In the Matter of the Arbitration

between

DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, FCI DUBLIN, CA
("the Agency")

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL NO. 3584
("the Union")

Re: FMCS Case No. 12-50539

Arbitrator's Opinion & Award

ARBITRATOR: Edna E. J. Francis

APPEARANCES:

For the Agency: Jennifer Miller, Esq.
Labor Relations Specialist
U. S. Department of Justice
Bureau of Prisons

For the Union: Michael T. Pazder, Esq.
Legal Rights Attorney
AFGE District 12

The arbitration hearing was held December 5, 2013, December 6, 2013, and January 16, 2014, at offices of the Federal Correctional Institution, 5701-9th Street, Dublin, California

PROCEDURAL BACKGROUND

The parties convened this proceeding pursuant to the collective bargaining agreement between the parties, i.e., the "*Master Agreement between Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees*," (hereinafter "the Agreement"). (Joint Exhibit 1) The proceeding presents for resolution "a grievance" that is set forth on the Formal Grievance Form required by Article 31 ("Grievance Procedure" of the Agreement). The Form was signed by Union President Millikin on August 24, 2011. (Union Exhibit 8).

In Block 5 of the of the Formal Grievance Form, which, in essence, asks the preparer to state which "Federal Prison System Directive, Executive Order, or Statute [has been] violated," the preparer wrote:

1) Master Agreement (in its entirety) and Article 3 Section C, Article 3 Section D, Article 6 Section B Number 2, Section N, Article 27, Section A
2) Decision 65 FLRA 892
3) Title 5 United States Code 7116
4) FCI Dublin Institution Post Orders
5) Back Pay Act

In Block 6 of the Form, which asks, "[i]n what ways were each of the above violated?" and directs the preparer to "be specific," the preparer wrote:

> In an attempt to be very specific, an attachment is added as the space for this block does not allow for this much specificity. SEE ATTACHMENT

The Attachment provides the response to that inquiry in fifteen paragraphs. Most of the paragraphs answer the inquiry in two or more sentences. For example, the first paragraph states that "Management has failed to adhere to FCI Dublin Post Orders which require staff to be present and complete assigned tasks as listed to include but not limited to important security procedures. When these posts are left vacant or are abandoned these tasks do not get completed

as required and safety and security concerns increase." The second paragraph states, "Management failed to adhere to the Master Agreement, Article 3 Section C when they failed to meet and negotiate on custody augmentation procedures which impacts conditions of employment, where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of the staff augmentation policy, practices, and/or procedures. The third paragraph states, "Management failed to adhere to the Master Agreement Article 3 Section D when they failed to provide the custody augmentation policy to the Union. Management drafted a plan that was implemented and proposed to the Regional Director in the form of a Memorandum and they failed to enter into negotiations with the Union, prior to the issuance and implementation of the practices contained in the memorandum. The eighth paragraph states, "Management has failed to adhere to Master Agreement Article 16 Section C when they define the phrase 'other duties as assigned' or its equivalent as the ability to remove bargaining staff from their merit promotion selected job positions to a correctional services non-merit promotion job assignment also known as custody augmentation on a regular basis to save overtime expenditures, so regular in fact that rosters and memorandums are required to organize the use because it is so common practice." The ninth paragraph states, "Management has failed to adhere to Master Agreement Article 18 Section N when they failed to consider the circumstances surrounding an employee's request against reassignment to augmentation posts when a reassignment was considered necessary. Management has threatened discipline when employees have attempted to make such requests." The tenth paragraph states:

> Management has failed to adhere to Master Agreement Article 27 Section A when they failed to lower inherent safety hazards to the lowest possible level, without relinquishing their rights under 5 USC 7106 and they failed to furnish to employees places and conditions of employment that are free from recognized hazards that area causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive

> orders. Specifically, Management has vacated posts that are directly responsible for increased security functions such as employees who monitor high security offenders, employees that monitor security cameras, employees that monitor surveillance equipment, employment that conduct security checks, and employees that are first responders to emergencies.

The eleventh paragraph states:

> "The Agency is leaving posts vacant without good reason making the remaining officers' supervision of all of the inmates and almost impossible responsibility and raising safety concerns. Vacating these posts is a violation of our Collective Bargaining Agreement and the Agency refuses to negotiate or resolve the issue. Most recently the Agency and even more specifically FCI Dublin was found in violation of the same acts see 65 FLRA 892. As a remedy to case 65 FLRA 892, the Arbitrator ordered FCI Dublin to fill all vacant/abandoned posts by overtime or regular assignment forthwith. However, the Agency refuses to comply with said order.

The twelfth paragraph states, as follows:

> The Union is not asking or preventing the Agency from determining which and how many posts are necessary or determining the degree of staffing needed to maintain the security of its facility see (57 FLRA at 410-11) but once the Agency has determined that a post/position is necessary the Union argues that the post should be filled with regular Staff Officers not already assigned to a post/position or through overtime assignments. Post/positions should only be vacated for good reason such as an emergency however the Agency has sited (sic) over and over again that it's primary reason for vacating posts/positions is to save overtime funds. It should be noted that FCI Dublin's previous Warden received a $10,000 personal award for saving overtime money, this shows that Management Officials have a vested interest in saving overtime even if it causes increased security concerns.

The thirteenth paragraph states that the Agency has vacated critical correctional posts, viz., Special Supervision Unit, Special Housing Unit, Compound, Special Investigative Services, the Security Lock Shop Office, Phone Monitor, and Activities Lieutenant and describes the circumstances that allegedly render the posts "critical" correctional posts.

The fourteenth paragraph alleges that the Agency has vacated other support function positions whose incumbents provide critical support functions to the prison (Unit Counselors, Unit Case Managers, Food Services, Facilities Workers and Health Services Employees), thereby causing security concerns and making the remaining employees' supervision of all the inmates an almost impossible task.

The fifteenth paragraph states, as follows:

> The Agency has decreased staffing levels by vacating posts and/or positions which has raised the inherent safety hazards of all staff. This has directly decreased the numbers of staff assigned on daily Correctional Rosters and reduced the ability of staff to respond to serious incidents to include but not limited to assaults on staff. This reduction of force is not limited to Custody Staff but also includes Non-Custody Department who are also first responders to emergency situations in the Correctional Environment. This also adds to an increase of duties on a reduced workforce complement, reduces effective communication between staff and inmates. Which also decreases our ability to supervise inmates and control contraband coming into our facilities. These examples show how difficult it is for staff to carry out the mission of the Bureau of Prisons with vacant or abandoned posts and/or positions.

Block 7 of the Formal Grievance Form states the "date(s) of violation(s) as "August 1, 2011 (open continuous)."

The information sought in Block 8 of the Form (remedy requested) was provided through an attachment, which, in summary, sets forth the following:

1) We request an order to cease and desist further violations immediately.
2) We request that the agency fill all vacant/abandoned posts by overtime or regular assignment.
3) We request that all affected employees are compensated with overtime pay to include back pay, interest and liquidated damages for the amount of pay lost in overtime. As discussed in (65 FLRA 892) we are asking that the agency pay the bargaining unit the

amount of money equal to all posts left vacant or abandoned from January 2005 to the date this grievance is decided.

4) We request all attorney, legal fees and expenses incurred in the processing of this grievance be reimbursed by the agency.

5) We request that the grievants suffer no reprisal, harassment, or intimidation, as a result of filing this grievance.

6) We request whatever [further] remedy is deemed appropriate and necessary.

(Union Exhibit 8)

In most pertinent part, by letter dated September 20, 2011, Warden Randy Tews responded to the grievance, as follows:

> The violations you have cited lack specificity. You have failed to identify what provisions of the Master Labor Agreement (in its entirety) were violated. The agency is not charged with the responsibility of going through each and every section of the Master Agreement (in its entirety), Title 5, United States Code 7116, FCI Institution Post Orders, Decision 65 FLRA 892, and the Back Pay Act to determine what you are claiming. It is your responsibility, as the grieving party, to point out clearly and precisely what is being claimed.

(Union Exhibit 9)

By letter dated October 17, 2011 to the Agency, President Millikin invoked the Union's right to move the grievance to arbitration. (Union Exhibit 10) This proceeding stems from that invocation of arbitration.

The evidentiary record from the hearing comprises one Joint Exhibit; forty-eight Union Exhibits; ten Agency Exhibits; and testimony from fifteen witnesses. The Union called as witnesses Susan Canales, Stephanie Millikin, Edward Canales, Baudelio Diaz, Robert Powers, and Kimberly Gempler. The Agency called Kimberly Gempler, Julie Hyde, Shakaib Syed, Bobbi Butler, Jeffrey Powers, Alicia Nunez-Gonzaga, Sandra Hijar, Pedro Saenz, Kristie Bartlett, and Andre Matevosian. The hearing was recorded by a Certified Shorthand Reporter; a transcript of

the hearing was provided to the parties and to the Arbitrator. The parties submitted closing argument via post-hearing briefs.

THE ISSUES

From the outset, there was no dispute that the Agency had raised threshold procedural issues that would be addressed and resolved in the Arbitrator's decision-making process. The parties were unable to mutually formulate the substantive issues to be submitted for resolution if the procedural issues were resolved in favor of arbitrability. Therefore, each party defined the substantive issues from its perspective, with the expectation that at the close of the hearing, the Arbitrator would ultimately frame the issues, based upon the evidence and argument presented.

The Union's Statement

1) "Did the Agency violate the December 17, 2008 order from Arbitrator Philip Tamoush to 'fill all vacant/abandoned posts by overtime or regular assignment forthwith' at FCI Dublin? If so, what shall be the remedy?"
2) "Did the Agency violate the Master Agreement, as alleged in the Union's August 24, 2011 Grievance, when it vacated mission critical posts? If so, what shall be the remedy?"
3) "Did the Agency violate the Master Agreement, as alleged in the Union's August 24, 2011 Grievance, when it vacated non-custody posts?"

(Transcript, pp. 7-8)

The Agency's Statement

1) "Did the Union file the instant grievance in a timely manner in accordance with Article 31, Section d of the Master Agreement? If not, are further proceedings in this matter barred?"
2) "Did the Union comply with Article 31, Section f, and Article 32, Section a of the Master Agreement with respect to specificity when it filed the instant grievance? If not, are further proceedings in this matter barred?"
3) "[If further proceedings in this matter are not barred,"], with respect to the merits, did the Agency properly exercise its statutory contractual rights when assigning work and duties?"

(Transcript, pp. 8-9)

SUMMARY OF THE CASE

This dispute involves bargaining unit members employed at a complex in Dublin, California, which consists of three buildings referred to as the Federal Correctional Institution ("FCI"), Federal Bureau of Prisons. Although one of the buildings (itself called "FCI") is characterized as a "low-level" security institution for female offenders, it houses female inmates who have committed serious crimes, including murder, since the Bureau of Prisons has so few facilities for female offenders. The second building, The Camp, houses low-security female offenders. The third building houses male offenders of all custody levels who are being held pending disposition of their cases in Federal court. Some will go to maximum security prisons, and others to medium or regular security prisons. (Transcript, p. 29)

The mission of FCI Dublin is managed and overseen via approximately fifteen departments, the largest of which is the Correctional Services Department, typically referred to as "Custody." Its Correctional Officers are responsible for maintaining the safety and security of the institution by observing inmate behavior in the area of assignment. Other departments, known as "Non-Custody" departments, are responsible for specialized functions denoted by the name of their departments, e.g., Unit Management, Religious Services, Psychology, Education, Recreation, Correctional Systems, and Food Services. However, every employee at FCI Dublin, regardless of the employee's Departmental affiliation and regardless of what specialized position the employee regularly holds, is trained as a law enforcement officer and is a Correctional Officer first.

The Correctional Services Department issues a daily schedule (referred to as the "daily roster" or the "mission critical roster") that, at a minimum, identifies posts by shift for the entire day and the employees assigned to those posts. It has three shifts: day shift, evening shift, and morning shift. Non-Custody departments also maintain daily schedules that are similarly constituted, although some departments do not have three shifts.

The Custody Department's "daily roster" is also commonly referred to as the "mission critical roster" because it is based upon the "mission critical roster" that is developed and approved on a quarterly basis by the Regional Director, Bureau of Prisons and the Warden at FCI Dublin. Afterward, at FCI Dublin, the Administrative Lieutenant creates the daily rosters based upon the posts that have been approved on the quarterly "mission critical roster" and then issues the daily roster to staff, line staff and Correctional Officers. FCI Dublin management needs approval from higher-level management to add or remove posts. (Transcript, p. 269)

On December 23, 2004, National level policy regarding management of the "Correctional Services Quarterly Roster" (Mission Critical Posts)" was set forth in a "Memorandum for All Regional Directors," issued by John Vanyur, the Assistant Director, Correctional Programs Division, Bureau of Prisons. (Union Exhibit 1, hereinafter "the Vanyur Memorandum") In most pertinent part, the Vanyur Memorandum states:

> At the November 15-19, 2004, Executive Staff Meeting, discussions took place regarding our ongoing need to reduce overtime within Correctional Services departments system-wide due to the Bureau's overall budget issues. This year, at the National Correctional Services Training, Captains were provided training on "How to Think Out of the Box" and learned the definition of mission critical posts. Likewise, they were instructed to create a new quarterly report to be reviewed and approved by their respective Warden and Regional Director. A number of the rosters submitted included the elimination of posts (removal of one or all perimeter patrol assignments) that are required by current policy, and a change in national policy would be required to effect such changes. **Therefore, we request that Captains resubmit a draft roster to include policy mandated posts previously excluded, as part of their mission critical posts.** Please submit this information through the Warden to the Regional Director no later than Wednesday, January 5, 2005.
>
> . . .

> Those eliminated posts will be placed on the sick and annual roster in accordance with the Master Agreement, Article 18. By increasing the number of sick and annual staff, and with good daily roster management by the Captain, our objective to significantly reduce Correctional Services overtime, i.e., Bus and Airlift,E315, Hospital, should be met.
>
> Therefore, if you do not accurately construct a "mission critical" roster, and only identify posts absolutely needed for the daily operations of the facility, you will likely fail to meet needed overtime reductions.
>
> Once reviewed and approved, the new blank Mission Critical Quarterly Roster must be posted by February 6, 2005, in order to allow staff an opportunity to review and bid on posts in accordance with the Master Agreement, Article 18.
>
> . . .
>
> Likewise, as you draft this new roster, the following criteria will be adhered to:
>
> . . .
>
> - The Captain must be personally involved in his/her overtime expenditures. He/she will insure all other reasonable options have been explored prior to authorizing overtime to fill "mission critical" posts.
> - Additional posts will not be added to the "mission critical" Quarterly Roster without the approval of the respective Regional Director.
>
> (Union Exhibit 1)

On January 5, 2002, in a follow-up to the aforementioned Memorandum, the Director of the Federal Bureau of Prisons, Harley Lappin, issued a "Message to All Staff" providing "an update regarding plans that the Executive Staff and I have developed to allow us to continue to successfully perform our mission and further reduce our costs, as necessary to live within the very constrained budget we are facing this fiscal year." (Union Exhibit 2) The Memorandum alludes to three major initiatives that "will yield substantial cost savings, while at the same time allow us to continue to operate safe and secure prisons with appropriate inmate opportunities. It reaffirms the importance of "staffing positions that have direct contact with inmates." Then,

under the heading of "Cost Savings Initiatives included in Phase III, Director Lappin addresses and defines "mission critical posts," as follows:

- The identification of "mission critical posts" on the custodial roster, thereby allowing us to meet three key objectives: first, establish posts that would be vacated only under rare circumstances; second, reduce the reliance by correctional services on other departments to cover custody posts; and third, substantially reduce overtime costs. These objectives would be achieved by making available other correctional services posts for relief, medical escorts, and special assignments—areas that have often been covered by use of overtime or non-custody staff. Our goal is to save at least $25 million in overtime for Fiscal Year '05. We do not plan to reduce the number of correctional services positions at the present time.

(Union Exhibit 2, p.2)

Documentary evidence and testimony from both Union and Agency witnesses indicates that in the years following issuance of the aforementioned National policy, the Correctional Services Department, FCI Dublin, continued to "augment" staff, i.e., to reassign Non-Custody staff to fill daily roster posts in the Correctional Services Department, to use Custody supervisors to cover vacant posts, or to leave some of the posts or positions unassigned. Detailed information is provided in Union Exhibit 16 regarding such augmentation during the period April 2011 to April 2013. For example, a summary derived from the information on daily assignments rosters in evidence, reflects that during April 2011, supervisor positions were vacated, i.e., left unfilled, 58 times, bargaining unit Custody posts were vacated 54 times and Non-custody bargaining positions were vacated 36 times. Similar summaries, derived from the information reflected on daily assignments rosters in evidence, also appear in the record for the months of May 2011, June 2011, July 2011, August 2011, September 2011, October 2011, November 2011, December 2011, June 2012, January 2013, March 2013, and April 2013. (Union Exhibit 16) The record also contains such data regarding other positions at FCI Dublin. (Union Exhibits 17 through 21) Lt. Gempler testified that in late April 2013, most augmentation at FCI

ceased, a development she attributed to the fact that staffing levels went up because the Agency had "some successful certs in hiring." (Transcript, p. 325).

In summary, various Agency witnesses testified that prior to augmenting an employee as the means of filling a vacancy in Custody, management took steps to ensure that the duties of the employee's regular position were not paramount that day or could handled by someone else, including the supervisor, if necessary. Capt. Bartlett testified that before moving individuals from their regularly assigned positions or before leaving a post or position unattended, she carefully considered the circumstances. For instance, if the applicable Lieutenant felt that employees could be temporarily moved from certain specialized posts (e.g., SIS, Phone Monitor, and Lock Shop) to work in Custody, Capt. Bartlett felt comfortable pulling them to do so. (Transcript, p. 467). Capt. Bartlett also testified that the safety and security of the institution were not jeopardized if she moved a Lieutenant, for instance—"So, if I had a Lieutenant and I moved them to, say, the Compound position, they were either not needed that day to perform their types of duties, or I was comfortable that they were still able to provide oversight and supervision from the position that I roster-adjusted them to." (Transcript, p. 462)

For many years prior to the filing of the instant grievance, the Union and FCI Dublin have continually had labor relations meetings and discussed various concerns of the Union about augmentation, including that bargaining unit members believed the practice made the environment less safe, that the practice adversely affected unit members' ability to complete the work of their own regular positions, and that the practice deprived members of the bargaining unit of overtime opportunities. Ms. Canales and Ms. Millikin testified that the Union initially accepted management's explanation that management had a right to use augmentation as a means of filling mission critical posts and, accordingly, the Union's position shifted from opposing the practice to working with management to develop a monthly augmentation schedule to ensure that augmentation would be equitably distributed among departments and to place employees on notice regarding their assignments. Nevertheless, the Union continued to

have concerns about the consequences of augmentation and vacating positions. On December 7, 2007, it filed a grievance.

The aforementioned grievance was resolved in an award issued by Arbitrator Tamoush on December 17, 2008. Arbitrator Tamoush stated in his Opinion and Award that "the parties could not agree on a single joint statement of the issues" and, therefore, each party submitted its statement of the issues. As reflected in Arbitrator Tamoush's Opinion and Award, the Union defined the issues as follows: 1) "Did the Agency violate Article 18, Section p of the Master Agreement when it failed to ensure that overtime was rotated equitably amongst the Cook Foremen at FCI Dublin?," 2) If the Agency did violate Article 18, Section p of the Master Agreement, are the grievants entitled to back pay under the Back Pay Act ... for the hours of work that the grievants were wrongfully denied overtime opportunities, for the period of time not exceeding six years?," 3) "Did the Agency violate the Master Agreement by vacating Cook Foremen posts at FCI Dublin?," and 4) "If yes, what shall the remedies be?" The Agency defined the issues, as follows: 1) "Did the Agency fail to equitably distribute overtime to the grievant, D. Duffy, on December 7, 2007, in accordance with the Master Agreement, Article 18, Section P?" and "If so, what is the appropriate remedy?" (Union Exhibit 6, p. 2)

In most pertinent part, Arbitrator Tamoush's Award states 1) that "the Agency violated Article 18, Section p (and q by reference) of the Master Agreement when it failed to ensure that overtime was distributed and rotated equitably among the Cook Foreman at FCI Dublin;" 2) that "the grievants are entitled to back pay, for the hours of work the grievants were wrongfully denied overtime opportunities for a period of time to include two years prior to December 7, 2007, and continuing to the date of the award;" 3) that "the Agency violated the Master Agreement by vacating Cook Foremen Posts at FCI Dublin;" and 4) "the Agency is ordered to fill all vacant/abandoned posts by overtime or regular assignment forthwith." (Union Exhibit 6, p. 13)

The Agency objected to Arbitrator Tamoush's award and manifested its position by filing an exception with the Federal Labor Relations Authority ("FLRA"). On May 31, 2011, the FLRA issued its decision regarding the exception. *U. S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin, California and AFGE, Local 3584,* 65 FLRA No. 185. (Union Exhibit 7) As recounted in the FLRA decision, the Agency excepted to the award on the grounds that "the award affects management's right to determine its internal security practices and to assign work under §7106(a)(1) and (a)(2)(B) of the Statute because the award precludes the Agency from leaving posts vacant" and "that, as interpreted and applied by the Arbitrator, Article 27 is not enforceable under §7106(b)(3) because, by precluding the Agency from vacating posts, it excessively interferes with the exercise of management's rights." (Union Exhibit 7, page 2) After taking into account the arguments of both parties and setting forth its analysis of the facts and law surrounding the exception, the FLRA denied the Agency's exception and issued its decision on May 31, 2011. (Union Exhibit 7, pp. 3-4).

On August 24, 2011, nearly three months after the FLRA's decision, the Union filed the grievance at issue in this proceeding. Former Union President Millikin, who filed the grievance, testified that the Union learned around August 1, 2011 that the FLRA had upheld Arbitrator Tamoush's award and that the Union filed the grievance promptly after learning that the FLRA had upheld Arbitrator Tamoush's award.

As demonstrated by daily assignment rosters in evidence, the Agency continued to augment and to leave posts or positions vacant in all departments after the FLRA had issued its decision upholding Arbitrator Tamoush's award.

SUMMARY OF ARGUMENT

The Agency's Position re Procedural Issues

The Union's grievance in the instant case is procedurally defective for two reasons: 1) the Union failed to file the grievance in a timely manner in accordance with Article 31, Section of the

Master Agreement and 2) the grievance lacks specificity pursuant to Article 31, Section f and Article 32, Section a.

Article 31, Section d, of the Master Agreement states in relevant part, "Grievances **must** be filed with forty (40) calendar days of the date of the alleged grievable occurrence. . . 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 (40) calendar days from the date the party filing the grievance can reasonably be expected to become aware of the occurrence." (Joint Exhibit 1). The Union filed the grievance on August 24, 2011, citing the date(s) of violation as "August 1, 2011 (open continuous)." The Union claims augmentation and vacating posts was a common occurrence at Dublin going back as far as 2005 and that "it seemed like it became really bad around 2008 through current...." (Canales Testimony, Transcript, p. 53) While the Union contends that the practice of augmenting non-Custody staff to work Custody posts during times of mandatory training, i.e., Annual Refresher Training, is a violation, the Union admits that it has been aware this practice was occurring as early as 2000. The Union admits it failed to file any grievances regarding augmentation, or vacating posts, other than the one it filed for the Food Services Department in approximately 2008. (Transcript, p. 165 and Union Exhibit 6). Clearly, it was well aware of the practice of augmentation several years prior to filing the instant grievance in 2011. It is attempting to circumvent its contractual obligations to file in a timely manner by claiming it was filing data requests and starting to collect data, and alleging it was "very difficult to get data from the facility." (Transcript, p. 165) Yet, despite this alleged "difficulty to get data," the Union managed to file a grievance for the Food Services Department for the same issue sometime in 2008. If it believed augmentation and/or vacating posts in other department was also a violation, why would it not have included those allegations in its earlier grievance, especially in light of the fact the Union has access to review and print the rosters? (Transcript, pp. 185-186). Instead, it waited, and is now attempting to collect back pay for staff beginning in 2005.

The Union also claims it delayed filing a grievance on behalf of other departments at FCI Dublin because of a pending FLRA decision on the appeal of Arbitrator Tamoush's award pertaining to vacating posts in the Food Services Department. (Transcript, pp. 165-168, Union Exhibits 6 and 7). There is provision or exception in the Master Agreement that waives the time limits for filing a grievance due to pending appeals, or because management had asserted it had not violated the contract. The Union had an obligation to file its grievance within 40 calendar days in accordance with the Master Agreement. It failed to do so. Even if assuming arguendo the delay was somehow justified as a result of the pending FLRA decision, the Agency contends the Union was still outside its 40-calendar-day time frame from the date of the FLRA decision, dated May 31, 2011, since the grievance was filed 85 days after the date of the FLRA decision.

Additionally, the grievance is procedurally defective due to its lack of specificity. Article 31, Section f, of the Agreement, requires the Union to file formal grievances using Bureau of Prisons "Formal Grievance" forms. Block 6 of the form requires the Union and/or the grievant(s) to "be specific" in terms of what was violated. At the hearing, the Union presented elaborate breakdowns with specific dates and post/positions that were in contention; yet, in its grievance, the allegations were kept general, spanning over an approximate 8-year time frame. The Union admitted it had access to rosters, and therefore, had the information available to it to provide the specifics that were provided at the hearing. Instead, it chose to use an ambush tactic by entering a plethora of documentation with specific examples for the first time at the hearing, contrary to Article 32, Section a of the Master Agreement.

In addition, the grievance contains a vast number of other allegations with no specific individuals identified or dates. For example, the Union claims that management "failed to consider the circumstances surrounding an employee's request against reassignment," that "extra work is being distributed unfairly and unequally to employees without reason" and that employees' performance evaluations were affected. Even at the hearing, when asked to identify any staff whose performance evaluations were affected by the augmentation process, Ms.

Canales refused to provide any examples or names. (Transcript, p. 15). Associate Warden Hijar testified that the grievance failed to provide nearly enough information for management to look into the Union's allegations. The grievance should be dismissed on the grounds that it is procedurally defective.

The Union's Position re Procedural Issues

Neither procedural objection raised by the Agency has merit.

The grievance meets all the specificity requirements for the filing of a grievance. Federal law only requires that a grievance be "fair and simple." The grievance herein satisfies that requirement. It also satisfies the requirements of the Master Agreement itself. In completing the Agency's grievance form, which the Master Agreement requires the Union to use in filing a grievance, the Union went above and beyond just filling out the form and included a two-page attachment that sets forth a great deal of detailed facts and detailed allegations. The Agency was well aware of the issues being raised in the grievance and had the ability to respond to them during the course of the grievance procedure. It has failed to show that the grievance should be dismissed because of lack of specificity.

There is also no basis for dismissing the grievance on the grounds of untimeliness. The Agency's late claim (raised for the first time at arbitration) that the grievance is untimely and is, therefore, barred from arbitration should be disregarded simply on the basis that it was not made prior to the arbitration hearing. However, if not disregarded on that basis, it should be disregarded on the basis that the claim is, in fact, not true. The Agreement requires that grievances must be filed within 40 calendar days of the date of the alleged grievable occurrence or within forty days of when the party became aware of the grievable occurrence. The grievance satisfies that requirement. Union leadership learned on or about August 1, 2011 that the FLRA had upheld Arbitrator Tamoush's award finding that the Agency had violated the Master Agreement by vacating posts and ordering the Agency to fill the posts. Within forty days of gaining that knowledge, it filed the grievance. The grievance is timely.

Discussion and Decision re Procedural Issues

The first order of business in this proceeding is to address procedural issues raised by the Agency, i.e., whether "the grievance" was timely filed and whether "the grievance" should be procedurally rejected. The matter of what is "the grievance" must necessarily be addressed first in order to address the issue of whether "the grievance" is timely.

I have placed "the grievance" in quotation marks because, in fact, the Formal Grievance Form the Union used to formally initiate the grievance procedure contains not just one discrete matter or a few discrete matters that allegedly constitute wrongdoing by the Agency, but rather alludes to many circumstantial bases for filing a grievance and expresses them via fifteen paragraphs[1] in an Attachment to the grievance form. The Master Agreement itself does not provide instructions regarding the degree of specificity necessary to set forth the basis of one's complaint. It provides that a grievance must be filed on the Bureau of Prisons "Formal Grievance" form and must be signed by the grievant or the Union. The Form directs the preparer to "be specific" in stating the grievance.

Ms. Millikin, who submitted the grievance, attested that the small block of space allotted on the form for setting forth the grievance was insufficient and she, therefore, used an attachment to explain the basis for the grievance. The Attachment itself is quite lengthy. However, the quantity of content itself did not lead to specificity. Some of the paragraphs in the attachment are quite succinct and do not describe with specificity the incident or circumstances that led to the grievance filing or cite any provision of the Agreement allegedly violated by the incident or circumstances. In some cases, the paragraphs fail in both ways, i.e., the incident itself is only vaguely described and there is no indication about what particular provision of the Master Agreement was allegedly violated by the circumstances or incident vaguely referenced.

[1] For ease of reference to content, I have taken the liberty of numbering from 1 to 15 the paragraphs that appear under the following sentence shown at the top on the Attachment: "Attachment 6. In what ways were each of the above violated? Be specific." (Union Exhibit 8). In addition to appearing in Union Exhibit 8, these paragraphs are also set forth verbatim in Union Exhibit 10, under the following sentence: "Today, October 17, 2011, the Union is invoking its right to move this matter to arbitration and we state the same violations as listed in the grievance..."

In those instances, vagueness is a serious procedural flaw. While such assertions may provide from the Union's perspective some context for the bigger picture that precipitated the grievance, the assertions lack necessary information regarding names, dates, or other such specifics to allow the Agency to tailor a response to the allegations. Rightfully, such minimalist allegations may be rejected on the basis that they are procedurally deficient. The allegations set forth in Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 9 fall into that category and will not be further addressed herein.

On the other hand, given the background in which "the grievance" arose,[2] the allegations in the remaining paragraphs (the tenth paragraph through the fifteenth paragraph), either alone or in conjunction with each other contain enough information both to fairly apprise the Agency of the particular circumstances at issue and to give notice of the contractual or legal authority allegedly violated. With respect to those paragraphs, there is no basis for finding that "the grievance" is procedurally defective. Therefore, the allegations taken together in those paragraphs, as shown below, are hereby deemed to constitute "the grievance" in this matter:

The tenth paragraph:

> Management has failed to adhere to Master Agreement Article 27 Section A when they failed to lower inherent safety hazards to the lowest possible level, without relinquishing their rights under 5 USC 7106 and they failed to furnish to employees places and conditions of employment that are free from recognized hazards that area causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders. Specifically, Management has vacated posts that are directly responsible for increased security functions such as employees who monitor high security offenders, employees that monitor security cameras, employees that monitor surveillance equipment, employment that conduct security checks, and employees that are first responders to emergencies.

[2] For many years prior to the filing of the grievance, the parties had periodically discussed those issues. Further, the complaints involve broad issues about circumstances and practices that are not disputed and where the absence of specific detail on the grievance form, e.g., names and dates, did not unfairly impede the Agency's ability to respond to those allegations during the grievance procedure.

The eleventh paragraph:

> The Agency is leaving posts vacant without good reason making the remaining officers' supervision of all of the inmates and almost impossible responsibility and raising safety concerns. Vacating these posts is a violation of our Collective Bargaining Agreement and the Agency refuses to negotiate or resolve the issue. Most recently the Agency and even more specifically FCI Dublin was found in violation of the same acts see 65 FLRA 892. As a remedy to case 65 FLRA 892, the Arbitrator ordered FCI Dublin to fill all vacant/abandoned posts by overtime or regular assignment forthwith. However, the Agency refuses to comply with said order.

The twelfth paragraph states, as follows:

> The Union is not asking or preventing the Agency from determining which and how many posts are necessary or determining the degree of staffing needed to maintain the security of its facility see (57 FLRA at 410-11) but once the Agency has determined that a post/position is necessary the Union argues that the post should be filled with regular Staff Officers not already assigned to a post/position or through overtime assignments. Post/positions should only be vacated for good reason such as an emergency however the Agency has sited (sic) over and over again that it's primary reason for vacating posts/positions is to save overtime funds. It should be noted that FCI Dublin's previous Warden received a $10,000 personal award for saving overtime money, this shows that Management Officials have a vested interest in saving overtime even if it causes increased security concerns.

The thirteenth paragraph alleges that the Agency has vacated critical correctional posts, viz., Special Supervision Unit, Special Housing Unit, Compound, Special Investigative Services, the Security Lock Shop Office, Phone Monitor, and Activities Lieutenant and describes the circumstances that allegedly render the posts "critical" correctional posts.

The fourteenth paragraph alleges that the Agency has vacated other support function positions whose incumbents provide critical support functions to the prison (Unit Counselors, Unit Case Managers, Food Services, Facilities Workers and Health Services Employees), thereby

causing security concerns and making the remaining employees' supervision of all the inmates an almost impossible task.

The fifteenth paragraph:

> The Agency has decreased staffing levels by vacating posts and/or positions which has raised the inherent safety hazards of all staff. This has directly decreased the numbers of staff assigned on daily Correctional Rosters and reduced the ability of staff to respond to serious incidents to include but not limited to assaults on staff. This reduction of force is not limited to Custody Staff but also includes Non-Custody Department who are also first responders to emergency situations in the Correctional Environment. This also adds to an increase of duties on a reduced workforce complement, reduces effective communication between staff and inmates. Which also decreases our ability to supervise inmates and control contraband coming into our facilities. These examples show how difficult it is for staff to carry out the mission of the Bureau of Prisons with vacant or abandoned posts and/or positions."

With respect to the remaining procedural issue pertaining to timeliness, the evidence fails to establish that the grievance, as defined in the preceding paragraph, is untimely. Article 31 ("Grievance Procedure") of the Master Agreement provides, as follows, regarding the time period for filing grievances:

> 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 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.

In response to the inquiry for "Date(s) of violation(s), the Form reflects "August 1, 2011 (open continuous)." At the hearing, Ms. Millikin attested that the Union learned around that time that

the FLRA had upheld Arbitrator Tamoush's award finding that augmentation violated the Master Agreement and that in view of continuing practices by the Agency that the Union found contrary to the award, the Union filed the grievance. The grievance was filed on August 24, 2011, which is well within 40 days of the time she attested the Union learned of the FLRA decision that gave the Tamoush award the imprimatur of finality in the Union's view. Therefore, using August 1, 2011 as the date from which to measure timeliness, the filing was well within the 40 days required by the Agreement. Additionally, if the practice of augmentation, rather than the date the Union learned of the FLRA decision, is the deemed the occurrence giving rise to the grievance, the grievance was also timely filed, since augmentation was continuing as a matter of course at the time the grievance was filed. The fact that the Union had not filed a grievance during the many years augmentation had been practiced did not forever waive the Union's right to file a grievance if, in fact, augmentation and vacating of posts constitute violations of the Master Agreement.

In summary, the grievance will not be dismissed on the basis that it was procedurally defective or untimely.

The Merits of the Grievance

The Union's Position

1) The Agency has violated the order of Arbitrator Tamoush by failing to fill all posts by overtime or regular assignment at FCI Dublin

The Agency has alleged that the Tamoush award and the FLRA decision upholding the award had to do with Cook Foremen in the Food Service Department at FCI Dublin. However, the Arbitrator's remedy was completely clear. He specifically referenced "Cook Foremen" and "the grievants" in paragraphs 1-3 of his Award when stating the violations that took place and the back pay that was due as a result of those violations. He then clearly ordered the Agency "to fill all vacant/abandoned posts by overtime or regular assignment forthwith." He could have qualified that remedy to only include Cook Foremen, or only include the Food Service

department, but instead chose to order the Agency to fill all of its posts because he determined the failure to do so violated the Master Agreement.

The Agency could have filed exceptions with the FLRA if it believed that the Arbitrator exceeded his authority by ordering the Agency to fill all posts, but did not do so, and the FLRA upheld the Award in its entirety. FCI had a binding order from the Arbitrator to fill all vacant posts, and that order was upheld by the FLRA on May 31, 2011 and the order then became final. It is, therefore, clear that FCI Dublin has had a legal obligation to fill all posts that the Agency has predetermined to be necessary posts since that time. The Union's grievance in the instant proceeding alleges that the Agency's failed to comply with the Tamoush award.

The Agency determined in advance which and how many posts were necessary for the Food Service department each day and each shift to ensure the safety and security of the institution. The process of routine and frequent Custody augmentation resulted in posts being left vacant in the Food Service department. It was either Cook Foremen posts being left vacant, or the FSA, AFSA, Administrative Assistant, or Materials Handler posts being left vacant, all of which were determined in advance to be necessary posts for the safety and security of the institution. If Agency management wanted one person to perform the duties of both posts on any given day or shift, it would have been scheduled as such, but that was not the case. Instead, the lack of adequate staffing in the Custody department, combined with a refusal to hire overtime to fill all vacant posts, led to the Food Service department having to leave posts vacant, in clear violation of Arbitrator Tamoush's 2011 Award.

The Award ordered FCI Dublin to fill all posts by regular or overtime assignment forthwith and the FLRA upheld that Award. The plain language of that Award included "all posts" at FCI Dublin, and therefore any post that was left vacant by the Agency after the date of the FLRA Decision upholding the Arbitrator's Award (rather than paying a bargaining unit employee overtime to fill the post if enough staff was not hired to cover the posts through regular assignment) should be included in a back pay award to AFGE Local 3584 bargaining

unit. And, while the plain language of the Award does not support a finding that the Award should be limited to Food Service, even if it did, the evidence clearly demonstrates that the Agency similarly violated the Award by leaving posts vacant, and the affected employees need to be made whole through overtime back pay payments for each post the Agency left vacant since May 31, 2011 when the FLRA decision was issued.

2) The Agency has violated the Master Agreement by vacating mission critical posts.

If the Arbitrator in this proceeding determines that the Agency violated the Award of Arbitrator Philip Tamoush by not filling all posts at FCI Dublin after receiving a binding order to do so, then the inquiry in this case is over and the affected bargaining unit employees should be granted back pay in the form of overtime pay for each post left vacant without good cause since the Award was upheld by the FLRA. However, if the Arbitrator determines that the Agency did not violate the Award or that the Award does not apply to any posts outside of the Food Service Department, then the issue of vacating posts in the other departments at FCI Dublin is now presented to the Arbitrator in this proceeding.

The evidence in this proceeding proves that the Agency has violated the Master Agreement by leaving mission critical posts vacant at FCI Dublin without good cause for several years. As shown in detail by the record, the Agency has vacated posts at FCI Dublin on a routine and consistent basis for several years, including posts in the Custody department that the Agency has determined to be "mission critical posts." The evidence overwhelmingly demonstrates that mission critical posts have been left vacant in the Custody department for several years, with the incidence of vacancies increasing around 2008, and then increasing even more in 2011 when the Agency began leaving mission critical Lieutenant posts vacant. The rosters presented by the Union show the posts on each day and shift that were left "unassigned."

The Union did not include in its calculations any instances involving posts that were left vacant due to emergencies, because the Union has always acknowledged that to be a necessary management right. However, every other vacancy of a mission critical post violated Article 27 of

the Master Agreement, and the Agency has not provided any "good cause" for vacating those mission critical posts, since the only reason was to avoid paying additional overtime costs, which became necessary since FCI Dublin failed to adequately staff its institution in a manner that was mandated by the BOP in order to meet its mission. Leaving those mission critical posts vacant solely for costs saving purposes violated management's obligation to lower the inherent hazards of the correction environment to the lowest possible level.

Arbitrator Tamoush concluded in 2008 that the Agency violated Article 27, Section a, of the Master Agreement by leaving posts vacant at FCI Dublin because the practice created an unsafe environment for staff. Arbitrator Tamoush held that the Agency did not fulfill its obligation to lower the inherent hazards of the correctional environment to the lowest possible level when it left posts vacant since those posts were the ones that the Agency had already determined were necessary to the safety and security of the institution, even in the Non-Custody Food Service department.

Contrary to the Agency's position, Article 27, as applied to the facts of this, does not abrogate a management right. The Agency is still raising that argument despite FLRA precedent at odds with its position. In addressing the Tamoush award and other similar awards (which found that the Agency violates Article 27 when it does not fill established posts already determined by the Agency to be necessary to the safety and security of the institution), FLRA held that the awards do not violate management's rights under 5 USC §7106. When an Agency raises a management rights defense to an award, the FLRA performs a three-step analysis: 1) determines where the award affects the exercise of a management right, 2) determines whether the award provides a remedy for a violation of a provision negotiated under 5 USC § 7106(b), and 3) when the award involves a provision negotiated under 5 USC § §7106(b)(3), commonly referred to as an appropriate arrangement, the Authority determines whether the appropriate arrangement **abrogates** a management right. For a provision to be an appropriate arrangement, it must "constitute an arrangement for employees adversely affected by the

exercise of a management "right." 65 FLRA at 893. An award abrogates management rights if it "precludes an agency from exercising" the affected rights. Id at 894.

Article 27 is an appropriate arrangement because it seeks to ameliorate the adverse effect of management's right to determine internal security practices and how to assign work. It ameliorates the adverse effects that result from the Agency's decision not to staff posts. The Authority has repeatedly held, in cases involving the vacating of posts, that Article 27 is an appropriate arrangement. (Four cases cited in post-hearing brief). The facts in this case are substantially similar to those cases. The language in Article 27, i.e., "without relinquishing its rights under 5 USC §7106," does not mean that Article 27 is not an appropriate arrangement. It simply means that the Agency did not waive any rights it had—such as refusing to bargain over permissive subjects of bargaining. The provision, however, does not trump the Union's rights under §7106(b)(3) to an enforceable appropriate arrangement for employees adversely affected by the Agency's exercise of 7106 rights.

Neither Article 27 nor the Union's requested remedy abrogates management rights. The Union seeks an award that finds that the Agency violated Article 27 when it vacated posts without good cause and orders the Agency to cease and desist from engaging in this practice. The FLRA has repeatedly held that such a requested remedy does not abrogate management rights. *FCI Dublin*, 65 FLRA at 893-894 (2011); *USP Atlanta*, 57 FLRA at 410-11; *MDC Guaynabo*, 57 FLRA at 333-34. In *MDC Guaynabo*, the Authority held:

> In this case, the award limits the Agency's ability to leave posts vacant. However, the limitation applies only to those posts that the Agency determined were necessary and which it requested, and received, approval for staffing. See Award at 20, 24. Nothing in the award prevents the Agency from changing its determination. Moreover, the award allows the Agency to leave posts vacant in emergency situation. As a result, the Arbitrator's award does not abrogate the Agency's right to assign work. 57 FLRA at 333-34

The Arbitrator should find that the Union's requested remedy does not abrogate any management rights under §7106. Here, the Union is only requesting that the Agency staff posts it has deemed necessary to safely and securely operate the facility, absent good cause not to staff them. At the very least, posts determined by the Agency to be "mission critical" meet that criteria. All of the evidence presented proves that for a post to be included on the Custody roster, it must have been determined by the Agency to be a mission critical post. (Lt. Gempler's testimony, at Transcript, p. 280; Capt. Bartlett's testimony, at Transcript, pp. 487-488; Associate Warden's testimony, at Transcript, p. 652) The evidence presented shows that the majority of the bargaining unit posts that were left "unassigned" on the mission critical roster were the SIS Tech, Phone Monitor, and Security Officer posts.

In accordance with the foregoing discussion, the Agency's actions in this case failed to lower the inherent hazards to the lowest possible level and created an unsafe environment at FCI Dublin. The Agency has violated the Master Agreement by vacating Non-Custody posts.

If the Arbitrator determines that the Agency did not violate the binding order of Arbitrator Tamoush to fill all posts at Dublin, or that his Award does not apply to any posts outside of the Non-Custody Food Service Department, the Agency violated Article 27, Section a the Master Agreement for years by routinely and consistently vacating posts, without good cause, in the other Non-Custody departments. Union and Agency witnesses testified that that Non-Custody staff play an important role in the safety and security of the institution. (Assistant Warden, at Transcript, p. 652; Food Service Administrator Hyde, at Transcript, p. 632; Associate Warden Hijar, at p. 381; Lt. Gempler, pp. 285-286)

By policy, augmentation by Non-Custody staff, is only supposed to happen in cases of emergency or other rare circumstances, such as during mandatory training. (See Agency Exhibit 4) However, augmentation of Non-Custody personnel at FCI Dublin was the regular course of business. (See Union Exhibit 5) It became so common and so frequent that management created augmentation schedules to let each Non-Custody department know which day its staff

would be subject to augmentation. (Union Exhibits 3 and 4) The evidence presented demonstrates by a preponderance of the evidence that the Agency failed to meet its obligations under Article 27 of the Master Agreement to lower the inherent hazards of the correctional environment to the lowest possible level when it left Non-Custody posts vacant just to avoid paying increased staffing costs to fill all posts that have been determined by the Agency to be necessary for the safety and security of the institution.

In addition to violating Article 27 of the Master Agreement, the Agency also violated other sections of the Agreement by vacating Non-Custody posts. More specifically, it violated Article 6, Section b (2) when it failed to treat all bargaining unit employees fairly and equitably in all aspects of personnel management by assigning some employees to work outside their regular posts or positions more often than other similarly situated employees. The Agency violated Article 14, Section a of the Master Agreement, by unequally assigning more work outside of their regular position to some employees than others and potentially impacting the performance evaluations they would receive from their supervisors. The Agency also violated Article 16, Section c, when it augmented Non-Custody staff to cover Custody posts on a routine and consistent basis. Article 16, Section c, states that the phrase "other duties as assigned" in position descriptions would not be used to regularly assign work to an employee that is not reasonably related to the employee's basic job description. While all staff recognize that they are Correctional Officers first, when employees are selected through the merit selection process to fill a certain specialized post in a certain department, it was never the expectation that they would regularly be expected to work outside of their position performing other duties. Testimony from Ms. Canales established that the Agency violated Article 18, Section n, by failing to consider the circumstances surrounding an employee's request against reassignment before augmenting staff.

In conclusion, the Union requests that the Arbitrator sustain the grievance in its entirety and order the Agency to cease and desist from continuing to violate the Master Agreement and

the Tamoush Award by vacating posts. In addition, the Union requests that, pursuant to the Back Pay Act, 5 USC Section 5595, the Arbitrator grant back pay to the affected employees due to the unwarranted and unjustified personnel actions committed by the Agency in vacating these posts.

The Agency's Position

As demonstrated by the following argument, the grievance is substantively defective.

A. The grievance challenges the substantive rights of management to determine its budget and internal security practices, and its right to hire and assign work as defined by 5 USC Section 7106, and identified in Article 5 of the Master Agreement. These rights are not negotiable; therefore, the grievance is deficient and must be dismissed.

The Union's entire case is based upon its belief that management may not leave a post vacant or unassigned, but rather, must fill all posts even if it requires the use of overtime. The Union is attempting to tie management's hands by requiring the Agency to staff all posts at all times. This would require the Agency to do one of two things: 1) over hire and establish a staffing level to fill-in for those employees who are on leave, retire, transfer, resign, are in training, suspended or terminated; or 2) fill every vacant position with overtime. Such a decision and order would abrogate both the statutory and contractual rights of management.

Without a doubt, the ability to determine both its budget and security practices are essential to the execution of the Agency's mission. Unlike many governmental agencies, management decisions made relating to the practices of the agency have a direct impact on the safety and well-being of inmates, staff and the public at large. To that end Congress enacted the management rights clause of the Federal Service Labor-Management Relations Act to ensure that the collective bargaining system [in the Act] would not undermine the effectiveness of government through unwarranted intrusion on management prerogatives. (Cases cited in brief.)

Restricting the Agency's right to staff its correctional facility with fewer correctional officers than it had scheduled would limit the Agency's authority to determine the degree of

staffing necessary to maintain the security of its facility. The FLRA has long held that the right to determine internal security practices under §7106(a)(1) includes the right to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property or operations against internal and external risks. (Cases cited in brief)

The FLRA has held that the decision whether to fill vacant positions is encompassed within an agency's right to assign employees under Section 7106(a)(2)(a) of the Statute; that the right to assign work under 5 USC 7106(a)(2)(B), encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned; that the right to assign work also includes the right to assign overtime and to determine when the overtime will be performed; that a proposal requiring the Agency to maintain coverage of staffed posts through overtime before leaving the posts vacant violated management's right. *AFGE, Local 1302 and DOJ, Bureau of Prisons, Florence, Colorado 55 FLRA 1078* (1999). In that case, which involves the same collective bargaining agreement as the one in the instant case, the FLRA found that the proposal prevented the Agency from determining when work assignments would occur, as well as when overtime would be assigned.

In Article 5, Section a, of the Master Agreement, the parties agree and acknowledge management's statutory authority as granted by Congress in 5 USC §7106. The parties further agree pursuant to Article 18, Section p, of the Master Agreement:

Specific procedures regarding overtime assignments may be negotiated locally.

1. **(W)hen Management determines that it is necessary to pay overtime** for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for those overtime assignments, which will be distributed and rotated equitably among bargaining unit employees. Emphasis added. Id. Article 18, Section p.

Enshrined in the referenced provisions of the Master Agreement, the parties agree management is the exclusive authority for determining which posts are manned, when they are manned, and whether overtime will be incurred to fill the position. To the extent management has any restraint placed on exercising its authority, such restraint is procedural as defined in the Master Agreement, Article 18. The United States Court of Appeals for the District of Columbia, in reversing the Federal Labor Relations Authority, articulated this very idea. *Federal Bureau of Prisons v. Federal Labor Relations Authority, 654 F.3d 91* (July 8, 2011) The Master Agreement is devoid of a requirement for management to staff all posts, or for that matter any post, let alone be forced into incurring unnecessary overtime costs. The Appellate Court in identifying the underlying fault in both the Arbitrator's and the Authority's logic recognized:

> The Bureau would retain "its Article 18(d) prerogatives" and " [l]ocal wardens would simply report the kind of mission critical rosters they [had] been posting" since receiving the Vanyur memorandum because it was within their discretion under Article 18(d) to do so.

The Union would have the Arbitrator consider the wording of Article 27, Health and Safety, to undercut management's rights to determine both its budget and internal security practices. To do so is to undercut the Agency's statutory authority §7106 and is little more than an attempt to circumvent the Master Agreement. In Article 27, Section a, The parties recognize and acknowledge the inherent risks of a correctional environment:

> There are essentially two 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 §7016.** 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 f 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. Emphasis added.

Both statutorily and contractually, the Agency is well within its rights to reassign bargaining unit members from one post or position to another as it deems necessary to accomplish its mission. The Agency has the exclusive right to set its internal practices and control its budget. In determining its security practices, the Agency has the sole responsibility to determine which posts are critical and should be manned and which are not. It is tasked with balancing security concerns and fiscal realities. Regardless, there is no duty to bargain or seek the Union's acquiescence over such a reassignment.

Management's right to leave certain posts vacant is granted to management under 5 USC 7106, which has been incorporated into the Master Agreement at Article 5. The right to assign work also includes the right not to assign work. Pursuant to the Master Agreement, the Agency neither surrendered nor impeded its exclusive rights under §7106(a).

B. The Union failed to establish management's decision to vacate posts increased the inherent risks of a correctional environment. The fact that management decided not to staff a particular post does not disregard the safety of the staff. Management exercises a variety of controls to influence, maintain, and improve the security conditions of each facility.

The first question is whether management must fill vacant posts with overtime. A review of the Master Agreement clearly shows that management may fills posts with regular time, leave posts vacant, reassign staff to fill posts, use overtime to fill posts, or not use overtime to fill posts, as identified below:

Article 18, Section n: The Employer agrees to consider the circumstances surrounding an employee's request against reassignment when a reassignment is necessary.

This provision clearly shows that management has the right to reassign employees from post to post.

> Article 18, Section p. : Specific procedures regarding overtime assignments may be negotiated locally. 1. When Management determines that it is necessary to pay overtime for positions/assignments normally filled by the bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed equitably among bargaining unit employees.

The key language in this provision is, "when management determines." This clearly gives management the ultimate right to determine whether overtime will or will not be used to fill posts.

> Article 18, Section r.: Normally, nonprobationary employees, other than those assigned to sick and annual relief, will remain on the shift/assignment designated by the quarterly roster for the entire roster period. When circumstances require a temporary -less than five (5) days] change of shift or assignment, the Employer will make reasonable efforts to assure that the affected employee's days off remain as designated by the roster.

Again, the Master Agreement allows the Employer to change an employee's shift or post assignment.

There is no merit in the Union's claim that the Agency violated Article 27 of the Master Agreement, since the claim must be analyzed in conjunction with the aforementioned provisions of Article 18. The relevant language in Article 27 states, "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 obvious purpose of this provision is to balance the obligation of the Agency to reduce workplace hazards with its statutory rights under 5 USC Section §7106 to manage the institution. The wording of the provision is quite clear in that management does not, in any way, relinquish its rights: to assign work or to not assign work; to assign, direct or reassign employees; to determine its budget; to determine the personnel by which agency operations shall be conducted; to determine the number of employees; or to determine internal

security practices. If the provision were interpreted to mean that all posts must be filled at all times, then the provisions in Article 18, Section n., p., and r. are null and void.

Captain Bartlett, who is responsible for the overall security of the institution, testified in great detail about how staff safety is paramount and she carefully analyzes her options when determining which posts should be manned during a specific shift. She explained she was comfortable "puling certain posts, i.e., Phone Monitor, SIS Techs, and Lock Shop, only after consulting with her Lieutenants to ensure those staff did not have anything important going on. She explained that those posts were flexible and did not require direct inmate supervision. In addition, the SIS GTechs and Lock Shop were positions that required specialized skills and were not filled when those particular staff were on leave. Capt. Bartlett testified that she went through the Daily Roster to ensure that every post that required direct inmate supervision and was critical to the operation of the institution was manned.

One of the most absurd contentions raised the Union is that using Lieutenants to cover Custody posts fails to lower the inherent hazards of working in a correctional institution. To begin with, Lieutenants are management positions within the Correctional Services Department. In addition, Associate Warden Hijar testified that she started relying on Lieutenant to cover Custody posts after the Union made an issue of it in a Labor Management Relations meeting, asking why Lieutenants were not being utilized to cover Custody posts. (Transcript, p. 361) Capt. Bartlett testified that using Lieutenants to cover Custody posts was never a concern to her because her decision to rely on them was either because a particular Lieutenant position was not needed that day to perform their types of duties, or she was comfortable with them moving where they could still provide oversight.

The bottom line is that the Union failed to identify any evidence of increased hazards, i.e., assaults, riots, fights, or other adverse incidents that occurred as a result of a Lieutenant covering a Custody post, or a staff member being reassigned from the position of Phone Monitor, Lock Shop, SIS Tech, or a non-Custody department position. The record does not

contain any evidence of an increase in inmate-on-staff violence during the life of this grievance. Each management official who testified was asked if bargaining unit staff had approached them and expressed any safety or security concerns. Their testimony was consistent: they were not approached by any of their staff with safety or security concerns. Further, there is no record of either a bargaining unit staff member or the Union reporting any unsafe working conditions.

The purported violation of Article 27 is nothing more than pretext—a thinly veiled attempt to force the Agency into providing overtime opportunities. Both Captain Bartlett and Associate Warden Syed attested to that, stating that the only "issue" or concern staff had was the money, the "skipping of overtime." The underlying issue and obvious motive driving the Union's case is its misguided perception that staff is somehow entitled to overtime. Even when the Union began attempting to use "safety" and/or "security" as its argument, it was only after the grievance was filed in preparation for the arbitration hearing.

C. The Union failed to prove any violation with respect to the prior arbitration award and FLRA decision concerning the Food Services Department.

No evidence was presented to demonstrate management failed to lower the inherent hazards of working in a correctional environment, particularly in the Food Services Department where the Union claims a prior arbitration and FLRA decision ordered management to not vacate posts. No Food Service staff member testified on the Union's behalf to substantiate any claims about increased hazards of vacated posts. Instead, broad allegations were provided by Ms. Canales, a Correctional Services employee and Union representative, claiming food service staff was augmented to work in Custody. In response to those allegations, Food Service Administrator Julie Hyde provided thorough testimony explaining the various options she had available to her to cover food service posts, such as covering with management personnel (i.e., herself or her Assistant), her departmental secretary, or the employees who became extra once they were relieved at the camp at 8:00 a.m. by the PM Camp staff. In addition, Ms. Hyde pointed out that she was never asked for any official staff schedules or annual leave schedules

and, therefore, was unsure of how the Union had obtained unofficial records that were not up-to-date and that were presented at the arbitration hearing.

To tie management's hands by abolishing its rights to determine its budget and internal security practices would be a travesty to U. S. taxpayers. The issue in this case is the same issue and alleged violation that was pursued through arbitration by the Union at the Federal Correctional Complex in Terre Haute, Indiana. In that case, the Arbitrator did not find a violation and stated, "Management's determination that overtime is not necessary in these instances has not been shown to constitute a failure to lower inherent hazards to the lowest possible level nor has it been shown to be in derogation of any contractual obligations regarding overtime." *AFGE, Local 720 and U S. Department of Justice, Federal Bureau of Prisons, FCC Terre Haute, Ind.*, FMCS 10-57015 (2012) (Arbitrator Drucker) In an arbitration proceeding at the U. S. Penitentiary, Leavenworth, Kansas, Arbitrator Capollo agreed the agency "has retained the right pursuant to 5 USC 7106 to determine the internal security practices of the facility and to assign work even as it has agreed to lower the inherent hazards of the correctional environment in the Master Agreement. In the federal sector, a statute trumps a collective bargaining agreement. From the evidence adduced, the Agency has made adjustments and changes to assignments as needed. It has pulled officers off posts to aid other posts that have an immediate need." Arbitrator Cipolla further indicated the agency recognized that safety is a great concern in the day-to-day operation of the facility. See *AFGE, Local 919 and U S Department of Justice, Federal Bureau of Prisons, USP Leavenworth, Kansas*, FMCS 07-02865 (2008)

To conclude that management must always fill vacant posts would be an abrogation of management's rights. The language in Article 27 stating that the Employer does not relinquish its rights under 5 USC §7106 would be meaningless. In order to always fill vacant posts, it would require filling some posts with overtime and this then would nullify 5 CFR §550.11(a)(1)(c). Additionally, the language in the provisions of Article 18, Section n., Section p., and Section r.

would also be meaningless. Also, Article 39, Furloughs, would be meaningless since all posts would always have to be filled. Finally, as to the ability to fill a post or not fill a post, Article 5 would be meaningless. A ruling in favor of the Union interpretation would clearly abrogate, i.e., abolish, annul, cancel, dissolve, negate, rescind, void, etc., management's rights, not only under the Statute but also in various portions of the Master Agreement.

The Union's requested remedy of overtime is inappropriate, since the Agency is not required to fill all vacant posts with overtime. The Agency believes the evidence shows that management's use of reassignments or leaving posts vacant was not done arbitrarily but rather was based on legitimate business reasons.

The Union failed to provide any evidence to support their position beyond the opinions of the interested bargaining unit staff and cannot prove a violation. Rather, they simply disagree with the method and manner in which staffing is done at FCI Dublin. The Arbitrator is bound to the four corners of the Agreement and thus by the parties' agreement in Article 32, Section h, that the arbitrator cannot add to, subtract from, disregard, alter, or modify any of the terms of the Master Agreement. The grievance is substantively deficient and must be decided in the Agency's favor.

DISCUSSION

The Merits of the Grievance

Since the parties were unable to formulate a joint submission agreement, transitioning here from the procedural issues to consideration of the substantive aspects of the case requires establishment of the components and contours of the dispute. In framing the substantive issues, the Union focuses on three areas of controversy and on what would be the appropriate remedy for any found violation: 1) whether the Agency violated the directive of the 2008 Tamoush award that FCI Dublin "fill all vacant/abandoned posts by overtime or regular assignment forthwith;" 2) whether the Agency violated the Master Agreement when it vacated mission

critical posts; and 3) whether the Agency violated the Master Agreement when it vacated non-custody posts. Beyond the procedural issues, the Agency perceives the overarching substantive issue to be whether the Agency properly exercised its statutory rights when it assigned work and duties in circumstances the Union claims to be violations of the Master Agreement. In my opinion, the issues statement formulated by the Union fairly encapsulates all the issues in the disputes, including those set forth in the Agency's statement.

The threshold issue regarding the merits of the instant grievance relates to the effect of the Tamoush Award upon the disposition of the issues in the grievance. The parties disagree about the intended scope of application of the Award. The Union notes that the award ordered the Agency "to fill all vacant/abandoned posts by overtime or regular assignment" and that the Agency is violating the award by failing to fill all vacant posts by overtime or regular assignment. The Agency asserts that the grievance in that case pertained to the vacating of Cook Foremen posts at FCI Dublin and that the directive in the award regarding filling posts by overtime or regular assignment relates only to Cook Foremen. In my opinion, a reading of the entirety of the Opinion and Award definitely favors one position over the other.

As quoted by the Arbitrator in the body of the Opinion and Award, the Union's own "Statement of the Issues" relates the grievance only to Cook Foremen. (Union Exhibit 6, p. 2). In the "Background and Summary of Facts" section of the Opinion and Award, the Arbitrator notes that the case involves two issues: 1) alleged inequitable distribution of overtime among employees in that position and 2) "vacating posts which were supposed to be filled by additional or second Cook Foremen." (Union Exhibit 6, p. 5). He reinforces that observation later in the Opinion and Award, stating "[i]n this case, then, the issue statement proffered by the Union, covering both lack of equitable distribution of overtime and the vacating or abandoning of post positions are appropriate to be dealt with here." (Union Exhibit 6, p. 10) He wrote in the first paragraph under the "Award" that "[t]he Agency violated Article 18, section p (and q by reference) of the Master Agreement when it failed to ensure that overtime was distributed and

rotated equitably among the Cook Foremen at FCI Dublin." While Arbitrator Tamoush would certainly be the best interpreter of his award, my reading of his Opinion and Award leaves the impression that he did not deal with issues in a manner that would lead to a broad, all-encompassing award directing FCI Dublin "to fill all vacant posts at FCI Dublin," intending it to cover posts other than Cook Foremen. From my perspective, the award directed the Agency to distribute overtime equitably for Cook Foremen and to fill all vacant/abandoned Cook Foremen posts. Arbitrator Tamoush's award withstood the objection the Agency filed with the FLRA and is, therefore, settled authority regarding the two issues it addressed regarding Cook Foremen Nothing in the instant Opinion and Award will change the Award issued by Arbitrator Tamoush.

Both the grievance and the evidentiary record in this case demonstrate that the preeminent focus of controversy in this case involves the practice of augmentation, wherein employees from Non-Custody departments are reassigned to cover vacancies in the Custody Department and the practice of leaving posts vacant, both in the Custody and Non-Custody departments. The Union asserts that those practices violate Article 27 of the Agreement, which requires the Agency to reduce the inherent hazards of the prison environment "to the lowest possible level without relinquishing its rights under 5 USC 7106" and that the appropriate remedy for the violations is a cease and desist order and back pay awards, in accordance with the Back Pay Act and Article 18, to those employees who would have worked overtime but for the Agency's alleged violation of the Agreement. Among other provisions, Article 18 of the Agreement establishes the procedures management must use when management decides to assign overtime. The Agency correctly notes that all references in the Master Agreement are couched in language showing that whether overtime will be assigned is a determination made by management and that nothing in its provisions mandates when management must assign overtime. However, any discussion regarding overtime in this proceeding arises only in the context of determining whether awarding compensation is an appropriate remedy if employees would have worked overtime in the absence of a violation of the Master Agreement.

The Agency disputes the Union's interpretation of Article 27 of the Agreement and asserts that the Agency has properly carried out its responsibilities to maintain security and safety of the institution by ensuring that the duties of all positions were covered. Further, it strongly urges that the interpretation of Article 27 urged by the Union would require the Agency to abrogate its rights, i.e., "to relinquish its rights under USC 7106." In its entirety, 5 USC 7106 provides, as follows:

> a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
>
> 1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) in accordance with applicable laws--
>
> (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
>
> (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
>
> (C) with respect to filling positions, to make selections for appointments from--
>
> (i) among properly ranked and certified candidates for promotion; or
>
> (ii) any other appropriate source; and
>
> (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
>
> 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 subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
>
> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

With respect to the merits, the nub of the controversy does not lie with disputes over the nuts and bolts of the matter. Neither the assertion that augmentation was a well-established

practice before the grievance was filed nor the assertion that the vacating of various posts and position was a common, routine phenomenon is in dispute here. The Union presented voluminous evidence, including daily rosters, spanning several years that establish the daily particulars of staffing in Custody and Non-Custody departments, e.g., approved posts and positions by date and time, names of employees assigned to approved posts, assignments left vacant. From the evidence presented, the conclusion is inescapable that both augmentation and vacating posts were ingrained practices at FCI Dublin.

In support of its position that the use of augmentation and the tolerance of vacated positions violate Article 27 of the Master Agreement, the Union relies principally upon 2004 and 2005 policy issuances at the National level regarding "mission critical posts." The aforementioned National policy, still in effect insofar as the record herein reflects, charged management with constructing "mission critical rosters," which would identify "mission critical posts," and characterized "mission critical posts" as "positions that have direct contact with inmates," "posts that are absolutely needed for the daily operations of the facility" and posts that "would be vacated only under rare circumstances." (Union Exhibits 1 and 2)

The record establishes that mission critical rosters are formulated on a quarterly basis at the Regional level; that FCI Dublin then constructs its daily rosters based on the approved staffing established at the Regional level; and that changes to the mission critical daily roster require approval at the Regional level. (Transcript, p. 269) However, in this record, except in the case of Phone Monitor, there is no evidence that FCI Dublin management sought and received approval from the Regional level to deviate from the mission critical rosters in evidence, once they had been established and issued in the ordinary course of business. There is also no evidence of continuing emergencies or rare circumstances that justified vacating "mission critical posts" with regularity. Thus, the practice of leaving "mission critical posts" vacant in other than rare or emergency situations, left the institution shy of the number of

"mission critical posts" that management itself had determined were necessary for the safe and secure operation of the facility.

The Agency defends the practices of augmentation and of vacating positions by emphasizing that the parties' agreement in Article 27 is conditioned upon an understanding that the Agency did not relinquish its rights under 5 USC 7106 when it agreed "to lower those inherent standards to the lowest possible level." Specifically, it asserts that augmentation and vacating of positions represent proper and expected exercising of various rights protected by 5 USC 7106, i.e., "to determine the mission, budget, organization, number of employees, and internal security practices of the agency;" "to assign employees;" "to assign work, . . . , and to determine the personnel by which agency operations shall be conducted.

While it is true that the Agency was exercising such rights when it managed the "mission critical rosters," it is also true that the Agency engaged in collective bargaining involving some of those rights and in some instances has tempered those rights via provisions in the collective bargaining agreement. Article 27 poses one such instance. The Agency's exercise of its rights was subject to the agreement it made in Article 27 of the Agreement. Therein, the Agency agreed with the Union via the collective bargaining process that the Agency will "lower the inherent hazards of the correctional environment to the lowest level possible, without relinquishing its rights under 5 USC 7106." (Joint Exhibit 1, p. 56) This is not a case where the Union is unilaterally seeking to usurp management's right to determine appropriate staffing or the internal staffing practices of the Agency. Instead, by management's own determination, the staffing reflected on daily "mission critical rosters" is critical to the operation of the institution, i.e., it is management's determination of staffing necessary to lower the inherent hazards of the correctional environment to the lowest level possible. Therefore, the failure of FCI Dublin to staff "mission critical posts" in accordance with the daily roster the Agency itself has promulgated (and not amended) has necessarily failed to lower the inherent hazards of the correctional environment to the lowest level possible. The qualifier in Article 27, Section a,

"without relinquishing its rights under 5 USC 7106" does not obviate finding a violation in the circumstances of this case. Further, in cases involving circumstances similar to this case, wherein the Agency made the same argument, the FLRA has found that the qualifying language does not automatically preclude finding a violation when management's rights are involved. *BOP FCI Dublin and AFGE Local 3584*, 65 FLRA No. 185; *BOP FCI Lompoc and AFGE Local 3048*; *BOP FCC Coleman and AFGE Local 506*, 58 FLRA 291; *BOP FCI Sheridan and AFGE Local 3979*, 58 FLRA 279; *BOP USP Atlanta and AFGE Local 4052*, 57 FLRA 331.

Neither the Drucker Award nor the Cipolla Award nor the decision in the U. S. District Court case cited below, militates against finding the Agency violated the Master Agreement in the circumstances present here. Nothing in the Drucker opinion or in the Cipolla opinion establishes that the evidentiary record in those cases was essentially the same as the evidentiary record that exists in this case. Nothing in the circumstances of either case persuades that the results there should obtain in this proceeding. The same finding holds true for *Federal Bureau of Prisons v. Federal Labor Relations Authority*, 654 F. 3d 91 (July 8, 2011), the U. S. District Court case upon which the Agency relies for its position that sustaining the grievance in the instant proceeding would abrogate the Agency's rights under 5 USC 7106. The Court summarized, as follows, the crux of the controversy that was before the Court as well as the Court's disposition of the matter:

> The Federal Bureau of Prisons petitions for a review of a decision of the Federal Labor Relations Authority holding that the Bureau had the duty to bargain over its implementation of a "mission critical" standard for staffing federal correctional institutions. Because the Authority unreasonably concluded the mission critical standard is not "covered" by the collective bargaining agreement between the Bureau and its employees' union, we grant the decision and vacate the Authority's decision.
>
> http://caselaw.findlaw.com/us-dc-circuit1573467.html

The case there addressed an issue regarding whether negotiations that led to the Agreement at issue had "covered" the matter in controversy, the answer to which would determine whether

the Agency was obligated to engage in mid-term bargaining. In essence, the Court decided that the matter was "covered" by the existing Agreement because, given particular provisions already in the Agreement, the parties had had an opportunity to bargain regarding the matter. Therefore, the case is inapposite to the circumstances of this case. It does not preclude a determination here that the Agency, by its own measure, has failed to lower the inherent hazards of the correctional environment to the lowest level possible and, therefore, has violated Article 27 of the Master Agreement.

The record fails to establish by a preponderance of the evidence that aspect of the grievance asserting that augmentation per se or that leaving a non-Custody post vacant constitutes a violation of Article 27 of the Master Agreement. Although the fact that a non-Custody post or position still exists at all and is included on the daily roster is at least circumstantial evidence of its importance to the Agency's mission, the Agency nevertheless retains rights pursuant to 5 USC 7106 to manage its workload, its use of manpower, and its budget. Such rights necessarily include the right to temporarily reassign an employee from a non-Custody department to another department, including the Custody department, or to temporarily leave vacant the position in the non-Custody department—as long as the right is exercised in accordance with any contractual limitation. Here, there is no evidentiary basis for finding a contractual limitation on management's right to reassign qualified employees from a post or position in the non-Custody department to a post or position in another department, including the Custody department.

The 2004 and 2005 National issuance establishes a policy regarding "mission critical posts" that practically precludes leaving those posts vacant, if the Agency is mindful of meeting its own standard regarding safety and security. However, with respect to non-Custody positions, there is no comparable policy in evidence which establishes that management's decision to vacate a non-Custody post, after management has given due consideration to relevant workload, staffing, and other factors in the non-Custody department, necessarily fails to lower the inherent

hazards of the correctional environment. In this proceeding, Agency witnesses persuasively attested that when posts in their non-Custody departments were vacated, whether caused by augmentation of the incumbent or by absence due to sick leave or other such reasons, someone else, including supervisors, if necessary, performed the critical work of the position and left less pressing work to be handled later. While the record contains evidence reflecting the occurrence of hazardous incidents in the workplace (e.g., the discovery of unsecured weapons in the environment; an irate, inconsolable inmate), the evidence regarding those matters fails to persuade that there was a nexus between the existence of vacant positions and those incidents. In my view, any of the incidents could have happened irrespective of the level of staffing.

The final matter to be addressed herein relates to the appropriate remedy for the found violation of the Master Agreement. In its post-hearing brief, the Union requests remedial relief, as follows, "in the event the Arbitrator determines that the Agency violated the Agreement by leaving mission critical posts vacant at FCI Dublin": 1) "back pay in the form of overtime at the average hourly rate of pay for each vacant mission critical post going back six years from the date the grievance was filed, continuing until the date of the Award in this case;" 2) "if the Arbitrator grants any of the requested back pay remedies, then in order for the parties to determine the exact amount of back pay owed to the affected employees, the Union requests that the Arbitrator order the Agency to grant two Union representatives all official time necessary to work with the Agency on determining the exact amounts of overtime back pay owed to the affected and eligible bargaining unit members;" 3) "should the grievance be sustained in whole or in part, the Union respectfully requests that the Arbitrator retain jurisdiction for a period of 90 days for purposes of resolving any questions related to the remedy in the Award and to resolve any question of attorney fees to which the Union may be entitled based on the Arbitrator's findings." In summary, the Agency's position is that the grievance should be denied because sustaining it would abrogate rights accorded by 5 USC 7106.

From my perspective, the evidence warrants issuance of a cease and desist order for the violation as well as back pay that is a derivative of missed overtime opportunities. The Agency rightfully asserts that any decision about whether to call overtime is a function of management and that, accordingly, employees do not have a right to work overtime. However, the issue of overtime arises here in a different context, where the evidence establishes 1) that in the absence of the violation of the Master Agreement, calling overtime would have been necessary to meet the safety and security standards the Agency itself had adopted and 2) that bargaining unit employees would have been awarded overtime in accordance with the procedures set forth in the Master Agreement. Therefore, the Award herein will direct that the Agency grant back pay stemming from missed overtime opportunities for bargaining unit employees who would have worked "mission critical posts" that were vacated in the absence of an emergency or other rare occurrence, for the period August 24, 2011 (the date the grievance was filed) to the date of this award. The Union was free to file a grievance earlier than August 2011 and was not compelled either to accept management's word that it was not violating the Master Agreement or to await disposition of the exception filed regarding the Tamoush Award. Therefore, there is no justification for granting back pay for the entire period of time authorized by the Back Pay Act or beginning on any date earlier than the date the grievance was filed. Given the voluminous amount of data to be reviewed in implementing the remedy herein and given the spirit of cooperation urged by the "Preamble" to the Master Agreement, the Union's request that the Agency grant official time to bargaining unit representatives to assist with implementation of the remedy is understandable. Therefore, in accordance with Article 11, Section c-11, the Agency should consider granting official time for that purpose to one bargaining unit representative "using the procedures set forth in Article 6(h), 7(e) and 11(B)" so that the individual can "11. confer with national staff representatives of the Union in connection with a grievance, arbitration..." (Joint Exhibit 1, pp. 27-28).

In accordance with the foregoing discussion and based on the entire record in this proceeding, I hereby issue the following award.

AWARD

1) The Award of Arbitrator Tamoush applies only to Cook Foremen.

2) The Agency did not violate Article 27 of the Master Agreement by reassigning employees from non-Custody departments to the Custody department or by vacating positions in non-Custody departments.

3) The Agency violated Article 27 of the Agreement by vacating "mission critical posts" in the absence of an emergency or other rare circumstances.

4) The Agency shall cease and desist from vacating "mission critical posts" in the absence of an emergency or other rare circumstances.

5) The Agency shall grant back pay to bargaining unit employees who would have worked overtime but for the Agency's decision to vacate various "mission critical posts" in the absence of an emergency or other rare circumstance during the period August 24, 2011 to the date of this award. The Agency and the Union shall work together to identify bargaining unit employees who would have worked overtime on such occasions and to establish the amount of overtime pay they would have received on those occasions. The parties are free to mutually agree to a different means of redressing the missed overtime opportunities.

6) In accordance with Article 11 ("Official Time") of the Master Agreement, the Agency shall consider granting official time to one bargaining unit member to assist the Union's representatives in accomplishing the directive set forth in Paragraph 5 above.

7) I will retain jurisdiction of the grievance until at least September 15, 2014, in order to resolve any issues that may arise between the parties regarding implementation of the remedial relief directed herein. If issues remain unresolved shortly before that date and my retention of jurisdiction should, therefore, be extended, either party may so notify me and the other party in writing on or before that date of the need for my services. Upon such timely notice, my retention of jurisdiction will be further extended for the period of time necessary to allow resolution of the issues.

8) In accordance with statute, the Union has reserved the right to request attorney's fees at the appropriate time.

9) In accordance with Article 32, Section d of the Master Agreement, my fees and expenses for arbitration services shall be borne equally by the Agency and the Union.

Dated: May 8, 2014
Los Angeles, California

Edna E. J. Francis
Edna E. J. Francis