IN THE MATTER OF ARBITRATION		
	§	
BETWEEN	§	
	§	
COUNCIL OF PRISONS LOCAL	§	
(AFL-CIO) AMERICAN FEDERATION	§	**FMCS No. 07-51976**
OF GOVERNMENT EMPLOYEES	§	
LOCAL 33, EL RENO, OKLAHOMA	§	
(Union)	§	**Visiting Room MOU**
	§	
-and-	§	
	§	
UNITED STATES DEPARTMENT OF	§	
JUSTICE, FEDERAL BUREAU OF	§	
PRISONS, FEDERAL CORRECTIONS	§	
INSTITUTION, EL RENO, OKLAHOMA	§	
(Agency/Employer)	§	
	§	

Arbitrator: Diane Dunham Massey selected through the procedures of the Federal Mediation and Conciliation Service.

HEARING

Hearings were held in the above matter on May 24 and July 26, 2007, at the Federal Prison Facility in El Reno, Oklahoma. The witnesses were sworn and excluded from the Hearings. The proceedings were transcribed and the transcript was provided to the Arbitrator. Post-hearing briefs were received by the Arbitrator by October 8, 2007. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

FOR THE UNION

Charles Bishop	Local 171 Steward, Advocate
Billy McCormack	Local 171 Steward, Advocate
Donny Boyte	Grievant, Chief Steward, witness
J. Scibana	Warden, witness
S. Willis	Associate Warden, witness
S. Mora	Associate Warden, witness
E. Vogele	Lieutenant, witness
R. Benefiel	Captain, witness
Kelly Newman	Corrections Officer, witness

APPEARANCES (CONTINUED)

FOR THE AGENCY

Michael A. Markiewicz	Agency Representative
Judy Campbell	Lead Employee Services Specialist
R. Benefiel	Captain, witness

ISSUES

At the beginning of the Hearing, the Parties stipulated to the following statements of the issues:

1. Is the portion of the grievance alleging the violation of Article 27, Section A of the Master Agreement arbitrable?

2. Did the Agency fail to provide properly/legally requested data to the Union for preparation of the grievance in violation of Chapter 5, U.S.C. § 7144(b)(4) and/or in violation of the Master Agreement, Article 7, Section A?

Neither Party argued these proposed issues in their post-Hearing briefs and, therefore, the Arbitrator did not reach a determination on them.

3. Is the question of official time for the Union to prepare for this grievance properly before this Arbitrator as part of this arbitration?

On July 17, 2007, this Arbitrator ruled that the question of payment of official time, while ancillary to the merits of this grievance, is properly addressed in this matter. Moreover, this Arbitrator found that considering the official time issue during the course of arbitrating the merits of this grievance does not violate Article 32, Section A of the Master Agreement, and that the Parties could present evidence concerning the Union's allegation that it was not paid adequate official time for the grievance and arbitration process herein, and the related remedy, if any.

As to the merits of this matter, the Parties agreed to the following:

4. Did the Agency violate Article 11 of the Master Agreement when it allocated the hours in question to the Union for preparation of this grievance? If so, what is the appropriate remedy?

5. Did the Agency violate Article 27, Section A of the Master Agreement when it vacated the Visiting Room No. 3 position on September 16, 2006? If so, what is the appropriate remedy?

6. Did the Agency violate the Settlement Agreement dated January 5, 2005, when it vacated the Visiting Room No. 3 position on September 16, 2006? If so, what is the appropriate remedy?

BACKGROUND

On September 16, 2006, Management reassigned the Correctional Officer assigned to the Visiting Room No. 3 post to another post, leaving two (2) officers to monitor the inmates, visitors and activities in the Visiting Room. The Union grieved on October 23, 2006, asserting that Management's action violated the Parties' Master Agreement as well as a prior Settlement Agreement dated January 5, 2005. The Union also asserts that Management violated Article 11 of the Master Agreement by allocating an insufficient number of hours of official time so that the Union could investigate and prepare its case.

The grievance was appropriately processed and remains unresolved. The Union alleged that it had not received sufficient official time to prepare for this arbitration. The Agency objected to including the official time issue in this arbitration. In an Interim Award dated July 17, 2007, this Arbitrator ruled that the question of official time was properly before her in this proceeding. The Parties were afforded the opportunity to present evidence and arguments concerning official time. The Parties stipulate that the matter on the merits and arbitrability are properly before this Arbitrator for Opinion and Award. The Parties also agree that the Arbitrator may retain jurisdiction for the purposes of interpreting and implementing the remedy if one is so ordered. The Parties did not object to an extension of time for issuance of this Award.

RELEVANT PROVISIONS OF THE AGREEMENT

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 USC, Section 7106:

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and

2. in accordance with applicable laws:

    a. to hire, assign, direct, layoff, and retain employees in the Agency or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted;

c. with respect to filling positions, to make selections for appointment from:

(1) among properly ranked and certified candidates for promotion; or

(2) to take whatever actions may be necessary to carry out the Agency mission during emergencies.

*** * ***

ARTICLE 18 – HOURS OF WORK

*** * ***

Section r. Normally, nonprobationary employees, other than those assigned to sick and annual relief, will remain on the shift/assignment designated by the quarterly roster for the entire roster period. When circumstances require a temporary [less than five (5) working days] change of shift or assignment, the Employer will make reasonable efforts to assure that the affected employee's days off remain as designated by the roster.

*** * ***

ARTICLE 27 – HEALTH AND SAFETY

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. the first, which affect the safety and well-being of employees, involves the inherent hazards of a correctional environment; and

2. the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.

*** * ***

ARTICLE 32 – ARBITRATION

*** * ***

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.

*** * ***

OTHER RELEVANT PROVISIONS

Settlement Agreement
FMCS No. 04-06813-0
Dated January 5, 2005

In full settlement of the above-listed grievance filed by Local 171, the parties freely and voluntarily agree to the valid provisions as follows:

1. The Agency affirms their commitment to prevent the introduction of drugs into the institution.

2. The Agency agrees that videotaping is not a requirement for requesting that inmates be placed in a dry cell in order to validate the introduction of drugs into the institution.

3. The Agency agrees prior to vacating the post of the Visiting Room #3 officer all other options to vacate posts will be considered.

* * *

POSITION OF THE UNION

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

Management violated Article 27 of the Master Agreement on September 16, 2006, when it vacated the Visiting Room No. 3 position without providing post orders to the remaining staff

on how to complete their duties. Management's violation increased inherent risks for the staff, failed to carry out the intent of the Parties' Settlement Agreement, and violated the Agency's self-imposed safety measures. The Union demonstrated that the Agency did not consider all options prior to vacating the Visiting Room No. 3 post on September 16, 2006.

In 2006, the Agency created the Mission Critical Roster ("MCR"), mandating that supervisors at all facilities create a roster of all staff who are critically needed to operate the facility in a safe manner. The MCR was created to stop the Agency from regularly vacating Correctional Officer posts when they had been assigned to the roster, and states that Correctional Officer posts should be vacated only on "rare occasions." The MCR initiative went into practice at FCI El Reno, where some posts were vacated regularly. The Union opposed Management's continued vacating of posts identified as "critical" to the institution's safe operation, and agreed to settle a prior grievance. The Settlement Agreement was intended to show the Union's willingness to cooperate with Management without infringing upon management rights. According to the Settlement Agreement, Management was to consider all available options before vacating Visiting Room No. 3 post.

The Union recognizes that the Agency has the absolute right to assign staff, but Management nevertheless has obligations and responsibilities associated with that right. In Article 27, Section A of the Parties' Master Agreement the Agency agreed to "lower those inherent dangers to the lowest possible level." This provision does not curtail the Agency's right to assign staff, but it does hold the Agency accountable for the manner in which it chooses to exercise such right. The Agency's accountability for the security practices it determines is negotiated with the Union at the national level. Such negotiations result in policies intended to lower inherent dangers to the lowest possible level. One example of such negotiations is the Correctional Services Manual, a document so sensitive and confidential that the Agency will not permit the Union to copy it due to security concerns. Nevertheless, testimony was given about the Correctional Services Manual. The Union does not agree with Captain Benefiel's testimony that the procedures set out in the Correctional Services Manual are consistently followed and, therefore, presumably lower inherent dangers. Rather, the Union believes these policies are not consistently observed. When questioned about post orders, Captain Benefiel recognized they were incorrect. Even if they were written by someone else before Captain Benefiel arrived at FCI El Reno, he has the responsibility to ensure that they are correct and to approve them. National policy requires Correctional Officers to review and sign post orders, and can be held civilly liable for failing to perform the post orders or following incorrect post orders. The Agency has not complied with its self-imposed duty to provide specific instructions to all Correctional

Officers, through their post orders, as to how to perform their critical duties. The Agency's failure to instruct officers how to perform critical duties and failure to staff critical positions places all staff in jeopardy.

The evidence demonstrated that, although national policy requires post orders specific to every post, employees would not become aware of such post orders unless they were briefed on them or knew about them from experience. On September 16, 2006, when the Visiting Room No. 3 post was vacated, the Visiting Room No. 2 officer would be assumed to have discharged his own duties as well as those of the Visiting Room No. 3 officer. However, the Visiting Room No. 2 officer on that date was a probationary employee, new to FCI El Reno, without experience to know that he was expected to assume the duties of the Visiting Room No. 3 post and who did not know the specific duties of that post. Additionally, the evidence established that the supervisory Lieutenant did not explain to Visiting Room No. 1 and No. 2 officers how they were to accomplish their mission on September 16, 2006.

Visiting Room No. 1 and No. 2 officers worked the shift from 7:00 a.m. to 3:30 p.m., and the Visiting Room was open from 8:00 a.m. to 3:00 p.m. During that time, each of the two (2) officers was entitled to a thirty (30) minute duty free, uninterrupted lunch break; assuming they took their breaks at different times, this left one of the officers alone in the Visiting Room for one (1) hour on September 16, 2006. Furthermore, Visiting Room No. 2 officer was gone from the Visiting Room for 320 minutes on September 16, 2006, escorting inmates and visitors, and doing searches. This meant that there was only one (1) Correctional Officer present in the Visiting Room on September 16, 2006 for a total of 160 minutes. Even though there was a fairly low number of visits that date, the Visiting Room is to be staffed by three (3) officers so that two (2) officers will be physically present for most of the day. The Visiting Room No. 1 officer sits at a desk, and is responsible for auditing paperwork, operating and monitoring the camera system, and supervising the inmate worker assigned to the Visiting Room. The Visiting Room No. 1 officer cannot accomplish these assigned duties and also monitor 17 inmates – two (2) of whom were on the hot file and required closer scrutiny – as well as 29 adults and 13 children in the manner required to keep inherent dangers at the lowest possible level.

FCI El Reno is a high security level prison, and its Visiting Room is a volatile environment. There exist risks of a visitor, inmate or employee being assaulted, and of narcotics and other contraband being introduced into the facility. Management's decision to vacate the Visiting Room No. 3 post resulted in insufficient staff to even carry out the basic duties of the Visiting Room posts, much less to lower inherent dangers. Failing to search inmates before allowing them to return to the general population after a visit poses a danger.

Failing to specifically assign an officer to conduct such searches, and then assuming that it is being done does not lower inherent risks to the staff. In fact, what Management has done is dangerous and exposes the staff, inmate population and the community to enhanced risk. The inmates have time to think about ways to defeat existing security measures, and do it on a daily basis. The Agency is not fulfilling its duty to police its policies and practices locally, and it is only a matter of time until the Union's concerns about safety materialize.

The Union entered into a Settlement Agreement with the Agency on January 5, 2005, concerning FMCS No. 04-06813-0. The Union became aware that the Agency knew about a staff member who was introducing contraband into the unit, so it filed a grievance to stop this activity and thereby lower inherent risk. Part of the Settlement Agreement provides that the Agency will consider all other options before vacating the Visiting Room No. 3 officer The Union expected that acceptance of the term "all available options" meant that the Agency would vacate the Visiting Room No. 3 officer as a last resort. However, the Agency did not consider all options on September 16, 2006. For example, it could have vacated the SHU 4 officer on that date, as it did the following weekend notwithstanding Captain Benefiel's testimony that the Agency did not want to vacate the same place for two (2) weekends. Furthermore, Captain Benefiel's statement that non-custody employees were not used routinely to cover custody posts during that time period is incorrect, as evidenced by the following week's custody rosters. Associate Warden Willis testified that there were three (3) available custody staff members who were on special assignment on September 16, 2006 and who could have covered roster needs, yet the Agency chose not to utilize them. According to Captain Benefiel, the routine practice was to use available special assignment officers to cover the Visiting Room No. 3 post if necessary. The officer working the Dry Cell was finished by 1:00 p.m., and could have been sent to the Visiting Room on September 16, 2006, to assist there. Additionally, just two (2) weeks after this incident, the institution returned a sizeable amount of money to the Agency that had been allocated for payment of salaries, which could have been used to pay overtime of $250.00 on the date in question. The Agency had numerous options that it did not consider.

On May 24, 2007, the Agency staffed a custody position (Visiting Room) with a non-custody staff member, which the Agency denied it did as a rule, so that the Visiting Room would be fully staffed for the Arbitrator's visit. Just three (3) days later, between the first and second days of Hearing, another cubby hole was found in the women's restroom, constructed by inmates or their visiting families for the purpose of introducing contraband into the institution. The person(s) who made the cubby hole had ample, unsupervised time to create it, further underscoring the need for complete staffing of the Visiting Room to lower inherent dangers to

staff. The Agency's decision failed to provide adequate security as defined in its mission to furnish a safe and secure environment for incarceration of federal offenders, federal employees and the public who visit the institution, all of whom were threatened on September 16, 2006, by the Agency's decision not to staff the Visiting Room No. 3 post that day.

Union members Billy McCormack, Donny Boyte and Charles Bishop were denied adequate official time to investigate and prepare for the grievance and arbitration process, thereby requiring them to do such work on their off-duty time. On May 1, 2007, Union Advocate McCormack submitted a request to Captain Benefiel seeking 40 hours of official time for himself and Charles Bishop, and 24 hours of official time for Grievant Boyte. Advocate McCormack resubmitted such request on May 9, 2007, advising Captain Benefiel that he had not responded to the first request. Captain Benefiel responded on May 9, 2007, but the attachment referred to in his e-mail response was not attached. Five (5) days later, Captain Benefiel provided a response stating that he would approve 16 hours for Charles Bishop, 8 hours for Advocate McCormack, and 0 hours for the Grievant. On May 15, 2007, Charles Bishop notified Captain Benefiel that the Union did not agree with the amount of official time approved, and advised him that the Agency was required by federal law to approve what is reasonable, necessary and in the public interest.

Captain Benefiel testified that he did not review applicable law or the Settlement Agreement in deciding the amount of official time to be approved. Captain Benefiel stated that he assumed the amount of official time requested was not necessary because the case was similar to a prior grievance and that Donny Boyte was experienced. Essentially, Captain Benefiel made a value judgment although he testified he has no experience representing employees in arbitrations. Neither does Associate Warden Willis, who assisted Captain Benefiel in deciding the amount of official time to be approved, have any such experience. The Agency unilaterally determined the amount of official time and delayed responding to the Union's requests, thereby jeopardizing the Union's ability to fully prepare for the Arbitration Hearings. Management's action impacts on the Union's duties and obligations as the sole and exclusive bargaining representative for bargaining unit members. The Union is entitled to sufficient official time to ensure that it properly prepares and represents bargaining unit members to its fullest ability. The Union has satisfied its burden of proving that the Agency unjustly denied official time, thereby causing Billy McCormack, Donny Boyte and Charles Bishop to prepare on their own time. The FLRA has found that a denial of pay for representational duties performed on an employee's own time amounted to a violation of the Back Pay Act. 60 FLRA No.107, 0-AR-3862 (December 30, 2004).

The grievance should be sustained. The Agency should be ordered to cease and desist from vacating the Visiting Room No. 3 position, and it should be ordered to abide by the Parties' Settlement Agreement of January 5, 2005. The Agency also should be ordered to post on all bulletin boards at FCI El Reno for at least sixty (60) days an apology to the Union and its members, and the Warden ordered to orally apologize for violating the Parties' Settlement Agreement to all staff members at the next staff recall. The Agency should further be ordered to stop increasing the staff's inherent dangers and jeopardizing the staff's safety. Additionally, the Agency should be ordered to reimburse Billy McCormack for a total of 27 hours; Charles Bishop for a total of 20 hours; and Donny Boyte for a total of 20 hours. The Union asks for such other relief as the Arbitrator may deem appropriate.

POSITION OF THE AGENCY

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

As to the Union's official time complaint, the Agency gave the Union reasonable time to prepare for the Hearings. The Union is not entitled to as much official time as it wants. Furthermore, the Union has litigated the same type of issue in the past and, therefore, already had experience and arguments from the previous matters. Therefore, the amount of official time granted to the Union is reasonable.

Article 27, Section A of the Master Agreement gives Management the right to reassign employees, even if doing so leaves a post vacant. Management also has the contractual right to determine internal security practices such as that involved in this grievance. The issue of whether the Agency violates Article 27, Section A by leaving a Correctional Officer post vacant has previously been considered by the FLRA in *U.S. Department of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma and AFGE Local 171*, 58 FLRA No. 21 (September 30, 2002). In that case, the FLRA found that the Agency did not violate the Master Agreement when it left correctional officer posts vacant. The FLRA also has determined that:

- The Agency's authority under § 7106(a)(2)(A) to assign employees includes the right to decide whether or not to fill posts.
- The Agency cannot be required to fill vacancies or keep posts staffed through overtime because doing so would violate the Agency's rights.
- Section 7106(a)(1) gives the Agency the right to determine:

- internal security practices, including the right to determine policies and practices that will secure or safeguard the Agency's personnel, physical property or operations from internal and external risks; and

- the degree or type of staffing needed to maintain the security of a facility

Thus, FLRA precedent clearly establishes that the reassignment of employees, even when it leaves a post vacant, falls within Management's Rights.

The issue presented in this grievance has been arbitrated at FCI El Reno several times in the past. In FMCS No. 99-07154, the arbitrator denied the Union's grievance which asserted that Management violated the Master Agreement when employees assigned to the correctional roster were "pulled" (also known as "vacating a post" or "reassigned") from posts. In FMCS No. 01-11034, the arbitrator denied the Union's grievance, which alleged Management willfully and intentionally increased inherent hazards of jobs by vacating posts throughout the institution. The arbitrator denied the grievance raised by the Union in FMCS No. 06-53150, which claimed increase of inherent hazards when the Visiting Room No.3 post was left vacant.

Management does not reassign posts in an arbitrary manner. Management's decisions are made to provide for the security and safety of the Agency's employees, the public and the inmates, after reasonable options are considered. Captain Benefiel, who has the authority to decide how posts will be staffed, testified about the various options considered before the Visiting Room No.3 post was vacated. Captain Benefiel also explained why posts other than Visiting Room No.3 were not vacated. The Settlement Agreement only requires the Agency to consider other options, and it did so.

The gist of this grievance is the Union's claim that Management violated the previous Settlement Agreement. However, as Elkouri and Elkouri note, when an agreement's language is clear and unequivocal, an arbitrator generally should enforce the meaning as expressed, even if the results seem harsh or contrary to one of the parties' original expectations. The language of the Settlement Agreement is not ambiguous and should be enforced. It requires only that Management consider other options. The Union has not proven that Management failed to consider other options and, therefore, the Union has not satisfied its burden of proof.

Furthermore, the Union was not able to demonstrate disparity. The evidence demonstrated that every day in a correctional environment is different. The Agency also pointed out that weekday staffing differs from weekends, when fewer lieutenants are available. Accordingly, the grievance should be denied.

OPINION

THE FACTS

Much of the background evidence is not disputed. It indicates as follows:

FCI El Reno provides a Visiting Room for inmates, including those classified as Special Housing Unit ("SHU") inmates (who, for security reasons, must be restrained whenever they leave their cells, but who are not restrained in the Visiting Room). The Visiting Room, along with the front entrance, rear gate and front lobby of FCI El Reno, is a special security area covered by a separate section of the Correctional Services Manual. The inmate Visiting Room at FCI El Reno generally is staffed by three (3) Correctional Officers who are designated as Visiting Room Nos. 1, 2 and 3. The shift for the Visiting Room Officers lasts from 7:00 a.m. to 3:30 p.m., and the Visiting Room is open from 8:00 a.m. to 3:00 p.m. The Visiting Room No. 1 Officer, who sits at an elevated desk at the entrance to the Visiting Room, is primarily responsible[1] for checking inmates and visitors into the Visiting Room, monitoring the video cameras posted in the Visiting Room, and taking care of the Visiting Room's logbooks and other associated paperwork. The duties of the Visiting Room No. 2 Officer, who is primarily responsible for general oversight of the Visiting Room, include escorting visitors between the Visiting Room and the front entrance. The Visiting Room No. 2 Officer escorts only five (5) visitors per group; on busy days, the Visiting Room No. 2 Officer may be required to escort groups to and from the entrance every ten (10) or fifteen (15) minutes. The time spent in processing and escorting visitors to and from the Visiting Room can result in the Visiting Room No. 2 Officer's absence from the Visiting Room for a total of up to five (5) hours. The Visiting Room No. 3 Officer primarily works the back of the Visiting Room, processing inmates into and out of the Visiting Room. It takes about five (5) minutes to process each inmate into, or out of, the Visiting Room. Before being released back into the inmate compound, inmates are required to remove all clothing and then are visually searched to ensure that they do not leave the Visiting Room with anything they did not bring into the room.

The introduction of contraband into the inmate population increases the inherent dangers of working in a correctional environment. Visitors frequently attempt to deliver contraband, including narcotics, for inmates, and have been known to conceal narcotics in

[1] Each of the Officers assigned to the Visiting Room has many other duties and responsibilities. For example, the procedures for admitting visitors and inmates into the Visiting Room, and then processing them to leave, involved multiple steps designed, in part, to prevent contraband from being introduced into FCI El Reno.

visitor restrooms and other locations accessible to visitors. Additionally, gang communication can occur in the Visiting Room. At times, visitors fight in the Visiting Room, and Correctional Officers have been assaulted. Some inmates have engaged in sexual acts with, or attacked, their visitors. According to Correctional Officer Kelly Newman, who has worked for the Agency for 12.5 years, having only two (2) Visiting Room Officers on duty during visiting hours is "playing Russian roulette." (Transcript ["Tr."]. at p. 181).

On Saturday, September 16, 2006, 42 visitors (including 13 children) visited 17 inmates at FCI El Reno. On that date, the Visiting Room No. 3 post was vacant. The Post Orders for that date reflect that no one was assigned to strip search inmates entering and leaving the Visiting Room, or to conduct visual searches. According to Captain Benefiel, 54 staff members were on duty on September 16, 2006 which, he said, is a typical number for a weekend. Because inmates work on weekdays, a greater number of staff – including an average of four (4) correctional services supervisors – is assigned throughout the institution Monday through Friday. Captain Benefiel stated that on weekends, the "best case scenario" is to have two (2) correctional services supervisors on duty: the Operations Lieutenant, who is responsible for running the institution on off hours, and "when feasible" an Activities Lieutenant. According to Captain Benefiel, the routine practice at FCI El Reno was to place a special assignment officer, if available, into the Visiting Room No. 3 post when necessary in order to keep the Visiting Room fully staffed. Special assignment officers are those who are assigned on the daily roster, but not to a specific post.

The Union recognizes that, in order to achieve the lowest level possible of inherent hazards, staffing all posts is equally as important as staffing the Visiting Room, although it contends that the posts of Activities Lieutenant, Control 2, Special Housing Unit ("SHU") 4 and Shake-down are not so crucial to security and employee safety.

In late October, 2006, the institution returned to the Region approximately $400,000.00 representing unused fiscal year 2006 funds. Some of those unused funds were available to pay overtime. Payment of overtime was an option that could have been used to staff Visiting Room No. 3 on September 16, 2006.

THE ARGUMENTS

The Contract Language

Article 27 of the Parties' Master Agreement (entitled Health and Safety) provides, in pertinent part, as follows:

> Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:
>
> 1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and
>
> * * *
>
> With respect to the first, **the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106.** The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.
>
> (Emphasis added).

The Parties do not dispute that when contraband, such as narcotics or weapons, is smuggled into the facility, the inherent dangers of working in a correctional environment increase. Neither do the Parties dispute that the Visiting Room is a frequent site of purported delivery of contraband – particularly illegal narcotics – to inmates.

Management Rights

This Arbitrator generally is reluctant to interfere with an Employer's right to operate its business as it deems appropriate, including Management's right to assign employees. Article 5 of the Master Agreement provides, in part, that:

> 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 USC, Section 7106:
>
> 1. **to determine the** mission, budget, organization, number of employees, and **internal security practices of the Agency; and**

2. in accordance with applicable laws:

a. to hire, assign, direct, layoff, and retain employees in the Agency or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

b. **to assign work**, to make determinations with respect to contracting out, **and to determine the personnel by which Agency operations shall be conducted * * ***

(Emphasis added).

Thus, the Agency's action in leaving Visiting Room No. 3 vacant on September 16, 2006, seems to fall within its rights articulated under Article 5 and 5 USC Section 7106. However, Management's right to determine staffing is limited somewhat by section b. of Article 5, which states as follows:

> 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.

As a result, the Parties' Agreement must be considered.

Article 27

Section A of Article 27 addresses, in part, the safety and health of employees in the Federal Bureau of Prisons vis-à-vis the inherent hazards of a correctional environment. It states with respect thereto that:

> * * * the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

The evidence demonstrated that inadequate staffing of the Visiting Room facilitates the introduction of contraband into the inmate population which, in turn, creates a substantial and serious risk to the safety – indeed, the lives – of Correctional Officers, other staff and inmates. The Agency's witnesses did not dispute that the Visiting Room is a "popular", if not the primary, location by which contraband – such as drugs, weapons and other prohibited items – enters the institution. The testimony indicated that inmates can become violent, even to the point of killing,

to protect narcotics that have been smuggled into the prison. Correctional Officer Kelly Newman related incidents in which he had been physically attacked when he had found narcotics during cell searches. According to Officer Newman, having only two (2) Visiting Room Officers on duty is:

> * * * playing Russian Roulette.
>
> Tr., Vol. II at p. 181.

The evidence concerning the inherent dangers of a correctional environment and the potential for increased dangers when the activities of inmates and their visitors are not closely monitored in the Visiting Room persuades this Arbitrator that the workplace situation at issue in this grievance cannot be compared to a standard industrial setting, in which the result of inadequate staffing might simply slow down production. Nevertheless, the Agency has furnished this Arbitrator with various decisions which reaffirm the Agency's exclusive right to assign work and determine its internal security practices under 5 USC, Section 7106. Article 27 expressly recognizes the Agency's rights under Section 7106 and provides that the Employer need not relinquish such rights while lowering the inherent hazards to the lowest possible level. Notwithstanding such authorities, this Arbitrator is inclined to believe that Management did not satisfy its Article 27 obligations on September 16, 2006, when it left the Visiting Room No. 3 post vacated throughout the day[2] and assigned a Probationary Officer as the Visiting Room No. 2 Officer. However, this Arbitrator need not decide whether the Agency violated Article 27 because, unlike the cases[3] cited by the Agency, the instant grievance is impacted by additional contractual language contained in an agreement by which the Parties settled a prior case.

The Parties' Settlement Agreement

The Parties settled a prior grievance (FMCS No. 04-06813-0) by means of a Settlement Agreement dated January 5, 2005, in which they agreed as follows:

> 1. The Agency affirms their commitment to prevent the introduction of drugs into the institution.
>
> * * *
>
> 3. The Agency agrees prior to vacating the post of the Visiting Room #3 officer all other options to vacate posts will be considered.

[2] Perhaps a partial assignment of a Visiting Room No. 3 Officer, during the height of visiting hours, would have sufficed.

[3] None of the cases submitted by the Agency involved a Settlement Agreement.

This language curtails existing Management Rights by requiring the Agency to consider "all other options to vacate posts" before allowing Visiting Room No. 3 post to be unstaffed.

Consideration of Options

The evidence showed that Captain Benefiel made the decision to vacate the Visiting Room No. 3 post on September 16, 2006. Apparently due to the passage of time, Captain Benefiel did not remember many specifics of his thought processes that day, but he testified that:

> In the case with the (Visiting Room No. 3) and before I vacate a visiting post on the weekends, I will consider other options such as are there special officers assigned to special assignment, do I have an unassigned officer? At the point when this roster was being done we had a post that was identified as a shakedown post, which was a post that we use for general duties around. I would have considered removing the shakedown post before I removed the (Visiting Room No. 3). Past those two options, special assignment or the shakedown post, there really isn't any other viable option other than vacating another post somewhere else such as – you can't do the housing units. The only other option you have is special housing.
>
> Tr. at p.p. 117-118.

The evidence indicated that there were other options that could have been considered to staff the Visiting Room No. 3 post on September 16, 2006. For example, a week after the incident in question, the Special Housing No. 4 position was vacant but the Visiting Room No. 3 post was staffed, thus indicating a possible option for staffing the Visiting Room No. 3 post on the date in question. Moreover, a Special Activities Lieutenant has been used at times to staff the Visiting Room. Captain Benefiel also acknowledged that he has the authority, under certain circumstances, to pull employees from departments other than Correctional Services to work a custody position, which appears to have been another option that could have been considered on September 16, 2006. Additionally, the institution returned a substantial sum of unused fiscal year 2006 funds to the Agency; Captain Benefiel testified he did not consider using such funds for overtime, so that the Visiting Room No. 3 post could have been staffed on September 16, 2006. Such evidence persuades this Arbitrator that the Agency did not comply with the Parties' Settlement Agreement on the date in question and, as a result of failing to consider "all other options to vacate posts", the Agency did not lower the institution's inherent hazards to the lowest possible level.

This conclusion is supported by other evidence which indicated that the Visiting Room's Post Orders for September 16, 2006 were incomplete and incorrect, and that the two (2)

Correctional Officers working in the Visiting Room that date were not specifically instructed as to how to perform their duties in light of the absence of a third Correctional Officer. Moreover, the Visiting Room No. 2 Officer that day was still a probationary employee[4] and, thus, would not necessarily have the experience needed, according to Captain Benefiel, to know what to do when the post orders were inaccurate and the Operations Lieutenant had not briefed him, as occurred on September 16, 2006.

OFFICIAL TIME

Article 11 of the Master Agreement states, in part, as follows:

> Section a. Official time is defined as paid duty time used for various labor relations and representational obligations in accordance with laws, rules, regulations, and this Agreement.

Official time generally is allowed a Union representative during the grievance and arbitration processes, subject to the provisions of Article 11 and applicable laws, rules and regulations.

The Union asserts that the Agency violated Article 11 of the Master Agreement by failing to authorize sufficient official time as requested herein. The evidence demonstrated that Management delayed[5] responding to the Union's requests for official time, and disallowed the amount of official time requested by the Union -- 40 hours for Advocate McCormack, 40 hours for Advocate Bishop, and 24 hours for Grievant Boyte – based on Captain Benefiel's conclusion, with which Assistant Warden Willis concurred, that less time was necessary because the Union had already raised similar issues in prior grievances. As a result, Management approved 8 hours of official time for Advocate McCormack, 16 hours for Advocate Bishop, and 0 hours for the Grievant. During his testimony, Captain Benefiel stated:

[4] The evidence indicated that the Visiting Room No. 2 Officer performed competently on September 16, 2006. However, as the Union suggests, placing a probationary employee in a situation in which the only other Correctional Officer present is primarily concentrating on paperwork probably is not the most effective way to thwart the introduction of contraband.

[5] The delay was roughly a week, but led to the Union submitting repeated requests for official time. Moreover, Management's reply did not include the attachment referred to in the reply. The Arbitrator is persuaded that the delay and incomplete response occurred as a result of oversight, and was not intentional.

> In this particular case I cannot tell you that I went back and told – I did not go back and negotiate the official time with Officer Bishop. I made a value judgment on what I thought was the best for everybody. I thought I was being as fair as I could. When (the Union) made an exception to it, I thought that I had tried to settle that exception, and I did the best value judgment that I could. I did not go back and negotiate it with (the Union), specifically.
>
> Addendum Transcript, at p. 92.

Captain Benefiel also testified that he did not consider the Master Agreement or relevant law when unilaterally deciding how much official time would be allowed.

Denial of reasonable official time could have a chilling effect on the Union's ability to represent its members and own interest. Insufficient official time could prevent the Union from representing a grievant as effectively as possible, and from fully preparing for the Hearing of this grievance. The Union demonstrated that it reasonably used more time than what was allotted, and the evidence indicated that Captain Benefield did not consider the Union's evidence of the time spent before he denied its request. Therefore, this Arbitrator concludes that the Union is entitled to more official time than what was granted, and that a remedy is due.

REMEDY

The Union asks that the Agency be ordered to apologize, both by a posting and orally by the Warden, for violating the Settlement Agreement, and that it be ordered to stop jeopardizing the staff's safety. As to the official time component of this grievance, the Union asks that the Agency should be ordered to reimburse Billy McCormack (27 hours); Charles Bishop (20 hours); and Donny Boyte (20 hours). An apology might be appropriate in a situation in which Management has acted with spiteful intent or in conscious disregard of its contractual duties. That is not the case in this matter and, therefore, an apology is not appropriate. However, the Agency should post a copy of the Settlement Agreement to ensure that all employees are aware of the commitment made by the Parties. Further, although an apology is not required, Management should advise the Bargaining Unit of its recognition that this Arbitrator has ruled that Management did not meet its obligations under the Settlement Agreement, and that the terms of the Settlement Agreement have been covered with Management personnel at the facility. The Arbitrator finds that a cease and desist order would not be appropriate because, not only is this Arbitrator averse to cease and desist orders in general, but because any other similar occurrence must be considered on its particular facts.

At the Hearing, the Arbitrator advised the Parties that if she found that the matter of official time was properly part of this grievance arbitration (which she did by Award dated July 17, 2007) and that the Agency violated the Master Agreement as to the number of hours allocated to the Union for preparation of this case and that a remedy is due, she would remand to the Parties to determine what the appropriate remedy is with respect to official time.

CONCLUSION

This Arbitrator appreciates the difficult situation faced by the Agency in trying to safeguard the health and safety of its employees in the midst of devious and potentially violent inmates who do not respect law and civility, the Correctional Officers or each other. However, the terms of the Settlement Agreement clearly state that "all other options to vacate posts" are to be considered prior to vacating the Visiting Room 3 post, and that did not occur on September 16, 2006.

For the reasons here and above set forth:

AWARD

The grievance is sustained in part. The Agency violated Article 11 of the Master Agreement when it allocated the hours in question to the Union for preparation of this grievance. This matter is remanded to the Parties to determine what would be an appropriate remedy for the Agency's violations of Article 11.

In light of her finding that the Agency violated the Settlement Agreement dated January 5, 2005, this Arbitrator does not reach the issue of whether the Agency violated Article 27, Section A of the Master Agreement when it vacated the Visiting Room No. 3 position on September 16, 2006.

The Agency violated the Settlement Agreement dated January 5, 2005, when it vacated the Visiting Room No. 3 position on September 16, 2006. The Agency shall post a copy of the Settlement Agreement to ensure that all employees are aware of the commitments made by the Parties. Further, although an apology is not required, Management shall advise the Bargaining Unit of its recognition that this Arbitrator has ruled that Management did not meet its obligations under the Settlement Agreement, and that the terms of the Settlement Agreement have been

covered with Management personnel at the facility. The Arbitrator finds that a cease and desist order would not be appropriate not only because this Arbitrator is averse to cease and desist orders in general, but because any other similar occurrence must be considered on its particular facts.

The Arbitrator shall retain jurisdiction for the interpretation of the remedy herein.

Signed this 31st day
of December, 2007, in
Houston, Texas.

_____
Diane Dunham Massey
Arbitrator