

IN THE MATTER OF ARBITRATION BETWEEN

U. S. Department of Justice ) Tucson, Arizona  
Federal Bureau of Prisons  
Federal Correctional Complex, Tucson  
(Employer)

And

American Federation of Government ) Tucson, Arizona  
Employees, Local 3955  
(Union)

Date of Hearing ) July 30, 2008

Date for Briefs ) October 3, 2008

Arbitrator

Richard L. Horn

For the Agency

William D. Branch, L/M Relations Specialist

Appearances for the Agency

Connee Thygerson, Employee Svrs. Manager  
Jonathan Barnhart, Captain  
Ricardo E. Chavez, Warden

For the Union

Michael T. Pazder, Esq.

Appearances for the Union

Paul Morelli, Grievant  
Randy Lance, Lock & Security Specialist  
Mike Moriarty, Safety Specialist  
Alvaro Escobedo, Security Officer (Weapons)

In the Matter of Arbitration  
between

U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

## **BACKGROUND**

**The parties to this Agreement had a relationship for many years. The facility has approximately twenty (20) Lieutenants, and approximately two hundred (200) Correctional Officers in the Bargain Unit.**

## **THRESHOLD ISSUES BY THE AGENCY**

**Is the grievance barred from arbitration under 5 USC, 7121 C (5), If so what shall be the remedy?**

**Was the grievance filed timely in accordance with Article 31, Section d., if not, what shall be the remedy?**

**Did the Union provide the Agency with sufficient notice of what policies, regulations, and laws were allegedly violated and how were they violated? If not, what shall be the remedy?**

## **ISSUES**

**Were the grievants entitled to be paid a hazard pay differential for working with or in close proximity to explosive material in accordance with applicable law? If so, what shall be the remedy?**

**Has the Agency failed to follow applicable safety requirements or storage of hazardous materials in violation of the Master Agreement and Federal Law? If so, what shall be the remedy?**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**RELEVANT LANGUAGE**

**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 6 USC, Section 7106.

1. to determine the mission, budget, organization, number of employees, and 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) any other appropriate source; and
  - d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

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

1. at the election of the Agency, on the numbers, types, and grades of employees or positions assigned to any organizational sub-division, work project, or tour of duty, or the technology, methods, and means of performing work;
2. procedures which Management officials of the Agency will observe 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.

**Section c.** The preferred practice whenever Bureau of Prisons positions are announced under **Section a (2) (c).** above is to select from within the Bureau from

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**all qualified applicants. This shall not be construed as limiting the recruiting function or any other rights of the Employer.**

**In accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance.**

### **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 affects 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 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**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

with all applicable federal laws, standards, codes, regulations, and executive orders.

**Section b.** The parties agree that participation in and monitoring of safety programs by the Union is essential to the success of these programs. The Union recognizes that the Employer employs Safety and Health Specialists whose primary function is to oversee the safety and health programs at each institution.

1. it is understood by the parties that the Employer has the responsibility for providing information and training on health and safety issues. The Union at the appropriate level will have the opportunity to provide input into any safety programs or policy development; and
2. although the Employer employs Health and Safety Specialists whose primary function is to oversee the health and safety programs at each facility, representatives of the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), Centers for Disease Control (CDC), and other regulatory and enforcement agencies that have a primary function of administering the laws, rules, regulations, codes, standards, and executive orders related to health and safety matters are the recognized authorities when issues involving health and safety are raised.

**Section c.** The Employer will establish a safety and health committee at each institution. The committee will, in an advisory capacity to the Chief Executive Officer, and be composed of equal numbers of representatives of the Employer and the Union. The primary duties of the safety and health committee shall be to:

1. develop and recommend specific goals and objectives designed to reduce the number and severity of on-the-job accidents and occupational illnesses;
2. review reports of on-the-job accidents, injuries and occupational illnesses, to identify specific hazards and adverse trends, and to formulate specific recommendations to prevent recurrences;
3. review findings of inspections, audits, and program reviews to assist in the formulation of recommendations for corrective action; and
4. review plans for abating hazards.

Safety and health committees will meet quarterly. More frequent

meetings may be held at the discretion of the Chief Executive Officer.

Written minutes of each meeting will be maintained and made available to all committee members. All information necessary for the effective conduct of the safety and health committee will be made available to the committee.

**Section d.** Official time will be granted to the Union representative(s) to attend the safety and health committee meetings and to participate in any health and safety activity under laws, rules, regulations, executive orders, and this Agreement.

1. any costs incurred to participate in any local area meetings or activities references in this article will be reimbursed by the Employer in accordance with the Federal Travel Regulations.

**Section e.** Unsafe and unhealthful conditions reported to the Employer by the Union, or employees will be promptly investigated. Any findings from said investigations relating to safety and health conditions will be provided to the Union, in writing, upon request. No employee will be subject to restraint, interference, coercion, discrimination, or reprisal for making a report and/or complaint to any outside health/safety organization and/or the Agency.

**Section f.** When a safety and health inspection is being conducted by an outside agency such as OSHA, the National Institution for Occupational Safety and Health (NIOSH), or a private contractor, the Union will be invited and encouraged to have a local representative participate.

**Section g.** Material Safety Data Sheets for all hazardous materials in use will be maintained in the Safety Office.

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**Section h.** If an employee is injured in the performance of duty, the employee will be informed of the procedures to be followed for filing a claim for benefits under the Federal Employees' Compensation Act. The employee will be informed of the leave options available, including sick leave, annual leave, leave without pay, etc.

1. When an employee is injured, the Employer will provide him/her with the appropriate forms for filing a claim for benefits under the Federal Employees' Compensation Act;
2. At the employee's request, a representative of the Employer will assist the employee with filing for benefits under the Federal Employees Compensation Act; and
3. When an employee files a claim under the Federal Employees Compensation Act, the Employer will review the forms to ensure that they are properly completed and will file these forms, as appropriate, in a timely manner [no later than ten (10) working days after receipt, in accordance with 20 CFR 10.102]

**Section i.** Employees will be provided:

1. emergency diagnosis and first aid treatment of injury or illness, as necessary, that occurs or is aggravated during working hours and that are within the competence of the professional staff and facilities of the health services unit;
2. administration of treatment and medications, furnished by the employees and proscribed in writing for them by their personal physicians, at the discretion of the Chief Medical Officer; and
3. preventive services within the competence of the professional health staff at their discretion.

**Section j.** Repetitive requests by employees for medical records may be denied unless the file has changed since the last request.

**Section k.** When an employee receives inoculations for hepatitis, the Employer will test the employee to determine if the inoculation had the desired effect. If the desired effect was not achieved, the employee will be treated again, at the employee's request.

## ARTICLE 31 – GRIEVANCE PROCEDURE

**Section a.** The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

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

1. after the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representatives of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect not to participate;
2. if an employee files a grievance without the assistance of the Union, the Union will be given a copy of the grievance within two (2) working days after it is filed. After the Employer gives a written response to the employee, the Employer will provide a copy to the Union within two (2) working days. All responses to grievances will be in writing;
3. the Union has the right to be notified and given an opportunity to be present during any settlement or adjustment of any grievance; and
4. the Union has a right to file a grievance on behalf of any employee or group of employees.

**Section d.** Grievances must be filed within forty(40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955



occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

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

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

**Section f.** Formal grievances must be filed on Bureau of Prisons “Formal Grievance” forms and must be signed by the grievant or the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, through the Employer’s forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

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;
3. when filing a grievance against a Regional Director, the grievance will be filed with the Director of the Bureau of Prisons, or designee;
4. in cases of violations occurring at this national level, only the President of the Council of Prison Locals or designee may file such a grievance. This

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**grievance must be filed with the Chief, Labor Relations and Security Branch, Central office; and**

- 5. Grievances filed by the Employer must be filed with a corresponding Union official.**

**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.**

**Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) or two (2) ways:**

- 1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy ?, or**
- 2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.**

**Section i. The employees and his/her representative will be allowed a reasonable amount of official time in accordance with Article 11 to assist an employee in the grievance process.**

### **ARTICLE 32 – ARBITRATION**

**Section a. In order to invoke arbitration, the party seeking to have an issue**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

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

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

1. a list of arbitrators will be requested utilizing the FMCS Form R43;
2. the parties shall list on the request any special requirements/qualifications, such as specialized experience or geographical restrictions;
3. they shall, within five (5) working days 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;
4. if they do not agree upon one of the listed arbitrators from the second panel, then the parties must alternately strike one (1) name from this list until one (1) name remains; and
5. the arbitrator selected shall be instructed to offer five (5) dates for a hearing.

**Section c.** The grieving party will be able to unilaterally select an arbitrator if the other party refused to participate, only if the grieving party:

1. gives written notification to the HRM of its intent to unilaterally select an arbitrator; and
2. allows a time period of two (2) workdays for the HRM to participate in the selection after the written notification.

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**Section d. The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.**

- 1. The Employer will pay travel and per diem expenses for:**
  - a. employee witnesses who have been transferred away from the location where the grievance arose;**
  - b. employee witnesses who were temporarily assigned to the location where the grievable action occurred; and**
  - c. employee witnesses where the parties mutually agree to hold the hearing at a site outside the commuting area;**
- 2. the Employer will determine the location of the arbitration hearing; however, in the event that the Union, in good faith, advised the Employer that the designated location is unacceptable, the hearing will then be held at a mutually agreed neutral site; and**
- 3. in Council-level grievances, the Employer will determine the location of the hearing. The Employer will pay the travel and per diem expenses for the Union witnesses and one (1) Council representative. The Employer will not be responsible for the travel and per diem expenses of more than five (5) Union witnesses unless mutually agreeable to the parties or ordered by the arbitrator.**

**Section e. The arbitration hearing will be held during regular day shift hours.**

**Monday through Friday. Grievant(s), witnesses, and representatives will be on official time when attending the hearing. When necessary to accomplish this procedure, these individuals will be temporarily assigned to the regular day shift hours. No days off adjustments will be made for any Union witnesses unless Management adjusts the days off for any of their witnesses.**

- 1. the Union is entitled to the same number of representatives as the Agency during the arbitration hearing. If any of these representatives are Bureau of Prisons employees, they will be on official time;**
- 2. the Union is entitled to have one (1) observer in attendance at the hearing. If Management has an observer, the Union's observer will be on official time.**

**Section f. The Union and the Agency will exchange initial witness lists no later**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration.

**Section g.** The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

**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

**Section i.** A verbatim transcript of the arbitration will be made when requested by either party, the expense of which shall be borne by the requesting party. If the arbitrator requests a copy, the cost of the arbitrator's copy will be borne equally by both parties. If both parties request a transcript, the cost shall be shared equally including the cost of the arbitrator's copy.

**5 U.S.C. 5545(d) – Hazard pay differentials**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**(d) The Office shall establish a schedule or schedules of pay differentials for duty involving unusual physical hardship or hazards, and for any hardship or hazard related to asbestos, such differentials shall be determined by applying occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970. Under such regulations as the Office may proscribe, and for such minimum periods as it determines appropriate, an employee to whom chapter 51 and subchapter III of chapter 53 of this title applies is entitled to be paid the appropriate differential for any period in which he is subjected to physical hardship or hazard not usually involved in carrying out the duties of his position. However, the pay differential ---**

- (1) does not apply to an employee in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties thereof, except in such circumstances as the Office may by regulation prescribe; and**
- (2) may not exceed an amount equal to 25 percent (%) of the rate of basic pay applicable to the employee.**

### **AGENCY'S POSITION**

**The U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary at Tucson, Arizona (the "Agency") identified procedural three issues that the Agency maintained should result in a denial of the grievance: 1) whether United States Code (U.S.C.) §7121 c (5) bars the arbitrability of this grievance regarding job classification and pay rate; 2) whether the grievance was filed in a timely manner in accordance with Article 31, Section d. of the CBA; and 3) whether the Union provided the Agency with sufficient**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**notice of the alleged violations. In addition to the procedural issues, the substantive issue of this grievance according to the Agency was whether the agency violated the CBA and the U.S.C. regarding the pay status 4% differential rate, and if so, what shall be the remedy.**

**On the first issue regarding arbitrability of classification and pay rate, the union has requested an arbitration ruling on whether employees classified as Lock and Security Specialists are eligible for a rate of pay with a Hazard Pay Differential. Correspondence from Agency Manager Thygerson explained that hazardous duty had already been considered when the pay rate was established for the Lock and Security Specialist classification, and therefore no additional hazard pay differential was in order. According to the Agency, the Union's options for pursuing redress for this type of issue would appropriately have been either through Agency Director Lappin or an Agency desk audit or the Office of Personnel Management. The classification of positions, claims the Agency, is arbitrable only when resulting in employees' loss of pay or grade. Since there was no such loss among the Lock and Security Specialists, the hazard pay differential is not arbitrable and the Agency requests that the grievance be denied.**

**The timeliness issue of the grievance is covered by Article 31, Section d., of the CBA, which states that grievances must be filed within forty calendar days of the date of a grievable occurrence. The Union's grievance claims the alleged violation occurred on May 14, 2007 and continuously thereafter. The Union, however, failed to file the grievance until September 21, 2007, more than one hundred and twenty days after the Union became aware of the alleged grievable occurrence. This timeliness issue was cited in the Agency's**

**response and denial of the grievance, and the Agency requests that the grievance be dismissed by the Arbitration for the Union's failure to abide by the terms of the CBA.**

**Regarding the Union's failure to provide sufficient notice of alleged violations to the Agency, the CBA requires grievances to be filed using the Bureau of Prisons' formal grievance form. This form includes a section for the grieving party to specifically identify how a directive, executive order or statute was violated. The Union failed to detail specific violations, and instead cited statutes that were removed in 2003 and made only general claims about violations. Also contrary to provisions in the CBA stating that modifications to a written grievance must be done only with mutual agreement of the parties, the Union made several attempts to modify its written grievance without obtaining Agency agreement to do so. The changes sought by the Union included requesting remedies of payment of attorney fees and an increased pay rate differential from the original 4% to 25%, and providing testimony on statutes not cited in the written grievance. The Agency claims that these procedural defects on the part of the Union should result in a denial of the grievance.**

**Should the procedural issues not result in a denial of the grievance by the Arbitrator, then the Union's failure to prove any Agency violation of laws, rules or regulations will uphold the Agency's position that the grievance be denied. The Agency testified regarding their numerous procedures for audits, reviews and accreditation. Specifically, testimony was given regarding the procedures for storing flash bangs that is in compliance with Agency policy and operations throughout the Bureau of Prisons. The Union's disagreement with position classification and procedures for storing flash bangs at USP Tucson does not constitute grounds for a grievance since no violation occurred of any**

**In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955**



**statutes, policies or the CBA. The Agency therefore requests of the Arbitrator that the Union's grievance and the requested remedies be denied.**

**UNION'S POSITION**

**The American Federation of Government Employees (AFGE), Local 3955 (the "Union") filed a grievance on behalf of bargaining unit employees at the U.S. Penitentiary in Tucson, Arizona, Federal Bureau of Prisons (the "Agency"). The parties, unable to reach a joint decision on the exact issues before the Arbitrator, agreed to allow the Arbitrator to make this determination consistent with the terms of the CBA.**

**According to the Union, the grievance arose from the Agency's improper and unsafe storage of dangerous materials resulting in an unsafe work environment for Lock & Security Specialists, and the Agency's denial of a hazardous pay differential for these employees. The Union proposed the following two issues for consideration by the Arbitrator: 1) whether the grievants were entitled to a hazard pay differential for their work with or near explosive or incendiary materials and if so, the appropriate remedy; and 2) whether the Agency violated the CBA and Federal law by failing to comply with safety requirements for storage of hazardous materials and if so, the appropriate remedy.**

**The grievance was filed by R. Lance, P. Morelli and P. Whitfield, all long-term bargaining unit employees working as Lock & Security Specialists. Whitfield retired about the time of the arbitration hearing and a new employee, A. Escobedo, had been employed as a Lock & Security Specialist. Testimony was given by Grievant Lance recounting the events that led to the filing of the grievance. In late 2006, Lance recalled unloading a**

shipment of explosive devices from a hazardous cargo truck, at which time he discussed the shipment contents with the truck driver. This incident first alerted Lance to the dangerous nature of the materials that he was responsible for handling and storing. Grievants Lance and Morelli then began their own research about these explosive devices, including federal regulations for storage of such devices. In their research, the grievants also found information indicating that they might be eligible for extra hazard pay for working with or near the explosive materials. Grievant Morelli discussed these matters verbally with Agency Manager Thygerson on or about May 13, 2007, and grievants Morelli and Lance followed up on the same issues with a letter to Thygerson and copies to Warden Chavez and Safety Manager Smith. The letter raised the issue of hazard pay, but mistakenly quoted the rate at 4%, and the letter also addressed the grievants' safety concerns about the handling and storage of the explosive materials.

In a letter dated May 30, 2007, Manager Thygerson responded to the grievants' May 14<sup>th</sup> letter, and Thygerson stated that a hazard pay differential was not in order because the hazardous work had already been taken into account in the pay rate for the Lock & Security Specialist job classification. Thygerson's letter did not address the safety concerns raised in the May 14<sup>th</sup> letter. On June 8, 2004, Grievant Morelli, with assistance from Lance, wrote a second letter to Thygerson, and again copied the Warden and Safety Specialist. This letter addressed in more detail a justification for hazard pay and concerns about the lack of compliance with federal regulations for storage of the explosive devices. Grievant Morelli received no response to the June 8<sup>th</sup> letter, but Morelli pursued efforts to set up a meeting with Warden Chavez to discuss the issues contained in the letter. A

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

meeting was finally held on September 20, 2007 with grievants Lance and Morelli and a team of Agency managers, including Warden Chavez. At the meeting, Morelli asked Warden Chavez to request the ATF, a higher-level agency to review and inspect the storage methods for explosive devices at the Tucson Penitentiary for compliance with federal regulations. Chavez denied the request.

The next day, September 21, 2007, a formal grievance was filed on behalf of grievants Morelli, Lance and Whitfield. On October 19, 2007, Warden Chavez responded by denying the grievance procedurally as untimely and lacking required specificity, as well as denying the merits of the grievance.

The Union's argument included a response to three procedural issues raised by the Agency. The Agency's first issue was that the grievance should be denied, citing Federal statute 5 U.S.C. §7121 (c)(5) containing language that position classification grievances which do not result in a reduction of pay or grade are not arbitrable. The Union responded that the grievance addressed not only the hazard pay differential, but also the health and safety issues created by improper storage of the explosive devices. Furthermore, the Union explained that the request for hazard pay differential was in no way a matter of position classification. For these reasons, the Union claims that statute cited does not bar this grievance from arbitration.

Secondly, the Agency raised a procedural issue of timeliness claiming that the grievance was filed more than the CBA's maximum of forty days from the date of the alleged grievable occurrence or awareness of the occurrence. The Union argued that from the time the grievants first became aware of the potential hazards of handling and storage

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**of the explosive devices and eligibility for hazard pay, the grievants embarked upon ongoing efforts to informally resolve their issues with Agency management. These efforts were consistent with the process outlined in the CBA. It was not until after the meeting with Agency management on September 20, 2007 that the grievants concluded that the ongoing informal resolution process had reached a stalemate. The written grievance was filed the following day. The Union also explained that the violations for which the Union was seeking redress in the grievance were of an ongoing, continuous nature, rather than a one-time occurrence. The forty day period would not apply in this case from any one specific date. The Union concluded that the grievance was filed in a timely manner.**

**The third procedural issue raised by the Agency was that the Union failed to provide sufficient notice of the exact violations of policies, regulations and laws. The Union admits to some errors in typing and legal citations, but insists that the lengthy process of informal discussions and meetings addressing the issues contained in the letters and the written grievance, gave complete clarity and opportunity to question any uncertainty about the alleged violations. The Union maintains there was no true basis for this procedural objection and the merits of the grievance should therefore be decided by the Arbitrator.**

**The Union claims that the Agency has violated federal laws by failing to abide by federal regulations governing proper storage of explosive materials and has violated the CBA by failing to maintain health and safety standards for employees. Grievant Lance gave detailed testimony about the federal regulations governing storage of explosive devices and explained how the practice for storing these devices at the Tucson Penitentiary differed from the federal regulations. Lance explained that the Agency was following the policy of**

**the Bureau of Prisons (BOP), but the BOP policy was faulty in its classification of the explosive devices and consequently the devices are being stored in conditions appropriate for non-hazardous rather than hazardous materials. Lance explained the potential dangers of the existing storage practices for explosive devices at Tucson. The Union asserted that the Agency is subject to enforcement of the federal ATF regulations for storage of explosive materials regardless of BOP policy, and yet the Agency had refused to allow ATF to inspect their armory at the Tucson Penitentiary.**

**The Agency defended their storage practices by referring to their successful review process and accreditation of the Tucson Penitentiary by the American Correctional Association (ACA). The Union claims, however, and Agency witnesses admitted that the ACA review may indeed have not included checking compliance with federal storage requirements for explosive materials.**

**The Union purports that the failure of the Agency to pursue providing the safest storage of explosive devices, as required by federal regulations, was also a violation under the CBA of the Agency's obligation to minimize risks to the health and safety of the employees. Article 27 of the CBA recognizes the inherent dangerous environment in prisons, but requires the Agency to take necessary actions to reduce the risks to the lowest level possible.**

**The Union requests the Arbitrator to address the Agency's violations of federal law and the CBA by ordering the Agency to comply with the federal storage regulations and fulfill the health and safety obligations in Article 27 of the CBA.**

**Eligibility for a hazard pay differential was the final issue addressed by the Grievants. According to the Union, the Lock & Security Specialists are entitled to receive a hazard pay differential for having been required to work with explosive devices in an unsafe manner and under unnecessarily hazardous conditions. The applicable regulations state that an employee is eligible for hazard pay if the position classification does not take into account the degree of hazard involved in the employee's duties and that the differential pay may not exceed 25 percent of the employee's basic pay rate.**

**Lock & Security Specialists Lance, Morelli and Escobedo testified they had not received any training on handling the explosive devices and that this aspect of their work was not included in their position descriptions. Considerable testimony was given defending the Union's position that subjecting the employees to the hazardous conditions while handling the explosive devices would not have reasonably been expected to be part of their normal job duties as Lock & Safety Specialists. Despite the Agency's claim that the hazardous duties were taken into account in the position classification, the Union concluded this was not the case.**

**The Union also addressed the requested rate of hazard pay differential which was first requested by the grievants at 4%, but later changed to 25 %. The grievants were mistaken in originally citing a 4% differential that applied to prevailing wage employees, but this was later corrected to citing the correct statute and regulation with the 25% hazard pay differential that would apply in this instance.**

**The Union concluded by requesting that the grievance be sustained in its entirety and that the following remedies be granted: 1) Agency compliance with federal regulations**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

for storage of explosive materials; 2) Agency adherence to Article 27 of the CBA; 3) award for back pay of the hazardous pay differential, pursuant to the Back Pay Act, for grievants; and 4) all other appropriate relief to grievants as determined by the Arbitrator. The Union also requested that if the grievance is sustained in whole or in part, the Arbitrator retain jurisdiction for resolving questions of attorneys fees.

### **DISCUSSION ON THRESHOLD ISSUES BY THE AGENCY**

Is the grievance barred from arbitration under 5 USC, 7121 C (5)? The Agency took the position that the grievance should be denied because the grievance is asking for a change in the employees' classifications. 5 USC, 7121 C (5) excludes grievances regarding "the classification of any position which does not result in the reduction in grade or pay of an employee" for the right to go to arbitration. During the hearing testimony brought the fact that the grievance requested a hazard pay differential and not a change in the classification of the employees. The grievant raised an entitlement to a hazard pay differential under 5 USC 5545(d) and 5 CFR 550.904. Accordingly, an employee can only be entitled to the hazard pay differential, if the hazardous pay has not been taken into account in the classification of his/her position. Ms. Thygerson stated that the employees' classification contained language covering the handling of hazardous material, but upon further study, I cannot find any reference to the handling of hazardous materials in the classification.

Was the grievance filed timely in accordance with Article 31, Section d? The

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

Agency took the position that the grievance was not timely, because “the Master Agreement does require that grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence or within forty (40) days of when the party became aware of the grievable occurrence. The Union however cited Article 31, Section b., wherein the Master Agreement also requires that both parties “will always attempt informal resolution at the lowest appropriate lever before filing a formal grievance.” It is very evident to this Arbitrator the Union made many attempts to resolve this situation starting with the first contact of Ms. Thygerson on May 13, 2007, May 14, 2007, with a letter to her, and her response that the issue being discussed was contained in their classifications. On June 8, 2007 the grievants sent a letter to Ms. Thygerson and Warden Chavez and received no response. The delay by the Agency in responding to requests to Warden Chavez, for a meeting is the fault of the Agency and not the Union. Waiver of time limits as in Elkouri & Elkouri –How Arbitration Works (Sixth Edition), Waiver to Time Limits:

(Consolidation Coal Company/UMW, Local1785 , 91 LA 1011 (Stoaltenberg, 1988); Employer may not assert untimeliness of grievance as defense to arbitration, where it failed to serve notice that it would oppose grievance on procedural grounds, contract requires disclosure of all facts to be relied upon during arbitration, and facts on which assertion is based were available to employer during processing of grievance.)

(Hayes International Corporation, 79 LA 1000, Valtin, 1979); Employer failure to raise untimeliness of grievance during lower steps of grievance procedure operates as waiver of issue at arbitration level. Case on its merits relates to employer’s plea that it must be forgiven for admitted violation of collective bargaining agreement’s seniority provisions and reliance on that vary agreements to interpose procedural barrier amounts to inconsistency.)

In my estimation, the delay by the Agency serves as a waiver of the time limits contained in the Collective Bargaining Agreements. On September 20, 2007, the

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955



**grievants met with Warden Chavez, Warden Winn, Associate Warden Roy, Associate Warden Szafir, and Acting Captain Mendez and attempted to discuss the issue again to no avail. The next day the Union filed a formal grievance.**

**Did the Union provide the Agency with sufficient notice of what policies, regulations, and laws were allegedly violated and how were they violated? The Agency took the position the grievance is procedurally flawed due to a failure to provide sufficient notice to the Agency of the violations raised, and therefore the grievance should be dismissed on procedural grounds. The Union, however, stated that in a letter to Connie Thygerson, Warden Chavez, and the Safety Manager on June 8, 2007 stated the precise issues, and alleged violations the Agency was in fault of the Master Agreement. In his letter of June 8 2007 Mr. Morelli cited 5 USC 5545 and 5 CFR 550.904. The grievant also raised an issue of storage, citing ATF website, 27 CFR Part 55, sub-paragraph k, and received no response. During the meeting of September 20, 2007, Mr. Morelli outlined all the information as to the pay differential, and safety violations he felt the Agency was in error and asked questions of everyone in attendance, with no response. In the opinion of this arbitrator, just because the Bureau of Prison's audit of the facility found no violations as to the storage of hazards materials, doesn't mean hazard materials are storage properly.**

#### **DECISION ON THRESHOLD ISSUES BY THE AGENCY**

**The Arbitrator denies all three (3) Threshold Issuers raised by the Agency.**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

## **DISCUSSION ON THE ISSUES**

**Were the grievants entitled to be paid a hazard pay differential for working with, or in close proximity, to explosive material in accordance with applicable law?**

**Has the Agency failed to follow applicable safety requirements or storage of hazardous materials in violation of the Master Agreement and Federal Law?**

**The two (2) issues above really go hand –in-hand and will be discussed together. The Agency has denied the claim of the grievants to be paid for the working with, or in close proximity to explosive materials, and further states that because it had numerous inspections by the Bureau of Prisons’ audits, it was in compliance with all Federal Laws and thus, should not be required to pay a differential pay for this work.**

**The Union, however, states that the three (3) individuals (Randy Lance, Paul Morelli and Paul Whitfield), and now Alvaro Escobedo should be paid the differential pay for the handling and storage of these materials. The three (3) individuals during the hearing, all testified that they are required to handle, transport, and store explosive and incendiary devices as part of their duties. They also testified that these devices primarily include stun munitions, or flash bangs, as well as tactical blast strips. Testimony by Randy Lance during the hearing explained the classifications of these explosive as 1.1 and 1.3 with 1.1 the more explosive. He further testified since the grievants were not trained by the Bureau of Prisons in the handling, transporting and storage of these devices, they were in violation of Federal Laws. Mr. Morelli and Mr. Lance testified that their job descriptions do not address their respective duties of handling, transporting, or storage of**

**explosive materials. During the hearing, and under direct examination, Mr. Lance was questioned concerning all items in his job description, and as stated, the reference to equipment does not take in to consideration the stun munitions, because chemical munitions were listed separately, and explosive munitions were not listed, and are considered a serious hazard. Testimony from individuals during the hearing revealed that serious injury or death could occur in the handling and storage of these hazardous materials. The Union listed, Exhibits #12, 13, and 14 to provide information regarding the hazardous nature of these explosive devises.**

**The Agency refutes Mr. Lance's explanation and referred him to the manufactures' definition that stun munitions are "less than lethal stun munitions." Mr. Lance then referred them back to Exhibits #12, 13, and 14, wherein, the Material Safety Data Sheets provide crucial information about these devices. At the bottom of each one of those data sheets, for the Tactical Blast Strips, Tactical Blast Stun Munitions and Magnum Ultra Flash Stun Munitions there is a warning in bold that states, "WARNING THIS MUNITION IS DANGEROUS." The warning then states "this explosive munitions can cause serious injury or death, if not properly handled. Again, Mr. Lance explained that the problem is with the improper storage of these materials that makes them lethal. He referred to where in the armory where the munitions are stored, there is improper electrical wiring, and heated tanks. He stated, we have several hundred firearms, which if a weapon did discharge, the current container would not repel the projectile, and could cause a mass detonation. During the discussion with Mr. Lance, questions were asked**

**concerning the storage of these explosive material in their present containers. Mr. Lance said he received information to the fact that presently we are storing eighty (80) per container and the President of ALS Technologies said we should only store eight (8) per container, and at present, storage of eighty (80) per container would result in a mass detonation. Mr. Lance went on to point out that on the door to the armory there are placards that identify the types of hazards contained inside, which include 1.1 and 1.3 explosives. Mr. Moriarty, a Safety Specialist, testified that the flash bangs and thunder strips that they keep in the armory are explosive devices. He went on to testify that 1.1 class explosive is a mass detonation device and a 1.3 class explosive is a mass fire device. The grievants asked Warden Chavez many times about the storage of these materials, and if they met Federal Laws about proper storage of hazards devices. The only answer they got, was the Warden felt due to Bureau of Prisons' audits, they were in compliance! The grievants asked Warden Chavez if they could, or if he would, ask AFT to do a formal investigation concerning the proper storage and handling of these devices? He refused! Warden Chavez acknowledged that he wasn't aware of whether the ACA actually does a review of the storage of explosive materials to determine if they comply with Federal regulations.**

**The arbitrator refers the Agency to decisions by other arbitrators in similar cases involving hazardous duties performed by employees requesting hazardous differential pay:**

- 1. 44 F.L.R.A. 1118 \* 1992 FLRA LEXIS 157, \*\*; 44flra No.91 – U. S. Department of the Navy Naval Surface Warfare Center, Dahlgren, Virginia (Agency) and AFGE, Local 2096 (Union) O-AR-2139; Federal Labor Relations Authority. (The arbitrator found that work performed was “irregular or Intermittent”, and thus entitled them to the differential pay for that period.)**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

2. **54 F.L.R.A. 1117, \*, 1998 FLRA LEXIS 200, \*\*, 54 FLRA No. 98 – U. S. Department of the Army Alaska (Agency) and AFGE, Local 1834 (Union) Case No. O-AR-2911; Federal Labor Relations Authority.  
(The arbitrator found the grievants worked near and around explosive materials, which constituted a hazardous work environment)**
3. **19 F.L.R.A. 300, \*; 1985 FLRA LEXIS 280, \*\*, 19 FLRA No. 42 – U. S. Department of Labor (Agency) and National Council of Field Labor Locals, AFGE, AFL-CIO (Union), Case No. 894.  
(The arbitrator found that work performed was “irregular or intermittent”, and thus entitled them to the differential pay for that period.)**

**The arbitrator feels the Agency is in violation of Article 27, Section a. -**

**wherein, there are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons. The first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment. With respect to the first, the Agency agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. With respect to the second, the Agency 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. The Warden, when he denied the informal requests by the grievants, to have an outside agency investigate and give a opinion on the proper storage and handling of explosive devices, violated Article 27, Section a. of the Collective Bargaining Agreement.**

### **CONCLUSION**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**The key to answering “were the grievants entitled to be paid a hazard pay differential for working with or in close proximity to explosive materials in accordance with applicable law?” 5 U.S.C. 5545(d) – Hazard Pay Differentials imposes two (2) requirements that must be met for an award of Hazards Duty Pay:**

- 1. the hazardous duty performed by the employee must be irregular or intermittent;**
- 2. the hazardous duty has not been taken into account in establishing the grade classification of the employee(s) position.**

**In all the above discussion by the participants in the arbitration hearing, it became clear to this arbitrator that the position description did not include duties that were being performed by the grievants as to the hazardous nature of their jobs. The Agency contended that the job classification contained the language for them to perform the hazardous duties, but in my estimation it did not. The Agency was well aware of the Union’s position, as to differential hazardous pay and the improper storage, transportation, and handling of these hazardous materials, during the informal discussions with Connie Thygerson, Warden Chavez, and many others, before a formal grievance was filed.**

**With reference to the error by the Union in quoting a 4% hazard pay differential v.s. the correct amount which is 25% hazard pay differential, the Union provided in Union Exhibits #2, 3, and 4, wherein, the discussion on hazard pay differential was discussed with Employee service Manager, Connie Thygerson, three (3) different times starting with the May 14<sup>th</sup> letter, the May 30<sup>th</sup> letter, and the June 8<sup>th</sup>, 2007 letter. The question is mute because if the employees are entitled to hazard pay differential, the correct amount is 25%**

as required by the Back Pay Act. I'm sure Connie Thygerson was well aware of the correct amount, but never discussed it with the Union, because the Agency was denying the request, for reasons stated by Warden Chavez.

Captain Barnhart testified that he has no knowledge of whether ACA specifically reviews any federal storage requirements for explosive devices, or whether they have the authority to enforce any such regulations.

It was the duty of the Warden Chavez to research all applicable law as to the proper storage, handling and transportation of these hazard materials and not to just deny the grievance without any reason other than relying on the Bureau of Prison's audits which never dealt with this issue. For all the above reasons I have discussed, I feel the facility has violated the Collective Bargaining Agreement and Federal Laws when it failed to properly store explosive materials in its armory, and violated the Collective Bargaining Agreement again, when it did not properly pay employees who had the responsibility to store, handle, and transport these explosive devices. Warden Chavez could have avoided this arbitration by agreeing to have the Agency responsible for explosive devices, the ATF, do an audit of the armory.

### AWARD

The Arbitrator sustains the grievance, and awards back-pay of the differential pay allowed under the Back Pay Act, 5 U.S.C 5596 starting from the time the grievance was filed, (September 21, 2007). The Arbitrator also finds the facility is in violation of Federal

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955

**Laws concerning the storage, handling and transporting of explosive devices, and orders  
the facility to comply with these guidelines.**

**The Arbitrator will retain jurisdiction for thirty (30) days.**

In the Matter of Arbitration  
between  
U. S. Department of Justice – Bureau of Prisons  
United States Penitentiary, Tucson, Arizona  
AFGE, Local 3955