

IN ARBITRATION

BEFORE ROBERT W. LANDAU, ARBITRATOR

**AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1237,**

Union,

and

**FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTIONAL
INSTITUTION
MENDOTA, CALIFORNIA,**

Employer.

**ARBITRATOR'S OPINION
AND AWARD**

FMCS Case No. 12-58321
(Mendota, CA)

Unit Management Rosters

Hearing Date and Location:

June 12, 2013
Mendota, California

Representing the Union:

Michael T. Ellis
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Representing the Employer:

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Post-Hearing Briefs Received:

August 19, 2013

Date of Award:

September 30, 2013

ISSUES

Based on the submissions of the parties, the arbitrator formulates the issues for arbitration as follows:

1. Was the Union's grievance timely filed?
2. If so, did the Union timely invoke arbitration?
3. If so, did the Agency violate the Master Agreement in relation to Unit Management rosters?
4. If so, what is the appropriate remedy?

BACKGROUND

The parties are signatory to a nationwide Master Agreement originally executed in 1998. *Joint Exhibit 1.* The Union represents Unit Management staff employed at Federal Correctional Institution (FCI) Mendota, California, including Case Managers, Counselors, and Unit Secretaries. These employees are currently assigned to separate housing units designated as A Unit, B Unit, C Unit, and Camp Unit. Each unit is supervised by a Unit Manager or Administrator. Staff schedules for each unit are prepared on a quarterly basis for review and signature by the Unit Manager or Administrator, the Associate Warden of Programs, and a Union representative. The quarterly staff schedule for each unit indicates the work shifts and days off for each staff member assigned to the unit. At FCI Mendota, Unit Management staff are allowed to bid on work shifts and days off within their unit, but are not allowed to bid on work assignments in other units.

On June 5, 2012, the Union filed a grievance with the Acting Warden at FCI Mendota. *Joint Exhibit 3.* The grievance alleged that in May 2012 several new

positions were added to the Unit Management staff in B Unit, including two new Case Managers and two new Counselors, but no Unit Management personnel in other units were allowed to bid by seniority on these new work assignments, in violation of Articles 6 and 18 of the Master Agreement. The Union alleged that it became aware of the violation on May 23, 2012, when the B Unit quarterly staff schedule was issued for the quarter beginning June 17, 2012 through September 16, 2012.

On June 27, 2012, the Acting Warden at FCI Mendota rejected the grievance as untimely and improperly filed with the Warden instead of the Regional Director. *Joint Exhibit 4.* Later on the same date, the Union filed the identical grievance with the Regional Director, which was received on June 28. *See Joint Exhibit 2.* On July 24, 2012, the Union received the Regional Director's response rejecting the grievance as untimely filed and untimely submitted to arbitration under Article 31 of the Master Agreement. *Id.* On August 22, 2012, the Union submitted the grievance to arbitration. *Id.*

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 - RIGHTS OF THE EMPLOYER

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

2. in accordance with applicable laws:
 - a. to ... assign, direct ... employees in the Agency ...
 - b. to assign work ...

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

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

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, including the right:

2. to be treated fairly and equitably in all aspects of personnel management...

ARTICLE 18 - HOURS OF WORK

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

1. roster committee will be formed which will consist of representative(s) of Management and the Union...
2. . . .
 - a. employees may submit preference requests for assignment, shift, and days off...
 - d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests...

Section f. Roster committees outside the Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedures in Section d. be utilized....

ARTICLE 31 - GRIEVANCE PROCEDURE

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence.... A grievance can be filed for violations within the life of this contract....

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

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....

POSITIONS OF THE PARTIES

A. Union

The Union argues that the grievance was timely filed. On May 23, 2012, the Union became aware of the B Unit upcoming quarterly staff schedule and the fact that Unit Management staff in other units would not be allowed to bid by seniority on the new positions in the B Unit. The grievance was timely filed on June 5, 2012 with the Acting Warden at FCI Mendota. When the Acting Warden responded on June 27 that the grievance was improperly filed with the local Agency instead of the Regional Director, the Union immediately filed the identical grievance with the Regional Director on June 27. On July 24, 2012, the Union received the Regional Director's response which rejected the grievance on procedural grounds. On August 22, the Union timely invoked arbitration within 30 days of receiving the Regional Director's response.

As to the merits of the grievance, the Union argues that the Agency violated Article 18, Sections d. and f. of the Master Agreement by not forming a proper roster committee for Unit Management staff and not allowing Unit Management employees to bid by seniority on work assignments in other units for which they were qualified. At no time did the Union waive its right to have a roster committee. The Union further argues that management violated Article 6.b.2 of the Master Agreement by not treating Unit Management employees fairly and equitably in all aspects of personnel management. Bargaining unit members in other departments outside of Correctional Services at FCI Mendota, for example Material Handler Supervisors, are allowed to bid through a roster committee for their assignments, shifts, and days

off. In addition, Unit Management employees at other Correctional facilities, such as FCI Atwater (CA), FCI Gilmer (WV) and FCI Sheridan (OR), have been allowed to bid on any Unit Team assignments for which they are qualified.

B. Agency

The Agency contends that the grievance was not timely filed within 40 calendar days of the date of the alleged grievable occurrence. In this case the Union filed two grievances over the same issue, claiming the same contract violations. The instant grievance was filed on June 5, 2012. However, the Union previously filed a grievance over the same issues and alleged contract violations on April 2, 2012. In the April grievance, the Union stated that it was aware of the perceived violation on March 15, 2012. The Union had the opportunity to invoke arbitration on the April grievance, but did not do so. Rather, the Union waited until June 5 and filed another grievance over the same issues and alleged contract violations. Because the instant June 5 grievance was filed more than 40 days after the Union became aware of the alleged contract violations on March 15, the grievance is untimely and should not be arbitrable.

Moreover, the Union failed to timely invoke arbitration within 30 calendar days from its receipt of the Agency's grievance response. The Agency responded to the Union's June 5 grievance on June 27, 2012. However, the Union did not invoke arbitration until August 22, 2012, which was 56 calendar days after receiving the Agency's response. For this additional procedural reason, the grievance should not be arbitrable.

Regarding the merits, the Agency argues that the Union has not proven a violation of the Master Agreement. Rosters for employees in the Unit Management department are governed by Article 18, Section f. This section does not state that the roster procedures outlined in Article 18, Section d, are required. Rather, it specifically states that the roster procedures in Section d. are “recommended.” Accordingly, the Agency has the option whether or not to follow the roster procedures for the Correctional Services department outlined in Article 18, Section d. as to bidding for assignments, shifts and days off. In addition, Article 5, Section a. makes clear that nothing shall affect the authority of management to assign work. Management presented evidence of its legitimate business reasons for being able to assign Unit Management staff based on the needs of the Agency. As for holding a roster committee for Unit management employees, the evidence shows that roster committees have been and are being held, as evidenced by the quarterly staff schedules which contained signatures from both the department head and a Union representative. Furthermore, the evidence shows that the practice for rosters in the Unit Management department has evolved into a past practice of which the Union is aware by having reviewed and signed off on the Unit Management rosters. Finally, the Union failed to prove its allegation that Unit Management staff were not treated fairly and equitably compared to other departments. Warden Audrey Gill at FCI Mendota testified, without contradiction, that only one department outside of the Correctional Services department allowed staff to bid on their work assignments while several other departments did not.

DISCUSSION AND OPINION

A. Timeliness of Grievance and Submission to Arbitration

Article 31, section d. of the Master Agreement provides that grievances must be filed within 40 calendar days of the date of the alleged grievable occurrence. The Union's grievance filed with the Warden at FCI Mendota on June 5, 2012, specifically alleged that the Agency violated the Master Agreement (1) by not allowing all Unit Management staff to bid by seniority on new work assignments in the B Unit quarterly staff schedule issued on May 23, 2012, and (2) by not forming a roster committee for the Unit Management department. The "grievable occurrence" was management's issuance of the B Unit quarterly staff schedule on May 23. Therefore, on its face, the Union's June 5 grievance was timely filed within 40 days of the alleged grievable occurrence. When management at FCI Mendota notified the Union on June 27 that the grievance was improperly filed at the local level instead of the regional level, the Union immediately filed the same grievance with the Regional Director on the same date, and the grievance was received by the Regional Director on June 28. *Joint Exhibit 2*. Even if the Agency was correct in asserting that the grievance was improperly filed at the local level, the Union's filing of the same grievance with the Regional Director on June 27 was still timely filed within 40 days of the alleged grievable occurrence.

The Agency's contention that the June 5 grievance was untimely because it was essentially the same as a previous grievance filed on April 2, 2012, is without merit. The April 2 grievance was prompted by a previous quarterly staff schedule for Unit Management employees for the quarter beginning on March 18, 2012, and by

management's notice to the Union on March 15 asserting that it had no duty to bargain over Unit Management roster bidding procedures. *Agency Exhibits 3 and 4*. Because the April 2 and June 5 grievances were triggered by different grievable occurrences, they were not the "same" grievance even if they alleged the same or similar contract violations. In this regard, arbitrators have recognized the well-established "continuing violation" doctrine, under which a repeated or continuing alleged contract violation gives rise to a new grievable occurrence each time the alleged violation occurs. See, e.g., *Dept. of Justice, Federal Bureau of Prisons and AFGE Local 1741*, 106 LRP 45762 (R. Allen, 2002). As applied to this case, each time the Agency distributed quarterly staff schedules for Unit Management personnel without holding a roster committee and/or without permitting Unit Management employees to bid on work assignments outside of their respective units, this constituted a new grievable occurrence triggering the 40-day grievance filing time limit.

Furthermore, I find that the Union's submission of the grievance to arbitration was also timely under the Master Agreement. Article 31, Section g.1 states that the grieving party may submit a grievance to arbitration within 30 calendar days from its receipt of the other party's final response. Here the Union received the Regional Director's final response to the grievance on July 24, 2012, and invoked arbitration on August 22, 2012, less than 30 days later. *Joint Exhibit 2*. Thus the Union's invocation of arbitration was timely.

B. Merits of Grievance

Article 18, Section f. of the Master Agreement states in pertinent part: "Roster

committees outside the Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedures in Section d. be utilized.” (Underline in original.) Article 18, Section d. sets forth the specific procedures to be followed by roster committees for Correctional Services employees, including the following key elements: a roster committee will be formed consisting of Management representatives and at least two Union representatives; on each quarterly roster, employees will be given the opportunity to submit their preference requests for assignment, shift, and days off; and the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests.

Although the Agency asserts that roster committees have been formed for Unit Management employees at FCI Mendota (see Agency Brief at 7), this was flatly contradicted by the undisputed testimony of Associate Warden David Fajardo, B Unit Manager Ben Amos, and Union Local 1237 Vice-President Ernie Dickens that there are no roster committees for Unit Team employees. *Tr. 18, 48 and 173.* Also, there is no evidence that the Union ever waived its right to have a roster committee for Unit Management employees. *Tr. 173-74; Union Exhibit 2.* Under these circumstances, I must conclude that the Agency is in violation of the clear and unambiguous language of Article 18, Section f. which requires the formation of roster committees for employees outside Correctional Services unless mutually waived by both the Agency and the Union. Moreover, the Agency’s claim that there has been a past practice of having a Union representative review and sign off on

Unit Management rosters at FCI Mendota, even if correct, is insufficient to override the clear and unambiguous language of Article 18, Section f. which requires the formation of roster committees. See, *AFGE Local 1030 and U.S. Dept. of Justice, Federal Bureau of Prisons, FDC Houston, TX*, FMCS Case No. 02-50083, 103 FLRR-2 24 (Britton, 2002) (Attachment # 9 to Union Brief).

Furthermore, I conclude that the Agency violated Article 18, Section f. by refusing to negotiate Unit Management roster bidding procedures, as evidenced in a March 21, 2012 memorandum from the Union to the Warden at FCI Mendota. *Agency Exhibit 3*. In a similar case, the Federal Labor Relations Authority upheld an arbitrator's determination that the Agency violated Article 18, Sections d. and f., by refusing to negotiate with the Union over the formation of a roster committee to place support services employees in work assignments on a unit-wide basis. *U.S. Department of Justice, Federal Bureau of Prisons, FCI Otisville, NY and AFGE Local 3860*, 58 FLRA 307, 103 FLRR-1 64 (January 22, 2003) (Attachment # 4 to Union Brief) (hereinafter *FCI Otisville, NY*). Other arbitrators similarly have held that the Agency violated Article 18 of the Master Agreement by failing to negotiate with the Union over procedures for a Unit Team roster committee and/or the reassignment of Unit Management personnel. *Federal Bureau of Prisons, FCI Seagoville, TX and AFGE Local 1637*, FMCS Case No. 12-52469-3 (Barnard, 2013) (Attachment # 3 to Union Brief); *Federal Bureau of Prisons, FCC Forrest City, AR and AFGE Local 0922*, FMCS Case No. 10-02220 (Ahrens, 2011) (Attachment # 10 to Union Brief).

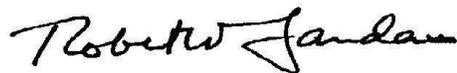
As to the Union's contention based on Article 18, Sections d.2.a and d.2.d, that the Agency must allow Unit Management employees to bid by seniority on any work assignments for which they are qualified, including assignments outside their current units, I find it is premature to rule on this issue at this time. See, *FCI Otisville, NY*, 58 FLRA 307 (assessment of effects of future bargaining over roster committee procedures on management rights is premature). As a general matter, bargaining over roster committee procedures pursuant to Article 18 of the Master Agreement does not improperly interfere with the Agency's general management rights to assign work. See, *Federal Bureau of Prisons v. Federal Labor Relations Authority*, Case No. 10-1089, Slip Op. at 7-8 (D.C. Cir. 2011) (Attachment # 5 to Union Brief).

Having determined that the Agency violated Article 18, Section f. of the Agreement by not forming a roster committee for Unit Management employees and failing to bargain over roster committee procedures, I conclude that the appropriate remedy is to direct the parties to negotiate roster committee procedures for Unit Management staff. As stated in Article 18, Section f., it is recommended that the procedures in Section d. be utilized. These procedures may include, but are not required to include, provisions allowing Unit Management employees to bid by seniority for assignments, shifts and days off.

AWARD

The grievance is sustained. The grievance was timely filed and was timely submitted to arbitration. The Agency violated Article 18, Section f. of the Master Agreement by failing to form a roster committee for Unit Management employees and failing to negotiate roster committee procedures with the Union. As a remedy, the Agency and the Union shall negotiate roster committee procedures for Unit Management staff in accordance with Article 18, Section f. of the Agreement. The Arbitrator will retain jurisdiction for 60 days to address any dispute that may arise regarding the remedy awarded in this matter.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert W. Landau". The signature is written in a cursive, flowing style.

Robert W. Landau
Arbitrator