding the change in procedures.

The Union invoked that right in its December 2, 2011 communication to the Warden. Management implemented the change without first negotiating with the Union. The unilateral implementation without negotiating was a violation of Articles 6 and 7 of the Master Agreement.

Remedy

The Union requests the Arbitrator to order the Agency to immediately enter into meaningful negotiations with the Union concerning completion of the Unit Team members’ right to bid on post assignments. Having found that the Union has not proved a violation of Article 18, this remedy is too broad. Further, as Article 18(f) makes it merely recommended, but not required, that non-Correctional Services employees be allowed to bid on assignment, shift and

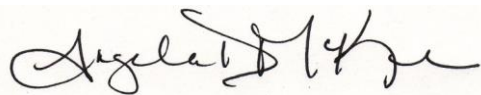
days off, and because the Union did not negotiate bidding on assignments during roster negotiations for the Unit Team, there is no contractual “right” for Unit Management employees to bid on their assignments. Instead, the appropriate remedy is that the parties be directed to immediately negotiate regarding any changes to the methods or procedures by which Unit Management employees were assigned or reassigned before the January 2012 unilateral reassignments. The Union has not requested that the January 2012 reassignments be reversed, and this award should not be interpreted as an order that the Agency take such action.

All requested relief not expressly granted is hereby denied.

VI. AWARD

The grievance is sustained in part. The Agency violated Articles 6(a)(2) and 7(b) of the Master Agreement when it unilaterally changed the procedures by which Unit Management employees were assigned or reassigned in January 2012 without first negotiating with the Union. The parties are ordered to immediately negotiate regarding any changes to the methods or procedures by which Unit Management employees were assigned or reassigned before the January 2012 unilateral reassignments.

July 9, 2015



Angela D. McKee
Arbitrator