

**BEFORE MARTIN HENNER  
ARBITRATOR**

<b>IN THE MATTER OF AN ARBITRATION BETWEEN</b>	)	<b>FMCS No. 09-53111</b>
	)	
<b>COUNCIL OF PRISON LOCALS</b>	)	<b>OPINION</b>
<b>THE AMERICAN FEDERATION OF GOVERNMENT</b>	)	<b>and</b>
<b>EMPLOYEES, LOCAL No. 3979</b>	)	<b>AWARD</b>
	)	
<b>and</b>	)	<b>DANNY PAYNE</b>
	)	<b>LEAVE SCHEDULING</b>
<b>U.S. DEPARTMENT OF JUSTICE, FEDERAL</b>	)	<b>GRIEVANCE</b>
<b>BUREAU OF PRISONS, FEDERAL CORRECTIONAL</b>	)	
<b>INSTITUTION at SHERIDAN, OREGON</b>	)	
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**REPRESENTING THE UNION:**

**RANDALL BOEGER  
UNION REPRESENTATIVE  
AFGE LOCAL 3979  
COUNCIL OF PRISON LOCALS**

**REPRESENTING THE AGENCY:**

**MICHAEL MARKIEWICZ  
AGENCY REPRESENTATIVE  
U.S DEPARTMENT OF JUSTICE  
BUREAU OF PRISONS**

**HEARING HELD ON:**

**NOVEMBER 18, 2009**

**AT:**

**SHERIDAN, OREGON**

**DATE OF AWARD**

**MARCH 11, 2010**

## INTRODUCTION

This arbitration arises out of a grievance filed by the Council of Prison Locals, American Federation of Government Employees, Local 3979 (Union), against the United States Department of Justice, Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon (Agency). The grievance was filed on behalf of Danny Payne, President of the Union (Grievant), on behalf of all bargaining unit members affected by the restrictions on leave scheduling imposed by the Agency.

The Union asserted that the Department had violated the parties' Master Agreement (Agreement) when it revised its leave policy for staff in its unit management teams.

Specifically, the leave policy governing unit management staff (counselors, case managers and the unit clerk/secretary) had formerly permitted two employees to schedule leave at any one time in each housing unit (or three employees at the Satellite Prison Camp, SPC). The Agency had now adopted a new policy which limited scheduled leave to only one member of a unit team at a time (or two at SPC). Briefly, in prior years, two leave slots were allowed, but now that was reduced to a single slot.

The Union asserted that such a change in a long standing leave policy violated the Agreement and the Local Supplemental Agreement, in that the change was effected without consultation with the Union and was arbitrarily made, without a justification for such a change based on needs of safety, security or mission accomplishments.

The Union further asserted that the real reason for the Agency's change in leave policy was retaliation. It was intended to punish the Union for having pursued a prior

grievance, which had alleged improper application of the Agency's leave practices, to arbitration. The Union won that arbitration, forcing the Agency to modify its practices.

When the parties were unable to come to a satisfactory resolution of the grievance, they proceeded to arbitration before the undersigned, who was selected from a panel furnished by the U.S. Federal Mediation and Conciliation Service. The matter was heard on November 18, 2009, at the Personnel Conference Training Room, Federal Correctional Institution, Sheridan, Oregon.

During the hearing, the parties stipulated that the matter was properly before the arbitrator, and all procedural prerequisites had been complied with.

The parties agreed that written briefs would be filed subsequently by the parties, with a postmark deadline of January 8, 2010. Both briefs were properly postmarked. The last brief, sent from Arizona, was received by the arbitrator on January 14, 2010, at which time the record was closed and the matter submitted for decision.

The Union was represented by Randall Boeger, Union Representative for AFGE Local 3979, and the Employer by Michael Markiewicz, Agency Representative, U.S. Department of Justice/Bureau of Prisons.

Both parties were afforded a full opportunity to offer written evidence, examine and cross examine witnesses, and submit arguments in support of their positions.

## ISSUES

Did the Agency violate the Agreement when it reduced the available slots for scheduled leave for bargaining unit employees in Unit Management?

RELEVANT CONTRACT LANGUAGE  
MASTER AGREEMENT  
Federal Bureau of Prisons and Council of Prison Locals

ARTICLE 6 - RIGHTS OF THE EMPLOYEE

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules and regulations.....

ARTICLE 19 - ANNUAL LEAVE

Section a. The Employer and the Union agree that annual leave is the right of the employee and not a privilege, and should be used by employees. All employees will be allowed utilization of their annual leave at least to the extent that annual leave carry-over will not exceed the statutory limitation for each individual. Any employee who wishes to accumulate up to the maximum, statutory carry-over will be allowed to do so. Annual leave will be scheduled as requested by employees in accordance with the provisions of this article insofar as it does not decrease the safety, security, or mission accomplishments of the organization.

Section b. All departments will use total-leave year scheduling.

1. all departments will apply the features outlined in Section I. of this article in scheduling annual leave for all bargaining unit employees unless mutually waived by the department head and the Union; and
2. in leave scheduling, both parties agree that an employee's annual leave will, whenever possible and to the greatest extent possible, begin on the first day of their workweek and end on the last day of their workweek. Both parties agree there will be times when this practice will not be feasible; however, the Employer will not arbitrarily deviate from the above practice.

Section c. Employee requests for unscheduled leave will be handled in accordance with applicable laws, rules, and regulations, including the Family and Medical Leave Act and the Family Friendly Leave Act.

1. requests for annual leave, sick leave, and/or leave without pay, for the purposes of adopting a child, will be handled in accordance with applicable laws, rules, and regulations.

Section d. Annual leave/sick leave, whichever is appropriate, should be granted to an employee in the case of death in the employee's family. A family member is defined as a spouse or Spouse's parents, son and daughter, including adopted sons or daughters and their spouses, parents, brothers and sisters and their spouses, and any individual related by blood or affinity whose close association is the equivalent of a family relationship. Annual leave may be granted to an employee to attend the funeral of a law enforcement/firefighter killed in the line of duty. Annual leave may be granted to an employee to attend the funeral of a co-worker.

Section e. In the event of a conflict between unit members as to the choice of vacation periods, individual seniority for each group of employees will be applied. Seniority in the Federal Bureau of Prisons is defined as total length of service in the Federal Bureau of Prisons. Seniority for Public Health Service (PHS) employees will be defined as the entrance date for the PHS employee being assigned to a Federal Bureau of Prisons facility. It is understood that, as the Bureau of Prisons absorbed the U.S. Public Health Service facilities located at Lexington, Kentucky and Fort Worth, Texas, agreements were made to give those PHS staff seniority for leave purposes based on their entire PHS career.

Section f. In accordance with applicable laws, rules, and regulations, the Employer may grant administrative leave or other appropriate leave during emergency situations in the local area for affected employees. These may include, but are not limited to, extreme weather conditions, serious interruptions in public transportation, and disasters such as fire, flood, or other natural phenomena. In metropolitan areas, the heads of Federal Executive Boards are responsible for the development and dissemination of special adverse weather leave notices and procedures for their locales. In areas not covered by Federal Executive Boards, the Chief Executive Officer will consider information from local, county, and/or state law enforcement officials, Department of Transportation officials, and weather services, who often disseminate information concerning hazardous traveling conditions in various localities. This information will be used in the decision process as to whether or not to grant appropriate forms of leave.

Section g. Leave must not be denied for arbitrary or capricious reasons. Denial or cancellation of leave should be based on work-related reasons. When cancellation appears to be necessary, the Employer agrees to notify the employee as far in advance as possible that his/her approved scheduled annual leave is to be canceled. The employee will be allowed to express any personal concerns. In making the decision, the Employer will consider potential disruption to the employee's family or personal financial loss.

Section h. The Employer recognizes that participation in internal Union business is a legitimate use of annual leave. The Employer will make every reasonable effort to grant leave to employees engaged in such activities.

Section i. Employees within the same department may request to trade approved annual leave periods. After an employee has been selected for transfer from his/her department/facility, such requests will not be allowed except when the employee is subject to losing annual leave at year's end. Vacated leave periods will be offered in accordance with the provisions of this article.

Section j. When annual leave periods become available by virtue of employee transfers, retirements, resignations, or other causes, these leave period(s) will be posted for interested employees in accordance with the provisions of this article.

Section k. Employees may request cancellation of scheduled annual leave. Requests for such cancellation shall be made in writing as soon as possible.

Section l. Total leave-year scheduling procedures may be negotiated locally provided that:

1. a leave committee of at least one (1) supervisor and at least one (1) Union representative, the number to be negotiated locally, will be responsible for implementing the seniority requirements of this article regarding total leave-year scheduling; and
2. after considering the views and input of the Union, the Employer will determine the maximum number of employees that may be on scheduled annual leave during each one (1) week [seven (7) consecutive days] period, and when scheduled annual leave will be curtailed because of training and/or other causes such as military leave. To the extent possible, such determination will be made and announced prior to setting up the annual leave schedule.

Section m. Total leave-year scheduling does not prohibit employees from requesting leave for various lengths and reasons throughout the leave year. The Employer will consider the employee's needs for an expeditious response, and such leave requests will normally be approved or denied within twenty-four (24) hours of the request.

#### LOCAL SUPPLEMENTAL AGREEMENT

Federal Bureau of Prisons

Federal Correctional Institution, Federal Detention Center, Federal Prison Camp,  
Sheridan, Oregon

and

American Federation of Government Employees Local #3979

#### ARTICLE 19 - ANNUAL LEAVE

Section a. Leave committees will consist of one Union representative appointed by the Union Local President and one Supervisor, or equal numbers whichever is

greater. This committee will be responsible for implementing the annual leave scheduling, unless waived by both parties in writing.

Section k. Annual leave will be scheduled in accordance with the provisions of this article insofar as it does not decrease the safety, security, or mission accomplishments of the organization.

## POSITIONS OF THE PARTIES

### THE UNION

The Union claims that Agency management improperly reduced the number of scheduled leave slots for unit management staff as retaliation against the Union for its actions in taking a prior grievance concerning leave practices to arbitration. Prior to that first arbitration, Agency management made threats to Union officers that, if they pursued that case, leave practices would be changed to the detriment of bargaining unit employees.

The Union further claims that, under the Agreement, Article 19, Section g, leave shall not be denied for arbitrary or capricious reasons, and under the Supplemental Agreement, Article 19, Section k:

Annual leave will be scheduled in accordance with the provisions of this article insofar as it does not decrease the safety, security, or mission accomplishments of the organization.

Since the Agency has failed to demonstrate its need, based on safety, security or mission accomplishments of the organization, the reduction in leave slots violates the Agreement and the Supplemental Agreement.

## THE AGENCY

The Agency denies that there was any motive of retaliation for its decision to reduce the number of scheduled leave slots. It was purely a decision based on the needs of the Agency.

The Agency also claims that, under the Master Agreement, it is exclusively a management decision to determine the number of scheduled leave slots to schedule, subject only to a requirement to give consideration of the views and input of the Union. The Agency asserts that such consideration was given.

## FINDINGS

### Background

The Bureau of Prisons maintains three kinds of institutions at its prison in Sheridan, Oregon. They are the Federal Correctional Institution (FCI), Federal Detention Center (FDC), and Satellite Prison Camp (SPC).

In each of these institutions, the housing units have unit management teams, consisting of counselors, case managers, and clerks or secretaries. These teams assist the inmates regarding their needs, complaints, health issues, transfers, discharges, and general adjustment to the institution.

A housing unit at FCI will typically have a team of five, consisting of two counselors, two case managers, and a clerk. Such a housing unit has two sides: "A" and "B", with a case manager and counselor assigned to each side and the clerk handling work for both.



In most past years (although perhaps not all), Agency management permitted up to two staff members of these teams to be away on scheduled leave at any one time. Because of the chance that other team members might need to take unscheduled leave due to illness or bereavement, a team might be left with only one or two team members on duty. However there is no evidence that this created any serious problems for the institution in past years.

In 2008, the Union was alerted that one of the unit managers had imposed additional restrictions on the use of scheduled leave for his teams. While he would still permit up to two team members to take scheduled leave at the same time, he prohibited both counselors or both case managers or both team members from either the "A" or "B" sides from taking scheduled leave at the same time.

As this appeared to conflict with the leave provisions of the Agreement, as well as provisions requiring equal treatment for all employees, the Union filed a grievance, which ultimately went to arbitration. It was heard by Arbitrator Walter Kaweck, Jr. Arbitrator Kaweck rejected the Agency's argument that such restrictions were necessary to assure mission accomplishments and safety of the organization.

Arbitrator Kaweck noted that all of the other housing units were able to meet with mission accomplishments and safety needs without the imposition of these additional restrictions. Thus the evidence supported the Union's position that the leave restrictions were not necessary and were arbitrarily imposed in violation of the Agreement.

The Union alleges that during the processing of this grievance in 2008, Agency management threatened them that if they pursued the grievance to arbitration and

prevailed, a consequence would be a tightening up of scheduled leave to the detriment of bargaining unit members.

### Findings - Contract Interpretation

In examining the language of the Master Agreement, I have come to the conclusion that the Agency's interpretation is correct. Management has the authority to determine the number of leave slots it wishes to authorize for any week. It is not required to justify its decision by reference to safety, security or mission accomplishments.

Article 19, section I, subsection 2, states:

after considering the views and input of the Union, the Employer will determine the maximum number of employees that may be on scheduled annual leave during each one (1) week [seven (7) consecutive days] period, and when scheduled annual leave will be curtailed because of training and/or other causes such as military leave. ....

In this case, evidence shows that the employer sent the Union information regarding its proposal to reduce scheduled leave slots. In fact, after it received a response from the Union, it made a slight modification for the leave slots at the SPC.

The language in the Agreement and Supplemental Agreement restricting arbitrary or capricious actions and requiring justification for leave denials to be based on security, safety and mission accomplishments, only applies when the Agency is considering granting or denying leave requests for previously authorized leave slots. They do not apply at the point the Agency is making its initial determination of how many leave slots to authorize.

Since such a change was solely within Agency discretion, there is no need to consider the evidence offered by both sides, on whether or not it was justified by

concerns of safety, security or mission accomplishments.

### Findings - Retaliation

The Agency is wrong in its brief when it argues that:

“The Union’s retaliation claim fails because the decision on the number of leave slots is an allowable action given to management under the contract terms.”

Just because an action is generally authorized by the contract does not mean that it will be permitted in all circumstances. For instance, an otherwise authorized decision can still be determined to be improper if it can be shown it was made in bad faith. It could also be improper for other reasons; for example, if it violated public policy or had a disparate impact on minorities.

In this case, the argument of the Union is be that, even if the reduction in leave was properly management’s determination alone, if that determination was tainted by motives of retaliation, then it was improper and must be set aside.

Specifically, Article 6 of the Agreement, Section b, provides that employees shall suffer no reprisals for the exercise of their Union rights. This would include the taking of grievances to arbitration.

Thus, the outcome of this case must be determined by whether the Union has proven its claim that retaliation was the real reason for management’s action to reduce the scheduled leave slots.

I will review the evidence of the two Union witnesses who testified they were threatened and the two Agency witnesses who were accused of making the threats.

Paul Antonson, a case manager, testified that he was the grievant in the prior arbitration decided by Arbitrator Kawecki. He testified that, prior to that arbitration, he had a conversation with unit manager, Tim Boldt. He testified that:

"He [Tim Boldt] had asked me if I was going to pursue a grievance, and when I told him I would, or that I was going to, he said that if I did and I won, that there would be a reduction in leave slots from two per week to one per week."

When Mr. Boldt was called by the Agency to testify, he was asked if he had ever made a statement to any Union official that he would "retaliate" against them if they continued to pursue the grievance. He answered, "That's - no."

But the wording of this question presumes that Mr. Boldt viewed telling Mr. Antonson that winning the grievance would cause a reduction in leave slots as a "retaliation". He might have thought of it as simply a statement of logical consequences of an adverse arbitral ruling; not as a threat at all. Thus his negative response to question about "retaliation", was not necessarily a denial of Mr. Antonson's testimony.

Furthermore, the Agency asked Mr. Boldt if he had ever made such a threat of retaliation to a Union official. Mr. Antonson was not a Union official, but was just the named grievant in that case. Accordingly, the Agency's questioning never actually elicited a denial from Mr. Boldt of having made a threat of retaliation. Thus Mr. Antonson's testimony is unrefuted.

Mr. Payne, the Union President, testified that he spoke with the newly arrived warden, Jeffery Thomas. Mr. Payne testified,

"During the meeting with the warden about the issue, he made the statement to me that, 'You know, if you -- if you really insist on taking this forward, you're going to give me no choice but to remove one of the slots so there's going to be no question as to who can bid for the leave, and do you really want to go through that just because you got one guy who didn't get what he wanted?'"

When Warden Thomas testified, he denied that told Mr. Payne that he was going to reduce leave slots to get back at the Union for pursuing the arbitration. He said that in his discussion he made comments in the nature of "we need to be more consistent among our managers when we deal with annual leave...."

Thus I am left with a conflict between the testimony of the Union President and the Warden. In such a case, an arbitrator must make a determination based on his assessment of witness credibility and a requirement to make a judgment of what most likely was said.

As indicated, I find Mr. Antonson's sworn testimony of being threatened with retaliation by Mr. Boldt to be unrefuted. This accusation is also the more important of the two, as Mr. Boldt and the associate Warden supervising him were the managers who actually took action to reduce the scheduled leave slots.

Regarding Union President Payne's accusation regarding Warden Thomas, I am inclined to believe that Mr. Payne heard a veiled threat from Warden Thomas, which was artfully phrased in terms of a need for probably consequences and the need for "consistency."

But I believe the threat of retaliation was intended.

Thus, I have reached a conclusion that the reduction in scheduled leave slots for unit management staff was done in retaliation for the Union's pursuing - and winning - the prior grievance related to scheduled leave.

Accordingly, I must order that the number of scheduled leave slots for unit management employees in the FCI and FDC be immediately restored back to two per

week, and the number of unit management scheduled leave slots at the SPC be restored back to three per week.

I further order that no reduction in the number of scheduled leave slots be made before the fall of 2011, for leave to be taken in 2012.

In future years, Agency management may again determine it appropriate to reduce the number of scheduled leave slots for these positions. It has that right under the Agreements. Whether any such future reduction is improper would be for another arbitrator to determine.

#### AWARD

1. The grievance is GRANTED.
2. The number of scheduled leave slots for unit management employees in the FCI and FDC shall be immediately restored back to two per week.
3. and the number of unit management scheduled leave slots at the SPC be restored back to three per week.
4. I further order that no reduction in the number of scheduled leave slots be made before the fall of 2011, for leave to be taken in 2012.

Respectfully submitted March 11, 2010, at Eugene, Oregon,

  
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Martin Henner, Arbitrator