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FEDERAL MEDIATION AND CONCILIATION SERVICES ARBITRATION

In the Matter of the Arbitration Of the Grievance of	
COUNCIL OF PRISON LOCALS (AFL-CIO) AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL NO. 3048, Grievant "Union"	FMCS Case No.: 09-50116A ARBITRATOR'S DECISION AND AWARD
And	
U. S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONS COMPLEX, LOMPOC, CALIFORNIA Respondent "Agency".	

PREFACE

The above-entitled matter was heard on September 11, 2009, by Richard C. Anthony, the Arbitrator duly selected by the parties pursuant to the selection process of the Federal Mediation and Conciliation Service. Pursuant to the terms of the applicable Master Agreement between the parties, this Arbitration Award

shall be binding on the parties. During the hearing documentary evidence was received, witnesses testified under oath and the proceeding was reported and transcribed. Written closing briefs were filed by the parties by December 7, 2009.

APPEARANCES

The Council of Prison Locals (AFL-CIO) American Federation of Government Employees, Local 3048, was represented by Timothy M. De Bolt, Union Advocate, 481 N.W. Hillcrest, McMinnville, Oregon 97128, telephone (503) 502-4695, email deboltwrvt@aol.com. The U. S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Lompoc, California was represented by Ruby Navarro, Lead Labor Relations Specialist, Federal Bureau of Prisons, 230 N. First Avenue, Room 201, Phoenix, Arizona 85044, telephone (602) 379-3791, Ext. 319, email rdnavarro@bop.gov.

CASE SUMMARY

The Union seeks to require the local Lompoc Prison Management to bargain the issuance of, and procedures and appropriate arrangements relating to, the use of stab vests and other safety equipment, and the Agency's alleged failure to lower the "inherent hazards" to the lowest possible level. The Agency declined to enter into such negotiations contending that such issues were resolved at the National level and no local negotiations were required.

ISSUES TO BE RESOLVED

The issues to be resolved are as follows:

1. Did the Agency violate the Master Agreement and the Local Supplement when it refused to negotiate over the issuance, procedures and appropriate arrangements involved in the use of stab vests, and other non-lethal personal protection devices?

2. If so, what should be the remedy?

SUMMARY OF THE EVIDENCE PRESENTED

On June 20, 2008, Correctional Officer Jose Rivera at USP Atwater was stabbed to death by inmates. As a result of this stabbing, Barry Fredieu, President of Local No. 3048, requested that the Lompoc management bargain over the availability of and the use of personal protection equipment including stab resistant vests, pepper spray, taser guns, collapsible batons, and puncture resistant gloves. At approximately the same time, the National Union requested negotiations on the issuance and use of stab resistant vests for all Correctional Officers in all of the some 122 prisons in the system, in addition to providing others safety equipment and procedures. Local Management did not respond to the local request to negotiate and on the National level the Bureau of Prisons did not agree that the subject was negotiable, but decided to issue vests to all personnel who desired them. The Union at the National level sought to negotiate the selection of the vests, the procedures for issuance, the procedures for use and

other related matters, but the Agency went ahead and selected a vendor, selected the vests and initiated distribution procedures. The Agency actually shipped vests to Atwater and asked the Union to agree to an accelerated bargaining process or to post implementation bargaining. Rather than hold up the issuance of vests, the Union agreed to post implementation bargaining. Such bargaining took place and was completed, but impasse was reached on certain issues which went to mediation and are pending before the Federal Labor Relations Authority.

The Local Union recognizes that many of the issues relating to the vests are now moot or resolved, but still contends that local negotiations should take place regarding the issuance and use of the vests on such matters as discipline for not wearing the vest even though acceptance of the vest was voluntary; locations as to where the vests were to be worn in light of blanket rules regarding secure compounds or places where no inmates were present; procedures for access to the vests; procedures for cleaning and replacing the vests; and other matters relating to their usage. The Local Union is also seeking to bargain on the issuance and use of other protective gear and equipment such as pepper spray, tasers, collapsible batons and puncture resistant gloves.

The Agency contends that there is no requirement to negotiate the same issues at the local level when those issues have already been addressed and resolved at the National level. The Agency also contends that under section 5 USC 7106(a)(1), the Agency has the right to determine internal security practices and thus the statute precludes negotiations on these items.

The Union cites Article 3, Section c, of the Master Agreement as the basis for its request to bargain, which provides as follows:

> "Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures (Joint Ex. 1).

The Agency contends that in addition to the fact that it is not required to negotiate internal security practices, there was no change in "policies, practices or procedures which would precipitate any need for negotiations. The Union contends that the substantial change in the prison environment with more inmates, fewer staff and more and varied violence constitutes the change in working conditions.

There are two other Articles from the Master Agreement cited by the parties as being applicable as follows:

"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 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 28 - UNIFORM CLOTHING

Section a. For uniformed employees, adequate foul weather gear and/or clothing will be provided and worn if the employee is required to work an outside assignment or post in inclement weather. This foul weather gear will be issued to employees for the duration

of the assignment to the outside post or for the duration of the foul weather season, whichever is more practical, and will then be returned to the Employer to be cleaned, if necessary, prior to reissuance. (Duration of assignment means: the employee's quarterly, weekly, or daily assignment.) The type of foul weather gear and/or clothing may be negotiated locally.

....

Section b. The Employer will ensure that adequate supplies of security and safety equipment are available for issue to and/or use by employees during the routine performance of their duties. This includes, but is not limited to, whistles, key chains, key clips, belts for equipment, disposable resuscitation masks and rubber gloves, handcuffs, two-way radios, body alarms, flashlights, hand-held metal detectors, weapons, ammunition, etc. Cases or holders, whichever is appropriate, to carry such equipment will also be available for these particular items of equipment normally using such cases or holders. Employees receiving such items will be accountable for them until they are returned to the Employer.

....

Section c. The Employer will provide additional equipment or clothing for safety and health reasons when necessary due to the nature of the assignment and as prescribed by the Safety Officer.

The Safety Officer will consider input from the safety committee as appropriate. This equipment or clothing will be in a size identified by the employee and will not be charged to the employee's uniform allowance.

Section d. On armed posts, if the wearing of a bullet-proof vest is mandated or requested, there will be a sufficient supply of such vests provided by the Employer. The Employer will ensure that adequate numbers and sizes of such vests are available, including vests sized for female employees. The cleaning of these vests may be negotiated locally.

....

Section g. Safety-toed footwear for uniformed and non-uniformed employees (when such employees work in a designated foot hazard area) will be shoes or boots at the discretion of the individual employee. The cost and quality of said footwear will be negotiated locally.

....

Section i. Any additional uniform items, when appropriate for health and safety reasons, will be negotiated at the local level.

...." (Joint Ex. 1).

The Union contends that the National negotiations over the stab proof vests do not relieve the Agency of its obligations to negotiate procedures and

appropriate arrangements at the local level.

DISCUSSION AND ANALYSIS

It was established by the evidence presented that there has been a change in working conditions in the prisons since the Master Agreement was entered into in 1998, due primarily to the overcrowding of inmates and their propensity to be more violent. Violence in the prisons has increased substantially over the years with greater sophistication, more aggressive and more gang related activity. Lower level institutions such as Lompoc are being assigned maximum custody inmates. The prisons are overcrowded with more inmates and fewer staff. These factors constitute a change in working conditions triggering the application of Article 3 of the Master Agreement calling for negotiations.

The Agency is correct in its position that it is not necessary to negotiate at the Local level things that have been resolved at the National level, but the Union has raised other vest issues which are not necessarily covered by the National negotiations such as where they are to be worn at a particular facility, how employees can be disciplined for not wearing it once they have initially chosen to have it issued, where they are stored and access to them, and procedures for cleaning and replacing them. It may be that once the National negotiations are finally resolved, nothing remains to be covered locally, but these types of issues may remain unresolved.

The Agency contends that under 5 USC 7106(a)(1), it has a right to

determine all internal security practices citing American Federation of Government Employees Local 1482 and U. S. Department of the Navy, United States Marine Corps Logistics Base, Barstow, California, 40 FLRA 12 (1991). At issue in that case were six proposals submitted by the Union in response to changes proposed by the Agency in regulations for rules for the operation of motorcycles and three-wheeled vehicles on the base. The rules of the Agency were more stringent than those required by the California Vehicle Code and the Union proposals would eliminate the requirements of the Agency involving such things as wearing helmets, protective eyewear, protective clothing and protective footwear. The Authority found that the Agency had established a link between its goal of safeguarding personnel and property and the proposed regulations to wear the safety equipment, and concluded that the Agency had the right to determine the kinds of equipment and clothing necessary for the operation of motorcycles and three-wheeled vehicles, and that the Union's proposal directly interfered with management's right to determine internal security practices under 5 USC 7106(a)(1).

The "direct interference" standard followed by the Barstow case has specifically been repudiated by "the holding of the U.S. Circuit Court of Appeals for the District of Columbia in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983), reversing and remanding American Federation of Government Employees, AFL-CIO, Local 2782 and Department of Commerce, Bureau of the

Census, Washington, D.C., 7 FLRA 91 (1981).

In deciding that case the Court rejected the so-called 'direct interference' test previously applied by the Authority in evaluating the negotiability of matters described as 'appropriate arrangements' under section 7106(b)(3) of the Statute. While that Court had previously sustained the application of that test as to 'procedures' under section 7106(b)(2)*1, it had not had an opportunity to address its applicability to 'appropriate arrangements' in rejecting 'direct interference' as an analytical device in section 7106(b)(3) cases, the Court enunciated a standard which requires an analysis of whether "excessive interference' with a right reserved to management would result from implementation of the proposal."

The Court concluded that some "arrangements" may be inappropriate because they impinge on management prerogatives to an excessive degree and it is up to the Authority to determine whether or not they are excessive. In the case of National Association of Government Employees and Kansas Army National Guard, 21 FLRA 24 (1986), the Authority adopted the test enunciated by the Court as its standards and articulated the factors to be considered at a determination of whether or not a given proposal is appropriate as an "arrangement" and therefore negotiable or inappropriate as an "arrangement" because it excessively interferes with management prerogatives and is therefore nonnegotiable. The Authority stated in making the determination as to whether an "arrangement" was appropriate or inappropriate, "the Authority will first examine the record to ascertain as a threshold question whether a proposal is in fact intended to be an

arrangement for employees adversely affected by management's exercise of its rights. In order to address this threshold question, the union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. In other words, a union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right or rights.

Once the Authority has concluded that a proposal is in fact intended as an arrangement, the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D. C. Circuit, by weighing the compelling practical needs of employees and managers." (Ibid)

Although in the case herein there are no specific proposals so that the issue of whether or not they are "appropriate arrangements" can be addressed, because the Agency has dismissed the issue of negotiations out of hand, it would appear that the standard applied by the Kansas case would be applicable and should be addressed so long as the Union can establish that sections of the Master Agreement are applicable. In that regard, the Union contends that the Agency's permissive use of certain protective equipment under "limited circumstances" violates Article 27 of the Master Agreement which requires the Agency to lower

inherent hazards to the "lowest possible level" recognizing that they can never be completely eliminated.

In the Agency's response to the grievance filed herein, it stated that "The subject of safety equipment is already addressed in Article 27 of the Master Agreement, thus there is no duty to bargain this subject of safety equipment again (to the extent that it is negotiable)" (Joint Ex. 4). It must be observed that a review of Article 27 reveals that it primarily addresses issues relating to the environment provided by the facilities themselves rather than the use of equipment in those facilities towards the occupants. The word "equipment" is not found once in Article 27, but is found six times in Article 28. In Article 28, the terms "equipment", "clothing", "items of equipment", and "uniform items" are mentioned throughout the Article, but not mentioned in Article 27.

The Union contends as follows:

> "The contract language clearly intended for issues concerning safety and security equipment to be placed under Article 28, especially since much of the equipment is worn on the correctional uniform and is a part of the uniform. There is little differentiation between the uniform itself and the equipment worn on the uniform, and the intent was, as clearly stated, to allow for negotiations over ***any*** additional uniform items" (Closing Brief).

It is noted that puncture resistant gloves is one of the things sought by the Union which could certainly be described as a part of the uniform and yet the

testimony herein established that such gloves were not provided but perhaps some were available upon request for certain unspecified situations. This would certainly appear to be an appropriate subject for negotiations.

The use of non-lethal weapons by a Corrections Officer is limited by Chapter 28, Code of Federal Regulations Section 552.25 and is subject to the authorization of the Warden. Warden Linda Sanders testified herein that she could authorize such use and could authorize Captain Gerardo Rosalez to make such equipment available in the event the requirements of the statute were met for their use, but both Warden Sanders and Rosalez were vague in their testimony as to ready availability and access to this equipment. The Regulations provide that such equipment can be used in situations which include assaults on another individual, destruction of government property, suicide attempts, or signs of imminent violence. The Union would like to negotiate whether or not some of these non-lethal weapons could be carried as a part of their uniform and therefore be immediately available in assaults or when imminent violence is about to take place, rather than have to go hunt up the Warden or the Captain to get authorization to issue equipment.

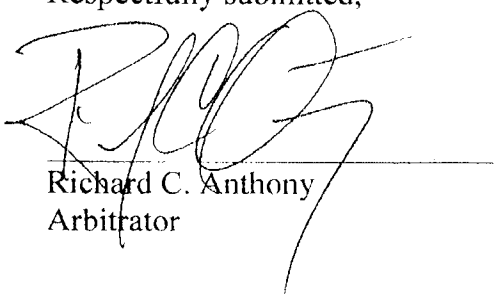
It is concluded that based upon the above analysis of the Master Agreement and the above cited case law, the Agency violated the terms of the Master Agreement and the Local Supplemental Agreement by refusing to bargain over the issuance, procedures and appropriate arrangements involved in the employment of stab vests and other non-lethal personal protection items.

AWARD

The grievance is sustained and the Agency is ordered to begin negotiations with the Union over the issuance, procedures and appropriate arrangements involved in the employment of stab vests and other non-lethal personal protection devices.

Dated: January 11, 2010

Respectfully submitted,



Richard C. Anthony
Arbitrator