IN RE: THE GRIEVANCE ARBITRATION BETWEEN:

LOCAL 501, COUNCIL OF PRISONS LOCALS,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO,

AFGE/Union,

AND FMCS # 11-52732-3

UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS, FEDERAL DETENTION
CENTER MIAMI, FLORIDA,

Agency/Employer.
_____/

OPINION AND AWARD

Arbitrator: Martin A. Soll, Esq.

For AFGE: Mr. Joe Mausour
President, AFGE Local 1102
National Worker's Compensation Coordinator
AFGE, Council of Prisons, Locals C-33
P.O. Box 2032
Lynwood, Washington 98036

For Agency: Ms. Andrea Geiger, Esq.
Assistant General Counsel
United States Department of Justice
Bureau of Prisons
320 First Street, NW, Room 814
Washington, D.C. 20534

Witnesses: Mr. Eric Young; Mr. Michael Meserve; Mr. Roger Payne; Mr. JR; Mr. RR; Mr. RA; Mr. AD; Ms. AM, Ms. Linda McGrew; Mr. John Rathman (by agreed written stipulation); and Mr. Edwin Perez (by agreed written stipulation).

Applicable Collective Bargaining Agreement:
Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees, Master Agreement dated March 9, 1998 - March 8, 2001, as extended.

Alleged Agency Violations of the Master Agreement:

> Article 3 - *Governing Regulations*; Article 4 - *Relationship of this Agreement to Bureau Policies, Regulations, and Practices;* Article 6 - *Rights of the Employee*; Article 18 - *Hours of Work*; and Article 38/*Qualified Handicapped Employees.*

JURISDICTION & BACKGROUND

The instant contract grievance was filed on December 14, 2010, by Local 501, Council of Prisons Locals, American Federation of Government Employees, AFL-CIO ("AFGE"), on behalf all bargaining unit employees assigned to Bureau of Prisons' ("BOP"), Federal Detention Center, Miami, Florida ("FDC Miami") ("Agency"). As more specifically discussed below, AFGE charges Agency with violating past practice and the above referenced articles of the parties' Master Agreement ("CBA") for the following reasons:

> It has been an established practice at FDC Miami that all bargaining members that have suffered non-work related injuries have been reasonabl[y] accommodated. A Union data request noted that 12 [bargaining unit] members have been given this opportunity in the past. Warden Linda McGrew [1] since her arrival at FDC Miami has unilateral[ly] suspended this practice without proper formal notification or negotiations with the Union. This has resulted in a significant change of working conditions for our members that has resulted in hardships and discriminatory treatment of our staff . . . (Joint Exhibit #4).

AFGE requests the undersigned award the instant grievance and to further order that Agency: return to the former status quo; cease and desist its violations of the CBA; comply with the CBA; reimburse all lost wages, sick leave and/or annual leave to those bargaining unit employees affected by the Agency's violations; and pay enhanced attorney fees.

In opposition to AFGE's charges, Agency requests the undersigned, in summary and as more specifically discussed below: (1) to deny the instant grievance on the grounds Agency/Warden McGrew, in summary, neither discontinued, changed, nor violated any binding past practice or

[1] The record shows that Ms. Linda McGrew ("Warden McGrew") served as FDC Miami's Warden from April 2010, until December 31, 2011.

policy or contract language; or (2), alternatively, to dismiss or deny the instant grievance on the grounds it was untimely filed under the provisions of Article 31-d of the CBA and, thus, not arbitrable.

Remaining unresolved, the grievance was submitted to binding arbitration before the undersigned agreed neutral arbitrator. Transcribed arbitration hearings were held at FDC Miami on December 8/9, 2011, and continued to March 21/22/23, 2012. On June 25/26, 2012, the undersigned received each of the parties' opposing and comprehensive post-hearing written briefs and attachments. Because of the complex issues of the case and the voluminous record, additional time for the undersigned to complete this Opinion and Award was agreed to by the parties.

APPLICABLE MASTER AGREEMENT/CBA LANGUAGE

Article 3 - *Governing Regulations*

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.

1. local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

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

Section d. All proposed national policy issuances, including policy manuals and program statements, will be provided to the Union. If the provisions contained in the proposed policy manual and/or program statement change or affect any personnel policies, practices, or conditions of employment, such policy issuances will be subject to negotiation with the Union, prior to issuance and implementation.

1. when national policy issuances are proposed, the Employer will ensure that the President, Council of Prison Locals, each member of the Executive Board of the Council of Prison

Locals, and each local President receives a copy of the proposed policy issuance within thirty (30) calendar days that the proposed policy issuance is completed. This will be accomplished by the policy issuance being sent, by certified mail, to the appropriate Union official at the institution/location where the Union official is employed;

2. after the last Council of Prison Locals Executive Board member receives the proposed policy issuance, the Union, at the national level, will have thirty (30) calendar days to invoke negotiations regarding the proposed policy issuance. The date on the signed "Returned Receipt" card will serve to verify the date that the last Council Executive Board member was notified;

3. should the Union invoke their right to negotiate the proposed policy issuance, absent an overriding exigency, the issuance and implementation of the policy will be postponed, pending the outcome of the negotiations;

4. should the Union, at the national level, fail to invoke the right to negotiate the proposed policy issuance within the time required above, the Agency may issue and implement the proposed policy issuance; and

5. when locally proposed policy issuances are made, the local Union President will be notified as provided for above, and the manner in which local negotiations are conducted will parallel this article.

Section e. Negotiations under this section will take place within thirty (30) calendar days of the date that negotiations are invoked. Negotiations will take place at a location that is mutually agreeable to the parties, and the Agency will pay all expenses related to the negotiations.

Article 4 - *Relationship of this Agreement to Bureau Policies, Regulations, and Practices*

Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 USC 7106, 7114, and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

Section b. On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this Agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties.

Section c. The Employer will provide expeditious notification of then changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the

provisions of this Agreement.[2]

Article 6 - *Rights of the Employee* (in relevant part)

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

* * *

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

Article 7 - *Rights of the Union* (in relevant part)

Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute and this Agreement. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

Article 18 - *Hours of Work* (in relevant part)

Section L. The Employer is committed to its responsibility regarding the health of all employees. Toward that end, the Employer may require that the health condition of employees requesting assignment changes for medical reasons be reviewed by the Chief Medical Officer. If employees wish, medical evidence from their private physicians may be provided to the Chief Medical Officer, who will fully consider this information before making reports to the supervisors with appropriate recommendations.

1. employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignment to other duties. Such employees will continue to be considered for promotional opportunities for which they are otherwise qualified;
2. the Employer will continue to accommodate employees who suffer a disability in accordance with applicable laws, rules, and regulations; and
3. Employees must report any planned or anticipated requests for leave due to medical or psychiatric hospitalization, treatment, or recuperation as early as possible so that necessary staffing adjustments may be planned.

Article 31 - Grievance Procedure (in relevant part)

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal

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[2] The undersigned observes this language is similar to Article 3-c and Article 7-b's language.

grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

Section c.
4. the Union has the right to file a grievance on behalf of any employee or group of employees.

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

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

Article 32 - Arbitration (in relevant part)

Section a. . . . If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard.

* * *

Section h. . . . The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:
1. this Agreement; . . .

Article 38 - Qualified Handicapped Employees

The Employer agrees to abide by all laws, rules, and regulations regarding the employment of individuals with disabilities. In this regard, the Employer will reasonably accommodate qualified employees with disabilities.

ISSUES [3]

[3] In their opposing post-hearing briefs, the parties submitted the following as their statement of issues:

As Proposed by AFGE:
Was the Agency's action to adversely deny accommodation to the employees just and sufficient cause, or if not, what shall be the remedy?

As Proposed by Agency:
Whether Warden Linda McGrew broke a binding past practice when she exercised her

1. Whether Warden Linda McGrew's light duty denials violated a binding past practice and/or the CBA's Article 3, and/or Article 4, and/or Article 6, and/or Article 18, and/or Article 38? And, if so, what is the proper remedy?

2. Whether the grievance was timely filed?

PRELIMINARY FINDINGS DENYING AFGE'S CHARGES THAT AGENCY VIOLATED ARTICLES 6, 18 & 38

AFGE charges that Agency's/Warden McGrew's (or her staff's) actions of disallowing light duty violated a binding past practice and the CBA's Article 18-*Hours of Work*; Article 4-*Relationship of this Agreement to Bureau Policies, Regulations, and Practices*; Article 3-Governing Regulations; Article 6 - *Rights of the Employee*; Article 18 - *Hours of Work*; and Article 38/*Qualified Handicapped Employees.*

Regarding AFGE's Articles 6 and 38 charges, the undersigned, having reviewed the record, finds no convincing or compelling evidence was submitted sufficient to establish or prove the grieved light duty denials at issue violated either article. To that extent the instant grievance as it pertains to Agency's charged violations of Articles 6 and 38 is denied.

Regarding Article 18, while AFGE alleges it too was violated in this matter, Agency counters that Warden McGrew's overall actions in this case were in compliance with Article 18 (in legal terms, a/k/a an "affirmative defense"), thus, it asserts that Warden McGrew violated no binding past practice nor any CBA language. The scope and validity of Agency's Article 18 affirmative defense

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discretion under Article 18, Section L, of the Master Agreement as to whether to grant temporary assignments of employees to other duties for non-work related injuries.

Since the parties' proposed statement of issues are obviously different, as required by the CBA's Article 32-a, the undersigned has determined and found the above as the appropriate issues for resolving the instant grievance.

is extensively addressed below. On the other hand, with the exception pertaining to FDC Miami Detention Officer RR's below addressed claim, the parties are advised the undersigned finds no evidence in the record supporting AFGE's charge that Warden McGrew's or her staff's light duty denials violated Article 18. Accordingly, with the exception of the claim of Detention Officer RR, the instant grievance as it pertains to Agency's charged violation of Article 18 is also denied.[4]

OVERVIEW OF THE CBA'S ARTICLES 4 & 3 and ARTICLE 18

Overview of Article 4, Sections a & c, and Article 3, Sections d & e

The language of both Sections a and c of Article 4, require Agency to notify AFGE at the "local level" of "changes in working conditions," whereas, the second sentence of Section c of Article 4 additionally requires that "[s]uch [Agency] changes ["to be implemented in working conditions at the local level"] will be negotiated [with AFGE at the local level] in accordance with the provisions of this Agreement." The words or language - "in accordance with the provisions of this Agreement," - the record shows, nor do the parties dispute, references, incorporates, and/or means that when Article 4-c's language is read together with the notification and negotiation

[4] As noted and discussed below, the record shows that Officer RR was removed from his assigned TAD of monitoring phone calls at FDC Miami by Agency/Warden McGrew's staff on or about December 27, 2010, which the record also shows was the direct result of the Department of Labor/OWCP's November 20, 2010, denial of Officer RR's Workers' Compensation benefits claim for an earlier on-duty injury. Since the record also shows that Officer RR has an on-going appeal of his Workers' Compensation claim denial before OWCP (see Tr. Day 3, pp. 98-99) the undersigned declines to rule upon at this time whether the removal of Officer RR from his TAD violated Article 18, and/or if he is eligible for any monetary or other relieve in this grievance. That being the case, the parties are advised that Officer RR's case and request for monetary or other relief in this grievance is included in the undersign's retention of jurisdiction paragraph # 7 stated at the end of this Decision & Award which may be raised by either party only upon OWCP's issuance of its final and binding decision on Officer RR's appeal.

language of Sections e and d of Article 3, and specifically paragraph 5 of Article 3's Section d, they collectively state and require that proposed Agency changes to local level employee working conditions will, in summary, comply with the following notification and negotiation procedures:

(1) that Agency's proposed working conditions changes will be expeditiously provided to the local Union President;

(2) that the manner and/or procedures in which the local negotiations are conducted will "parallel" those of Sections e and d of Article 3, thus;

(3) upon receipt of Agency's proposed working conditions changes, the local Union President would then have thirty (30) calendar days to invoke negotiations regarding the change(s);

(4) that should the local Union President invoke the right to negotiate the Agency's proposed changes, absent an overriding exigency, the issuance and implementation of Agency's proposed working conditions changes will be postponed pending the outcome of the negotiations, and;

(4) should the local Union President fail to or not invoke the right to negotiate the proposed changes within the said thirty-day time period, Agency may then issue and implement its working condition(s) change(s).

Overview of Article 18, Section L, Paragraph 1

The record shows, nor do the parties dispute, the words/language "temporary assignment to other duties" as stated in the first sentence of Paragraph 1, Section L of Article 18 ("Article 18-L-1" or "18-L-1") generally encompass two types of temporary assignments to other duties for bargaining unit employees. They are:

1. temporary assignments to other duties for those employees recuperating or suffering from **on-duty/work related** health conditions, illnesses or injuries, and temporarily unable to perform their assigned duties (emphasis added); and,

2. temporary assignments to other duties for those employees recuperating or suffering from **off-duty/non-work related** health conditions, illnesses or injuries, and temporarily unable to perform their assigned duties (emphasis added).

That being the case, for purposes of brevity and clarification, when henceforth stated or referenced in this Opinion and Award, the following will apply:

1. that all such Article 18-L-l/temporary assignments to other duties resulting from **off-duty/non-work related illnesses, injuries or health conditions**, shall be deemed, called, know as, referred to, or considered one-in-the-same as **"light duty,"** and/or **"light duty/accommodation(s)**," and/or **"light duty assignment(s)"** (emphasis added).

   and,

2. that all such Article 18-L-1/temporary assignments to other duties resulting from **on-duty/work related illnesses, injuries or health conditions**, shall be deemed, called, know as, referred to, or considered one-in-the-same as a **"TAD"** ("temporary alternative duty") and/or **"TAD assignment(s)"** (emphasis added).

The undersigned also takes notice, nor is it disputed:

- that only TAD assignments are legally governed by the Federal Employees' Compensation Act ("FECA") 5 U.S.C § 8101 *et seq*., and the rules and regulations of the Department of Labor ("DOL"), Office of Worker's Compensation Programs ("OWCP"); and further, that FECA, OWCP's rules and regulations, and BOP's current Program Statement 1601.04, Worker's Compensation Program dated September 11, 2002 (Agency Exhibit #1), similarly advise and require that Agency, as a federal employer, provide TAD assignments to those of its employees who have incurred job related injuries or illnesses which temporarily prevent them from performing their assigned duties.

The parties are also advised the words "reasonable accommodation(s)," "reasonably accommodated," or "accommodation(s)" as recited in this Opinion & Award below, unless clearly stated to the contrary, will mean "light duty" or "light duty assignment(s)."

SUMMARY OF THE EVIDENCE AND THE APPLICABLE EVENTS LEADING TO THE INSTANT GRIEVANCE, AND ITS ARBITRATION

(1) Denial of FDC Miami Correctional Officer KA's Light Duty Request

As a result of an off-duty illness or injury, on July 23, 2010, FDC Miami Correctional Officer KA ("Officer KA") [5] requested through his chain-of-command a light duty assignment which, in turn, was addressed by a letter dated July 29, 2010 (Agency Exhibit #9), signed by Captain Darrol Acre ("Captain Acre") on behalf of Warden McGrew. In relevant part, the July 23, 2010-letter stated as follows:

> I am in receipt of your correspondence dated July 23, 2010, which was forwarded to me for response . . . You indicated your request was due to the fact that you were placed on light duty status by your physician until August 23, 2010. Specifically, on July 21, 2010, your physician indicated you could return to work on light duty with the restriction that you only engage in sedentary work.
>
> As a preliminary matter it must he noted that there are no "Light Duty Positions" within the confines of a correctional institution. The exemption to this general philosophy only occurs where an employee is recuperating from a work related injury. Program Statement 1601.04, Worker's Compensation Program, states in pertinent part that the Agency may provide temporary alternative duty assignments (TAD) to bureau employees who have incurred job related injuries or illnesses which temporarily prevent them from performing their assigned duties. Nonetheless, "the security of the institution and the safety of staff and inmates therein remains of primary importance. Because of these factors, there is no guarantee that any staff member will be considered for, or receive a TAD assignment." The information that has been provided to the institution reveals that you are not eligible for a (TAD) assignment as your injury was non work related.
>
> While the Agency is indeed concerned with your health and wish to assist you as you work through your medical needs, it is essential to the mission of this institution that you be available for duty on a regular and full-time basis prior to returning to your position as a Correctional Officer. As a Correctional Officer working in a correctional environment under a covered law enforcement position, you are required to work within the secure confines of a federal prison and to supervise and interact with inmates on a daily basis. As a correctional officer, you have frequent, direct contact with inmates who may be violent or have a history of disruptive conduct. In this role, you may be required to physically control a disruptive inmate or respond to an institution emergency. At times you may be the only staff member in an area with inmates and should a disturbance occur, it would be your duty to deal with the

[5] The parties are advised that in order to maintain the confidentially of the medical condition(s) of the numerous Agency employees who either testified or are referenced in this matter, only their initials are stated in this Opinion and Award, nor are their specific medical conditions, illness or injuries identified other than being on-duty/work related or off-duty/non-work related.

situation until assistance was available. Every employee in a correctional institution must be able to respond to institution emergencies immediately and must be able to assist in the resolution of the emergency. These activities may involve the exercise of physical dexterity, stamina, and strength, and must be able to exercise without presenting a danger to yourself and/or others.

* * *

If you would like for the Agency to consider whether you qualify for a reasonable accommodation [i.e., "light duty"], we will need additional medical information including the following documentation: . . .

* * *

Please provide the requested medical documentation, no later than August 6, 2010. Also, enclosed is a medical waiver to allow your physicians to communicate with us directly if further clarification is warranted. Please sign the waiver and return it to me upon receipt of this letter.

Although, there is insufficient information at this time to conclude that you are a qualified individual with a permanent disability as defined under the Rehabilitation Act, once we receive the requested information, your request for reasonable accommodation [i.e., light duty] will be re-evaluated.

Additionally, if you feel you are unable to work your assigned post prior to a final determination regarding your request, you may request annual and/or sick leave from your supervisor.

By letter August 10, 2010 (Agency Exhibit #10), Captain Acre denied Officer KA's light duty request. Captain Acre's August 10-letter stated in relevant part:

I am in receipt of your medical documentation dated August 5, 2010, stating you have been under your physician's care since January 2006, for your medical condition. Your physician outlined your current diagnoses including . . .

* * *

As indicated in my prior correspondence to you dated July 29, 2010, there are no "Light Duty Positions" within the confines of a correctional institution. The exemption to this general philosophy only occurs where an employee is recuperating from a work related injury. Program Statement 1601.04, Worker's Compensation Program, states in pertinent part that the Agency may provide temporary alternative duty assignments (TAD) to bureau employees who have incurred job related injuries or illnesses which temporarily prevent them from performing their assigned duties. Nonetheless, "the security of the institution and the safety of staff and inmates therein remains of primary importance. Because of these factors, there is no guarantee that any staff member will be considered for or receive a TAD assignment." The information that has been provided to the institution reveals that you are not eligible for a (TAD) assignment as your injury was non work related.

As a correctional officer working in a correctional environment under a covered law enforcement position, you are required to work within the secure confines of a federal prison and to supervise and interact with inmates on a daily basis. As a

> correctional officer, you have frequent, direct contact with inmates who may be violent or have a history of disruptive conduct. In this role, you may be required to physically control a disruptive inmate or respond to an institution emergency. At times you may be the only staff member in an area with inmates and should a disturbance occur, it would be your duty to deal with the situation until assistance was available. Every employee in a correctional institution must be able to respond to institution emergencies immediately, and must, be able to assist in the resolution of the emergency. These activities may involve the exercise of physical dexterity, stamina, and strength, and must be able to exercise without presenting a danger to yourself and/or others.
>
> * * *
>
> . . . While I cannot provide you with a light duty post for your temporary . . . injury, upon your return to full duty status on August 23, 2010, you will be provided with . . . To that end, if you feel you are unable to work your assigned post, prior to August 23, 2010, you may request annual and/or sick leave from your supervisor, or submit a request for Leave Without Pay ("LWOP").[6]
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> * * *

(2) FDC Miami Associate Warden Edwin Perez's August 17, 2010-reply to Local 501 President Arturo Reynaldo's August 3, 2010-Data Request

By letter dated August 17, 2010 (Union Exhibit #10), FDC Miami Associate Warden Edwin Perez ("Associate Warden Perez") replied to Local 501 President Arturo Reynaldo's ("President Reynaldo") August 3, 2010-data request which asked for "all [FDC Miami] bargaining unit members placed on TAD Assignment/Accommodation, work related/non-work related." The August 17-letter stated as follows:

> August 17, 2010
> SUBJECT: Data Request/Report of all Bargaining Unit Members Placed on TAD Assignment/Accommodation, work related/ non work related.

[6] As a result of reading Agency's emailed April 27, 2012-Motion to Supplement Record (which the undersigned denied) and its attachments, and as stated in the record in this matter on March 23, 2010 (Tr. Day Five, p. 268), the undersigned learned that Officer KA's July 29 and August 10, 2010-light duty letters/denial (Agency Exhibits #9 & #10) were addressed in a separate grievance filed by Officer KA on October 14, 2009, and, in turn, arbitrated on June 23/24, 2011, in Miami before Arbitrator Richard Pegnetter as FMCS Case # 10-51672. The undersigned also learned that Officer KA's grievance/FMCS Case # 10-51672, was confidentially settled by the parties following its arbitration (Tr. Day Five, pp. 204-216, 268-271).

This is in response to the memorandum dated August 3, 2010, in regards to the data request/report of all bargaining unit members placed on TAD Assignment/Accommodation.

1. FDC Miami had 26 staff members in the last three years placed on TAD Assignments/Accommodations.
2. FDC Miami had 14 staff members placed on TAD/Accommodation assignment[s] due to work related injuries.
3. FDC Miami had 12 staff members placed on TAD/Accommodation [i.e., light duty] assignment[s] due to non-work related injuries.
4. FDC Miami had 0 staff members denied requests for TAD assignments. There was 1 denial of Accommodation [i.e., light duty] assignment.

(3) Summary of Correctional Officer RR's Testimony

According to the testimony of Correctional Officer RR ("Officer RR"), while on duty at FDC Miami on September 28, 2010, he sustained a recurrence/aggravation of a December 30, 2009-work related injury which, in turn, was operated on by his surgeon on January 19, 2011. Regarding Officer RR's September 28, 2010-injury and his operation, the record shows, in relevant part, as follows:

- On or about November 11, 2010, Officer RR submitted to FDC Miami's Safety Office his surgeons' November 11, 2010-signed work status report which stated and advised he could return to duty in a sitting job only, no excessive bending/twisting, pushing/pulling, or squatting/climbing, and if no modified duty available-no work.

- That Officer RR also requested "light duty" from FDC Miami's Safety Office and was assigned to monitoring inmate phone calls duties on the second floor of the FDC Miami facility. Officer RR testified as follows:

  Q. (By Mr. Mausour):
  . . . . So you asked for light duty and you were granted light duty, isn't that correct?
  A. (By Officer RR):
  I was granted light duty.
  Q. Who were you granted light duty by?
  A. By Safety. I called [the FDC Miami] Safety [office]. They called me in and granted me light duty.
  Q. And where did they grant you the light duty, what location?
  A. The second floor [of FDC Miami] monitoring [inmate] phone calls (Tr. Day Three, p. 67, also see pp. 102-103).

- Officer RR testified further that on November 15, 2010, while at work monitoring inmate phone calls:

  > . . . I was on light duty. Then Mr. Robert Taylor, Safety Manager, and General Foreman Jose Velazquez, came in, came into the room and they told me that my temporary duty assignment was terminated based on a letter that they got from Worker's Comp. They also had said to me to leave the building immediately. They said you need to leave now. They sent a letter. They said pick up your stuff, turn your computer off. They made sure I gathered all my stuff and they made sure I had left the room. So I felt kind of humiliated. I, you know, what's going on here? I mean verbal --I mean they said leave the building. They stood there, walked me out. They said you need to leave so it was humiliating in a way so — (Tr. Day Three, pp. 80-83, also see Tr. Day Three, pp. 102-103, 140-145).

- Officer RR also testified and/or the record shows:

  - That immediately following his departing work on November 15, 2010, he emailed management employees Mr. Gary Hammond, Mr. Jose Velazquez and Mr. Robert Taylor (Joint Exhibit #7) stating:

    > I have been verbally informed that I am not allowed to return to work in a temporary duty status as the letter I received today indicated. Please forward a written explanation as to why I am not being accommodated for a documented work related injury. Please include the name of the individual who is responsible for making the decision disallowing my return to work. I am requesting that you forward this information in writing by letter or by my private e-mail address listed below.

  - On November 19, 2010, Warden McGrew offered Officer RR the following TAD (Joint Exhibit #6), which he accepted/signed on November 23, 2010, and, in turn, he returned to monitoring inmate telephone calls at the FDC Miami facility. The TAD stated in relevant part:

    > November 19, 2010
    > Dear [Officer RR]:
    > As a result of your injury sustained during a work related incident on December 30, 2009, with the Federal Park Service, recurrence on September 28, 2010 at FDC Miami, and documentation from your attending physician, you are being offered a Temporary Limited Duty Assignment (TAD). Upon, your acceptance of the TAD, you will be assigned to phone monitoring and administrative duties as instructed.
    > * * *

  - Regarding the above November 11- 19, 2010-sequence of events, Warden McGrew testified and explained, in summary, that Officer RR's November 19, 2010-TAD (Joint Exhibit #6) took eight days -

from November 11 to November 19, 2010 - to process, and Officer RR was paid during this time (i.e., November 11-19, 2010) even though he was not at work.[7]

- On November 30, 2010, DOL/OWCP issued its Notice of Decision (Agency Exhibit #4) stating Officer RR's comp. benefits claim for his December 30, 2009-injury was denied.

- On December 27, 2010, Officer RR was advised by Associate Warden Perez and Supervisor Velazquez that as a result of the DOL/OWCP November 30, 2011-comp benefits denial, his TAD was discontinued, which, in turn, resulted in his utilizing his accrued paid sick leave and/or accrued paid annul leave.

- That by memo dated January 4, 2011 (Union Exhibit #4), Associate Warden Perez advised Safety Manager Robert Taylor as follows:

> On December 27, 2010, myself and J. Velazquez spoke with [Officer RR] concerning his TAD assignment. [Officer RR]

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[7] Warden McGrew testified as follows:

Q. (By Ms. Geiger, Esq.):
. . . [T]urn to Joint 6. What's the date on that document?
* * *
A. (By Warden McGrew):
This [Joint Exhibit #6, dated November 19, 2010] is [Officer RR's] . . ., TAD.
Q. So it looks like on 11/10, he [Officer RR] may have made a request or provided the necessary medical documentation for a work related TAD, is that correct?
A. Yes.
Q. And then on the 15th [of November, in Joint Exhibit #7], . . . [Officer RR is] questioning why he's not able to work?
A. Yes.
Q. And then on the 19th [of November], he [Officer RR] is able to work. What's happened between the 15th and the 19th?
A. Well, you have to be able to assemble the TAD Committee, which includes all those individuals that I had mentioned before so then they could come up with a recommendation and submit it to me for approval.
Q. So can someone work until the Safety Committee, once they say they have a limitation, until the Safety Committee meets?
A. No.
Q. . . . [I]s Worker's Comp paying . . . [Officer RR] during that 45 days?
A. Yes.
Q. So . . . [Officer RR is] on the payroll the whole time even though . . . [he] may not be at work?
A. Correct.
Q. So between 11/11 and 11/19 [2010] that was the length of the time between the time the Agency got the medical documentation and the decision regarding [Officer RR] was made?
A. Yes. (Tr. Day Four, pp. 232-233).

> was informed that based on the Department of Labor letter dated November 30, 2010 notice of decision, he is no longer eligible for a TAD assignment. [Officer RR] was informed a physician's full duty release is needed to return to his duties. [Officer RR] stated he would continue to pursue surgery.

- By memo dated January 5, 2011 (Agency Exhibit #7), FDC Miami Human Resource Manager Douglas Vonada ("HRM Vonada") advised Officer RR as follows:

  > You were placed on a Temporary Alternative Duty (TAD) based on the claim you filed with the Department of Labor. We received a letter from the Department of Labor indicating you claim was denied.

- On January 5, 2011, Officer RR emailed President Reynaldo (Union Exhibit #3), with a copy to Warden McGrew, the following memo:

  > Date: 1/5/2011 - 12:02 P.M.
  > Subject: Adverse Action/Ordered Home
  > Mr. Reynaldo, as you know I just had a visit from Mr. Gary Hammond, Facility Manager, Mr. Richard Pena, Acting AW and Mr. Douglas Vonada, HRM. They told me that based on the denial on my workmen comp. case that I could not be at work. I told them that the case with workmen comp. is in the process of appeal. They said that I still could not be at work. We both asked them to give me a letter justifying their decision for me not being allowed to come to work. Denying an accommodation and ordering me home is considered to be an adverse action by this agency. I have requested a written explanation detailing this adverse action and the agency's justification for such action. To date, I have not received a response in writing.

- On January 19, 2011, as noted above, Officer RR was operated on. By letter January 27, 2011 (Agency Exhibit #6), Officer RR's surgeon stated and advised in relevant part as follows:

  > Please know the above-referenced patient remains under my care for his . . . [injury]. [Officer RR] may return to full duty work without restrictions on February 7, 2011.

- And last, on February 7, 2011, Officer RR returned to full duty and pay without restrictions.

(4) Summary of Correctional Officer JR's Testimony

On October 1, 2010, FDC Miami Correctional Officer JR ("Officer JR") was operated on as a result of a non-work related September 30, 2010-illness. Officer JR testified, in summary, that on

or about October 4, 2010, he called and/or faxed to FDC Miami's Human Resources (and/or Warden McGrew's secretary) his request for light duty - which was denied, and that he returned to full duty on October 13/14, 2010, because he had exhausted his paid sick leave. In relevant part, Officer JR further testified as follows:

> A. (By Officer JR):
>
> I was in the hospital from the 1st to the 3rd [of October 2010] probably I was discharged. So I seen him [i.e., Officer JR's surgeon on] the 4th of October [2010] . . . And he [the surgeon] told me, you know, I could return [to work] on limited status. And I contacted here [i.e., FDC Miami] to try to get in touch with someone that could make that decision to come in [to work], which I called Human Resources [at FDC Miami] and they told me that I would have to go through memorandums. So what I did is I typed up a request for light duty status and faxed it in. I got a phone call later that afternoon [from FDC Miami Human Resources] saying that . . . it was denied. . . .
>
> * * *
>
> Q. (By Mr. Mansour):
>
> And they denied your TAD assignment. What do you refer to when you ask the Human Resource Manager, when you call them and the doctor says you can come back, what did you refer to that? Did you refer to it by a name or what did you call it?
>
> A. Light duty.
>
> Q. Light duty, okay. All right, and the Human Resource [office] says it was denied, correct?
>
> A. Yes.
>
> Q. Did they tell you who denied it?
>
> A. They said . . . Warden [McGrew] denied it (Tr. Day Two, pp. 245-247; also see Officer JR's testimony at Tr. Day Three, pp. 41-50).

(5) Summary of Correctional Officer AD's Testimony

On October 18, 2010, FDC Miami Correctional Officer AD ("Officer AD") was operated on as a result of an off-duty injury he sustained on October 9, 2010. Officer AD testified in summary: that in the course of a November 12, 2010-doctor visit, his surgeon advised he could return to work on November 15, 2010, on light duty; on November 15, 2010, he contacted and requested HRM Vonada to return to work on light duty and further gave Vonada a copy of a BOP/Agency form which his surgeon had previously signed and completed on October 29, 2010 (Union Exhibit #5, page 2);

however, his light duty request was denied.[8]

(6) President Reynaldo's November 19, 2010 (Article 31-b) Informal Resolution Request

On November 19, 2010, President Reynaldo filed with Warden McGrew an Informal (Article 31-b) Resolution (Joint Exhibit #2) which stated and charged in relevant part as follows:

> In accordance with Article 31: *Grievance Procedure* of the Master Agreement, AFGE Local 501 hereby submits an Informal Resolution regarding the practice of Reasonable Accommodations/T.A.D. assignments.
>
> The Union has become aware that in the past administrations, bargaining members who have suffered non-work related injuries have been reasonabl[y] accommodated in the institution by being placed in areas to monitoring inmate phones calls. The

---

[8] The surgeon's report pertaining to Officer AD stated, in relevant part, as follows:

- In box #21 (which asked *"beginning date of the personal . . . medical emergency:")* the surgeon hand wrote "10/18/10."
- In box #22 (which asked *"ending date (return to work):")* the surgeon hand wrote "11/15/10."
- In box #23 (which asked *"medical re-evaluation date:")* the surgeon hand wrote "11/12/10." And,
- In box #24 (which asked *"nature, severity and anticipated duration of medical emergency. . . :")* the surgeon hand wrote "Patient underwent surgery . . . on 10/18/10. He was advised to stay on a no work status until 11/15/10 as he recovers from surgery." (Union Exhibit #5, page 2).

Officer AD also testified that when he gave the completed form to HRM Vonada, in his own handwriting, he added the sentence/words in box #24, "*Dr. advised to work "Light Duty" effective: 11/15/10*.". When questioned about his adding the above sentence to box #24, Officer AD further testified and explained:

> A. (By Officer AD):
>
> When I talked to the doctor [on November 12, 2010], he [i.e., Officer AD's surgeon] looked at me and he said are you ready to go back to work light duty? He [i.e., Officer AD's surgeon] can't write it like it's medical terminology what he wrote here [in box #24]. He can't put light duty. They're not going to -- it's not a medical, official medical document.
>
> Q. (By Ms. Geiger, Esq.):
>
> Do you know a doctor can put what you're restricted from doing?
>
> A. No, but this is -- he [i.e., Officer AD's surgeon] was explaining what was wrong with me medically, but I don't know what he can do. I don't know nothing about this. I'm not a doctor. That's why I tried to rephrase it and I put this as -- I highlighted this [i.e., in box #24 of the form] so you guys [i.e., FDC Miami] know, they know that I talked to the doctor. He [i.e., Officer AD's surgeon] told me [on November 12, 2010, that] after 11/15 you can work. That's what he [i.e., Officer AD's surgeon] told me, light duty (Tr. Day Four, pp. 48-49).

> Union is aware that approximately 12 staff has been granted this request in the past. This is a well-known consistent and of significant duration established past practice.
>
> Since your arrival at FDC Miami you have unilaterally change[d] this practice that has caused an alteration in the working conditions of our bargaining [unit] members. This is noted when two recent members and others in recent months have been denied Reasonable Accommodations for their injuries, while others in the past have been assisted and taken care of in this area.
>
> * * *
>
> Local 501 has not been formally notified about these changes that have taken place, nor have we been granted the opportunity to bargain on this change of working conditions. These modifications that have negatively impacted the employees benefits, while in the past it has benefitted them immensely by not having to use their sick or annual leave for these temporary disabilities.
>
> * * *
>
> Article 4 - *Relationship of this Agreement to Bureau Policies, Regulations, and Practices*: Section c. The Employer will provide expeditious notification of then changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.
>
> * * *
>
> Local 501 seeks to have all provisions of the Collective Bargaining Agreement adhered to and for our members to be granted the opportunity for Management to continue[ ] to provide them with reasonable accommodations in this institution like in the[ ] past: Cease and desist this unilateral change, provide negotiations in this matter and status quo ante of the previous practice.

(7) Warden McGrew's December 10, 2010-reply to President Reynaldo's Informal (Article 31-b) Resolution Request

By letter dated December 10, 2010 (Joint Exhibit #3), Warden McGrew rejected President Reynaldo's Informal (Article 31-b) Resolution. Warden McGrew found and stated in relevant part as follows:

> This is in response to your informal resolution request dated November 19, 2010, indicating your belief that I have imposed a unilateral change of failing to provide reasonable accommodation for employees who are suffering from non-work related injuries . . .
>
> * * *
>
> As you are aware all positions located within the correctional institution are considered hazardous duty law enforcement officer positions. As such, every position at the institution requires employees to be physically able to perform correctional work safely and successfully, including the ability to respond effectively to emergencies. The ability to respond effectively to emergencies is an essential function of every position located within a correctional institution because the inability to do so may jeopardize the security of the institution and the safety of staff and inmates. Consequently, there are no light duty posts within the confines of Bureau of Prisons' correctional facilities. The exemption to this general philosophy only

occurs where an employee is recuperating from a work related injury. Program Statement 101.04, Worker's Compensation Program, states in pertinent part that the Agency may provide temporary alternative duty assignments (TAD) to bureau employees who have incurred job related injuries or illnesses which temporarily prevent them from performing their assigned duties. Nonetheless, "the security of the institution and the safety-of staff and inmates therein remains of primary importance. Because of these factors, there is no guarantee that any staff member will be considered for or receive a TAD assignment."

Every employee in a correctional institution must be able to respond to institution emergencies immediately and must be able to assist in the resolution of the emergency. These activities may involve the exercise of physical dexterity, stamina, and strength, and staff must be able to exercise these duties without presenting a danger to themselves and/or others. Employees who suffer from a disability may be eligible for consideration of a reasonable accommodation as defined under the Rehabilitation Act. Accommodations under this Act requires the individual be a qualified and disabled individual, and the requested accommodation must be reasonable. An employee must establish that he/she is an "individual with a disability." An individual with a disability is one who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. Interpretive Guidance on Title I of the Americans With Disabilities Act, Appendix to 29 C. F.R. 1630.2(1).

If it is determined that an employee has a disability as defined under the Act, a reasonable accommodation may consist of modifications or adjustments to the work environment, or to the manner or circumstances under which the position held is customarily performed that enables a qualified individual with a disability to perform the essential functions of that position. 29 C.F.R. § 1630.2(o) (ii).

To this end, it has always and continues to be the practice of the Bureau of Prisons to address the medical restrictions of each employee on a case by case basis. As I was not privy to the medical documentation regarding medical impairments of employees who sought accommodation prior to my tenure as Warden at FDC Miami, I am not in a position to comment on whether employees were accommodated as a result of their medical impairments rising to the level of a disability and thereby requiring the Agency to attempt to reasonably accommodate the employees. I do however, examine the medical documentation provided by employees and receive input from the Human Resources and Legal departments regarding whether reported impairments rise to level of a disability and the need to accommodate. Consequently, there has been no change in working conditions of bargaining unit employees based on an established past practice, as I continue to review request[s] for accommodation on an individualized basis and within the parameters required by Federal law.

(8) President Reynaldo's December 14, 2010-filing of the Instant Grievance

On December 14, 2010, Agency's Southeast Regional Director in Atlanta, Georgia, Mr. R.E.

Holt ("Director Holt"), received President Reynaldo's/AFGE's Formal Grievance filing (Joint Exhibit #4). In box #1 of the grievance (which asks, *"Grievant (s)*," it states "Local 501 (on behalf of all Local Members)." In box #5 of the grievance (which asks, *"Federal Prison System Directive, Executive Order, or Statute violated . . . "*), it alleges Agency's violation of the CBA's Article 4-*Relationship of this Agreement to Bureau Policies, Regulations and Practices*, Article 38 - Qualified Handicapped Employees, and Section L of Article 18-*Hours of Work*, and "any other applicable laws, rules and regulations." In box #6 (which asks, *"In what way were each of the above violated? Be specific."*), the grievance alleges and recites:

> It has been an established practice at FDC Miami that all bargaining members that have suffered non-work related injuries have been reasonabl[y] accommodated. A Union Data Request noted that 12 members have been given this opportunity in the past. Warden Linda McGrew since her arrival at FDC Miami has unilateral[ly] suspended this practice without proper formal notification or negotiations with the Union. This has resulted in a significant change of working conditions for our members that has resulted in hardships and discriminatory treatment of our staff. It has been noted recently that two members have been denied this care and consideration. All our members want to be treated fairly and equitably in all aspect of personnel management. If staff are our most valuable resources, why is management denying, impeding and not taking into account them in their times of need? This type of disparate treatment to our bargaining members does not foster good employee morale or strengthens Labor/Management Relations. The Employer is committed to its responsibility regarding the health of all employees and any employee suffering from health conditions or recuperating from illness or injuries, and temporary unable to perform their duties may submit to their supervisors written request for temporary assignments to other duties (phone monitoring), as noted in the Master Agreement, this has been denied by Warden McGrew to our employees.

In box #7 (which asks, *"Dates of violation(s)"*), the grievance further states, "November 19, 2010, and ongoing." And finally, in box #8 (which asks, *"Requested remedy"*), the grievance states, "status quo ante/cease and desist order," "comply with the parties' CBA," "reimbursement of lost wages with sick and annual leave for all [bargaining unit] members affected by this change," "enhanced attorney fees," and "any other remedy deem[ed] necessary and appropriate by a third

party."

(9) Director Holt's December 21, 2010-Rejection/Denial of the Instant Grievance

By letter dated December 21, 2010, to President Reynaldo (Joint Exhibit #5), Director Holt rejected/denied the grievance as follows:

> . . . In your grievance, you allege it has been an established practice at FDC Miami, for all bargaining unit members who had suffered non-work related injuries to be reasonably accommodated. You indicated, since Warden McGrew's arrival at FDC Miami, she has unilaterally suspended this practice without formal notification or negotiations with the Union. You allege this is a significant change of working conditions for members which has resulted in hardships and discriminatory treatment of staff. You have noted recently, two staff members have been denied this care and consideration. You further indicate the employer is committed to its responsibility regarding the health of all employees and any employee suffering from health conditions or recuperating from illness or injuries.
>
> In block 5 of the grievance form you are directed to identify the Federal Prison System Directive, Executive Order, or Statue which you believe was violated. Under this section you have outlined violations of the following:
>
> Article 4: *Relationship of this Agreement to Bureau Policies, Regulations and Practices*
> Article 38: *Qualified Handicapped Employees*
> Article 18: *Hours of Work*; Section L
> Any-other applicable laws, rules and/or regulations
>
> Block 6 of the grievance form requires the grieving party to state how the items cited in Block 5 were violated. It states that the grieving party must "be specific." Your grievance fails to specifically articulate how Article 4, 18, or 38 of the Master Agreement was violated. The grievance must provide sufficient information to determine the essential and basic facts necessary and your grievance does not.
>
> Your grievance is procedurally rejected for lack of specificity.
>
> Although your grievance is procedurally rejected; the following is for informational purposes. In Block 4 of the grievance you indicate informal resolution was attempted with Warden McGrew. Warden McGrew responded to you on December 10, 2010. I believe Warden McGrew has adequately responded to your informal resolution and I concur with her response.
>
> Based on the foregoing, your grievance is rejected and substantially denied.
>
> * * *

(10) Summary of Mr. Eric Young's Testimony

The record shows that since September 2007, to the present time, Mr. Eric Young ("Mr.

Young"), has been AFGE's Council of Prisons' Southeast Regional Vice President; that at FDC Miami he served as Local 501's Shop Steward and then Chief Shop Steward starting in 1996, and its Local President from 2000-2007; and while Local 501's Shop Steward, Chief Shop Steward and President, he attended and served as AFGE's representative at FDC Miami's union/management Article 18/Roster Committee and Article 27/Safety & Health Committee meetings. Mr. Young testified, in summary, that based upon his 1996-2007 attendance at FDC Miami's Safety & Health and/or Roster Committee meetings, and as Local 501's Shop Steward, Chief Shop Steward and Local President, he recalled that no FDC Miami bargaining unit members (including himself) were denied light duty while recuperating from an off-duty illness or injury.[9]

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[9] Mr. Young testified as follows:

Q. (By Mr. Mansour):
Okay. From your experience in FDC Miami do you recall anyone ever being denied light duty for non-work related injury?

A. (By Mr. Young):
For non-work related injury?

Q. Correct.

A. From my experience that was the first order of business in Roster Committees that I sat on. We would accommodate people but I had to make sure that whoever was being accommodated did not interfere with the collective bargaining rights of the other staff. For example, management always wanted to use the sedentary jobs, where people didn't have to move a lot, which was Control Center the Visiting room, the front lobby where I used to work, they used to want to put in those positions that, the most senior people, those are the positions that they mostly liked. So we had to come up with additional areas of the institution where we could accommodate these people without those individuals interfering with the collective bargaining rights of the other staff.

* * *

Q. (By the Arbitrator):
. . . I didn't hear [Mr. Young's] . . . answer. The main question was; in your [Mr. Young's] tenure, which goes back - . . . years, . . . [Mr. Mansour's] question was; did anybody get denied who was not - who was asking for an accommodation or a light duty [assignment] wh[ich] qualified as a off-the-job injury . . .[?]

A. (By Mr. Young):
In the time that I sat on those Roster Committees we had never denied anyone. . .

* * *

A. (By Mr. Young):
Ever since I['ve] been sitting on the Roster Committee since the late 90's when this contract [i.e., the CBA] came in existence, we never denied anyone. . .

Q. (By the Arbitrator):

(11) Stipulation of Testimony of FDC Miami's Former Warden, Mr. John T. Rathman

The record shows that Mr. John T. Rathman ("Warden Rathman") served as FDC Miami's Warden from 2007 to February 20, 2010, and was succeeded by Warden McGrew in April 2010. In the course of the arbitration, the parties signed a written stipulation (Joint Exhibit #8) which stated and agreed the following three paragraphs "[W]ould have been [Warden Rathman's] sworn testimony and therefore carries the same weight as if Warden John T. Rathman testified in person":

> Paragraph 1. During my tenure as Warden at the Federal Detention Center, Miami, Florida, between August 2007 and February 2010, I allowed a number of bargaining unit employees (more than 10) the opportunity to be temporarily assigned to other duties for non-work related injuries.
>
> Paragraph 2. I permitted these bargaining unit employees the opportunity to work in certain posts, such as phone monitor, ACIS, and Control #2, while temporarily assigned for non-work related injuries.
>
> Paragraph 3. I allowed these employees who incurred non-work related injuries the opportunity to return to work while under medical restrictions and/or limitations in an effort to work with these employees to get them back to work and to avoid exhausting their paid leave. By allowing employees to work with limitations, this benefitted both the Agency and the employee. There was never an employee that was denied accommodation while I was at the Federal Detention Center, Miami, Florida.

(12) Stipulation of Testimony of FDC Miami Associate Warden Edwin Perez

The record shows that from October 2007, to October 2010, Associate Warden Perez reported to Warden Rathman and later Warden McGrew. Similar to Warden Rathman's stipulation, the parties signed a written stipulation of testimony (Joint Exhibit #9) which stated and agreed the following three paragraphs "[w]ould have been [Associate Warden Perez's] sworn testimony and therefore

---

> So at th[ese] . . . [meeting[s] . . ., someone comes in with an off-the-job injury, what I'm hearing you say is, number one, is this correct; everyone got accommodated?
>
> A. Yes that's correct. (Tr. Day One, pp. 83-86).

carries the same weight as if Associate Warden Ewin Perez testified in person":

Paragraph 1. During my tenure as the Associate Warden at the Federal Detention Center, Miami Florida between October 2007 and October 2011, I have personal knowledge that a number of bargaining unit employees (more than 10) were temporarily assigned to other duties for non-work related injuries.

Paragraph 2. During my tenure at the Federal Detention Center, and while Warden Rathman was Warden, bargaining unit employees were given the opportunity to work in certain posts throughout the institution while they were recuperating from non-work related injuries. These bargaining unit employees were temporarily assigned to other duties. By allowing these bargaining unit members the opportunity to return to work while under medical restrictions and/or limitations, they were able to continuing working without exhausting their leave.

Paragraph 3. Warden Rathman allowed employees that incurred non-work related injuries the opportunity to work while under medical restrictions and/or limitations. By temporarily assigning these employees to other duties, both the Agency and employees were benefitted. I know of no employee that was denied accommodation while I was at the Federal Detention Center, Miami, Florida. If the Agency chooses to call this witness, he will testify in person.

(13) Summary of Warden Linda McGrew's Testimony

The record shows that the declared reasons or grounds for Warden McGrew's, or her staff's light duty denials are stated in Captain Acre's above quoted July 29 and August 10, 2010-letters to Officer KA (Agency Exhibits #9 &10), and essentially repeated by Warden McGrew in her above quoted December 10, 2010-reply to President Reynaldo's November 19, 2010-Informal (Article 31-b) Resolution (Joint Exhibit #3). Each document similarly states, among other things and in relevant part:

- There are no light duty positions or posts within the confines of an Agency correctional institution and when deciding to allow or deny light duty, she (Warden McGrew) considers, among others, the following factors:

  - That the security of the institution and the safety of its staff and inmates remains of primary importance.

  - That all correctional institution positions are considered hazardous duty law enforcement officer positions.

- That every position in a correctional institution require its employees to be physically able to perform correctional work safely and successfully, including the ability to respond effectively to emergencies.

- The ability to respond effectively to emergencies is an essential function of every position located within a correctional institution because the inability to do so may jeopardize the security of the institution and the safety of staff and inmates. And,

- It is the practice of the Bureau of Prisons to address the medical restrictions of each employee on a case by case basis.

Regarding her light duty approvals or denials, in the course of her direct and/or cross, Warden McGrew similarly testified in summary that:

- When it comes to the safety and security of an institution, each warden is different.

- When it comes to decision making, when it comes to ensuring that staff are safe and secure and they go home to their families every day, she goes by her knowledge, past experience, and based on policy.

- That she cannot go by what someone else [did] and how someone else ran their institution; which is something the warden has the right to review and make a decision that they feel comfortable with.

- That she evaluates each case on an individual or case-by-case basis.

- An employee unable to respond to an emergency due to a physical condition presents not only a risk for themselves but for other employees. And that,

- An employee who can't run can be taken as a hostage at any time.

The undersigned also takes notice that in the last paragraph of her December 10, 2010- response to President Reynaldo's Informal (Article 31-b) Resolution (Joint Exhibit #3), Warden McGrew vehemently denies the charge that she changed policy and/or a binding past practice under Warden Rathman of allowing all light duty requests. As stated in her December 10, letter (and repeated in her testimony here), Warden McGrew asserted:

. . . [I]t has always and continues to be the practice of the Bureau of Prisons to address the medical restrictions of each employee on case by case basis. As I was not privy to the medical documentation regarding medical impairments of employees who sought accommodation [i.e., light duty] prior to my tenure as Warden at FDC Miami, I am not in a position to comment on whether employees were accommodated as a 'result of their medical impairments rising to the level of a disability and thereby requiring the Agency to attempt to reasonably accommodate the employees. I do however, examine the medical documentation provided by employees and receive input from the Human Resources and Legal departments regarding whether reported impairments rise to level of a disability and the need to accommodate. Consequently, there has been no change in working conditions of bargaining unit employees based on an established past practice, as I continue to review request[s] for accommodation on an individualized basis and within the parameters required by Federal law. (Joint Exhibit #3).

In the course of her arbitration testimony, Warden McGrew further testified as follows:

- That during her tenure at FDC Miami, to the best of her recollection, she only denied light duty twice, - to Officer KA, and to a non-bargaining unit employee/Administrator TB. She further explained and stated:

  Q. (By Mr. Mansour):
  Warden Rathman, in his stipulation [of testimony, Joint Exhibit #8] indicated he [Warden Rathman] never denied anyone light duty for non-work related injury, correct?

  A. (By Warden McGrew):
  Yes.

  Q. You said -- testified that you only denied two. In the entire tenure of your being at FDC [Miami] you only denied two people, is that what you testified to today?

  A. To my recollection, yes, two.

  * * *

  Q. Did you deny -- do you remember the two that you denied -- let me rephrase that. Do you remember the two people that you denied light duty for non-work related injury?

  A. Yes. [Officer KA] . . . and [non-bargaining unit employee TB] (Tr. Day Four, pp. 112-113, 237; Agency Exhibits #9 & #10).

  * * *

- When questioned whether she denied Officer AD light duty, Warden McGrew testified that she had no knowledge of Officer AD, nor had she received a request from him for light duty.

- When questioned whether Officer JR had ever requested a temporary (light duty) assignment to other duties, Warden McGrew replied “Not that I remember. I remember pretty good remembering when they ask. No.”

- When questioned about Officer RR, Warden McGrew testified she never

received a request from him to be assigned to a temporary (light duty) assignment based on his medical limitations, and that if Officer RR had submitted a request for light duty based on his medical restrictions, that she would have looked at the request, however, she never received anything.

- That when questioned about the process at FDC Miami for requesting light duty, Warden McGrew testified the employee should contact their supervisor, the supervisor, in turn, should ask for the employee's medical limitations or restrictions, and then the matter should be brought to the warden's attention by the supervisor. She further stated employees are annually trained on what to do in the event of either an on-duty or an off-duty injury, and, if in a situation where the employee is not getting results from their supervisor, she added, "there is always a chain of command th[ey] . . . can talk to someone else [to] . . . see if [they] . . . can get a different opinion." She also testified verbal requests can be made for light duty, however, the employee will be asked to put their request in writing.

- When questioned about employee medical limitations, Warden McGrew testified she employs the institution's Chief Medical Officer to review the employee's medical documentation because she is not a medical doctor, and to do so is consistent with the Master Agreement.

- When questioned about the last sentence of Paragraph Three of Warden Rathman's Stipulation of Testimony (Joint Exhibit #8) ("There was never an employee that was denied [a light duty] accommodation while I was at the Federal Detention Center in Miami, Florida."), Warden McGrew testified as follows:

  Q. (By Mr. Mansour):
  Was that clear that he [Warden Rathman] never denied anybody?
  A. (By Warden McGrew):
  By reading his [Warden Rathman's] statement [Joint Exhibit #8], then I would say that's true.
  Q. Did you, when you decided to deny light duty for the bargaining member[s] or staff at FDC Miami, did you notify the Union that you're changing the binding past practice from Warden Rathman?
  A. No, because I did not change the policy.
  Q. Well, Warden Rathman allowed it and you didn't. What do you call that, in your opinion?
  A. . . . Article 18 [Section L] says that they will review the employee's request, their request. I did review based on their medical restrictions. Now, that was my responsibility to review and to ensure that that person would be able to work in an environment which is safe and secure for the employee and for other employees. And I, at that time, upon looking at that individual case, determined that that person was not able to work safety within that environment. (Tr. Day Four, pp.

107-108).

* * *

Q. Okay. Was it safer for the staff to work a light duty under Warden Rathman, but it's not safer for you? What's the difference, do you know?

A. How Warden Rathman defines what is safe and how I interpret it, based on an individual's needs at that time, because I don't have a broad base and just one question use that for everybody. I look at it on an individual basis.

So I don't know what criteria he [Warden Rathman] used. I don't know the individual cases that [Warden Rathman] reviewed. They may have been cases where they were fine to work in the environment and I have approved a non-work related injury and allowed that person to work in the institution because they could meet the central functions of their duties and still have medical restrictions. But on those two instances that I denied, I did not feel that they would be safe or others would be safe around them. But most importantly, them being safe. (Tr. Day Four, pp. 115-116).

* * *

Q. . . . Article 6, Page 10 [of the CBA] and I'm going to have you look at Section B, Number 2. Okay? Can you read that for the record?

A. "To be treated fairly and equitably in all aspects of personnel management."

Q. Okay, the question from me, why did Warden Rathman allow everybody non-work related [light duty] and you decided to be selective?

A. When it comes to the safety and security of an institution, each warden is different. So that's why a warden is in one location for two or three years and move on. When it comes to decision making, when it comes to ensuring that your staff are safe and secure and they go home to their families every day, I am going to go by my knowledge, my past experience and based on policy. I cannot go by what someone else and how someone else ran their institution. This is something that the warden has the right to review and make a decision that they feel comfortable with. I can't tell you what Warden Rathman felt comfortable with, but my job, once again, is to ensure that they go home safely to their families every day. So I can't tell you how he [Warden Rathman] thinks. I can't tell you how other wardens think. But I have approved them [light duty] in the past and in this case, I denied those two individuals [i.e., Officer KA and non-bargaining unit Administrator/Supervisor TB] (Tr. Day Four, pp. 120-121).

* * *

Q. Ms. McGrew, prior to December 14, 2010 [i.e., the filing date of the instant grievance], do you recall granting light duty for non-work related injuries] to any employees?

A. No (Tr. Day Four, p. 124).

SUMMARY OF THE PARTIES OPPOSING POSITIONS & ARGUMENTS

Summary of AFGE's Position & Argument

It is AFGE's position, in summary, that commencing with her April 2010-arrival at FDC Miami, Warden Linda McGrew's (or her staff's) unilateral light duty denials violated past practice and Articles 4 & 3 on the grounds the denials caused a "change" in the bargaining unit's "working conditions," without prior notification or negotiations with AFGE's local President, and, in turn, resulted in employee financial hardships and discriminatory treatment. While AFGE also argues and contends that Warden McGrew's light duty denials violated Articles, 6, 18 & 38 of the CBA, as found above by the undersigned (with the exception of Officer RR's claim, the record shows the same are unproven, and thus, denied.

In support of its remaining positions, AFGE argues and insists, in relevant part and in summary, that the instant grievance be awarded for the following reasons:

- That Warden Rathman's allowing of light duty [at FDC Miami from 2007 to 2010] was arbitrarily ended by Warden Linda McGrew during her tenure without properly notifying . . . Local 501 of her decision, thus violating Article 3, Section c. which clearly states that the Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment.

- That Agency failed to follow its own policies in regards to accommodation of injuries and short term incapacitation periods under the Master Agreement, which specifically becomes available and applies to employees who are unable to perform their regular duties because of illness or injury. Article 18 Section (L)(1) provides a bas[is] to . . . [an employee's] right to "Light Duty." This language makes no distinction between whether that inability is "job-related" or not.

- That Agency's attorney, Ms. Geiger, Esq., when asked by the arbitrator, if, to her knowledge, the language of Article 18-L-1 encompass on-the-job injuries, off-the-job injuries, or both. Ms. Geiger responded "Any injuries." In essence, this affirms under Article 18 Section L, that any employee suffering from health conditions or recuperating from illnesses or injuries are eligible for a

temporary assignment even if it is not work related.

- That Agency committed harmful error in the application of its own procedures which has affected numerous bargaining unit members, which mandates reinstatement of employees rights to accommodation and the restoration of all emoluments associated with this case.

- That Agency coerced employees to take leave against their will making them exhaust their paid leave unnecessarily with enforced leave. These actions are violations of the parties' CBA and unjustified, unwarranted personnel actions.

- That Warden McGrew's denial of non-work related light duty accommodation was not consistent with the past accommodations approved by the previous administration of Warden John Rathman to various employees who participated in this contractual benefit which has always existed at FDC Miami.

- When Warden McGrew was asked if she was aware of the Department of Justice Inspector General's report on monitoring (inmate's) phone (calls), she stated "Yes." She also stated employees are productive in the phone room. This by itself proves the Union's case that she did not accommodate employees as the prior Wardens had; and she failed to negotiate with Local 501, violating past practice.

- That Warden McGrew had positions available in the phone room (phone monitoring of inmate calls), but failed to accommodate all the employees represented in this grievance.

- The actions conducted by key Management officials have created an adverse impact among the bargaining unit employees.

- That Mr. Eric Young - Local 501's former Steward, Chief Steward and President from 1997/1998 to 2007 - testified that:
  - One of his responsibilities as a Union official was to oversee the roster committees in the various departments within the FDC Miami institution. The first thing that was talked about in the roster committee was light duty, therefore, he was familiar and had knowledge of all employees that were placed on light duty/reasonable accommodation for non-work related injuries.

  Mr. Young also testified to the fact that he was a participant in all the health and safety committee meetings in which no employee was ever denied light duty.

Summary of Agency's Opposing Positions & Argument

Part One - The Merits of the Grievance

Agency requests the undersigned deny the merits of the grievance on the overall grounds Warden McGrew violated no binding past practice requiring that light duty be allowed. Agency also argues and insists that in accordance with the Agreement, Warden McGrew exercised her Article 18-L managerial discretion to determine on a case-by-case basis whether or not to grant light duty based upon the safety and security of the institution and the safety of its employees, all of which, Agency stresses, trumps past practice.

Agency also argues Warden McGrew had no duty to bargain with AFGE over her light duty denials "because the matter of the granting of temporary [light duty] assignments to other duties is already covered by the Master Agreement['s] [Article 18]."

In support, Agency notes, contends and argues, in relevant part and in summary, as follows:

(*Regarding past practice and Article 18*)

- That Warden McGrew/Agency is not subject to a claim of past practice because this matter is explicitly addressed in the CBA's Article 18.

- In this case, the nature of the "practice" [regarding light duty] was for each warden to exercise his/her discretion as to whether to grant a temporary [light duty] assignment to other duties for non-work related injuries or illnesses. The prior Warden, John Rathman, and Warden Linda McGrew, exercised their discretion differently.

- Warden McGrew testified:
  - she didn't change a [light duty] past practice . . . because the practice, . . . is to review each individual case and make a determination based on the safety and security of the institution. She further testified, "It is not just black and white. It is the reviewing process and ensuring that, as [stated] in Article 18, . . . Section L, Number 1, [it] says that based on the employee's request [for light duty] that the Employer will review [the request]." She further added, "I never stopped the practice of reviewing employee [light duty] requests."

- that Article 18 allows her to make a determination [on whether to approve or disallow light duty] to the best of her knowledge and experience, and she is not bound to make a decision one way or the other, but that Article 18 gives her the freedom to look at each individual [employee's light duty request] on an individual basis.

(*Regarding Bargaining with AFGE and Article 18*)

- That employees may make requests for temporary assignments based on illness or injury subject to medical review. Article 18 does not say that employees suffering from illnesses or injuries will automatically receive temporary assignments. It applies to both work-related and non-work related injuries and illness. This is all the parties bargained for.

- In Section L-1 of Article 18, the appropriate arrangements that have already been negotiated are that injured or ill employees will make requests to their supervisors for temporary [light duty] assignment to other duties; these same employees may be required to submit medical documentation for review by the [Agency's] Chief Medical Officer; and if employees are granted a temporary assignment to other duties, "they will continue to be considered for promotional opportunities for which they are otherwise qualified."

- Pointing to the first sentence of Article 18-L-1's language (i.e., that "employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignment to other duties.") and the Federal Labor Relations Authority's ("Authority") decision in *United States Department of Justice Federal Bureau of Prisons Federal Correctional Institution Fairton, New Jersey and American Federation of Government Employees Council of Prison Locals AFL-CIO, Local 3975* ("*Fairton*"), 62 FLRA 187, 189 (October 26, 2007), Agency further asserts and argues:

> The relief the Union seeks is to return to the status quo ante. Parties [to a collective bargaining agreement] are only required to return to the status quo ante if there was a duty to bargain in the first place. Here there is no duty to bargain because the matter of the granting of temporary assignments to other duties is already ["]covered by["] the Master Agreement.
>
> [As stated in *Fairton*] "[t]he 'covered by doctrine' is a well-established defense to a claim that an agency failed to provide a union with notice and an opportunity to bargain over changes in conditions of employment . . . " "[T]he 'covered by' doctrine excuses parties from bargaining on the ground that they have already bargained and

> reached agreement concerning the matter at issue." [*Fairton*, 62 FLRA at 189].

(*Regarding the Bargaining Unit Members AFGE Alleges Were Denied Light Duty*)

- (Officer JR) - [Officer JR] testified that he returned to work on October 13 or 14, 2010, because he had exhausted his sick leave. His assignment sheets further show that he returned to full duty on October 14, 2010, more than two months before the Union's grievance was filed.

- (Officer RR) - Warden McGrew testified and insists she never received a request for light duty from [Officer RR], although she was copied on his January 5, 2010-email (Union Exhibit #3) where he sought information from President Reynaldo. On February 7, 2011 [Officer RR] was released to return to work by his surgeon without restrictions (Agency Exhibit #6).

- (Officer AD) - [Officer AD] produced no evidence to support his allegations that he requested light duty. Moreover, Warden McGrew testified that she did not receive a request from [Officer AD] for light duty. Accordingly, Agency contends and insists AFGE failed to meet its burden of proof to show that [Officer AD] was denied light duty or even requested light duty.

Part Two - The Timeliness/Arbitrability of the Grievance

Agency alternatively challenges the overall arbitrability of the instant grievance on the grounds it was not timely filed in accordance with Article 31-d's forty (40) calendar day time restriction.

Agency argues, in summary, that August 10, 2010 (i.e., the date Officer KA was denied his light duty request by Captain Acres), is both the date of the "alleged change in past practice" and the "alleged grievable occurrence" which, in turn, "triggers the grievance as far as timeliness." Thus, argues Agency further, the undersigned should forthwith dismiss or deny the grievance since its December 14, 2010-filing date is not within the required forty calendar days of the August 10, 2010-date of the alleged grievable occurrence. Agency also argues that Officer KA's August 10, 2010-light duty denial date contractually bars all subsequent denied light duty grievances "for each and every individual bargaining unit member allegedly denied light duty ***thereafter*** (i.e., after August 10, 2010)

(emphasis added). In support of its timeliness position, Agency further argues, in summary and in relevant part, as follows:

- Regarding Officer KA. That on July 29, and again on August 10, 2010, [Officer KA] knew his light duty request had been denied which dates are more than four months before the grievance was filed on December 14, 2010, rather than the forty days required under Article 31-d of the CBA.
  If the Union wanted to grieve . . . Warden [McGrew's] actions with respect to [Officer KA] individually, then the grievance should state that it is grieving the denial of light duty to . . . [Officer KA]. But that is not what the Union did. Instead it chose to file a grievance with respect to past practice on behalf of its bargaining unit members. Therefore, the date that the Agency first denied light duty so as to "unilaterally suspend a practice" [i.e., August 10, 2010], is the date of the alleged grievable occurrence for purposes of filing this particular grievance. Accordingly, pursuant to Article 31, Section d, of the Master Agreement, the Union had until September 19, 2012, to file its grievance, and, therefore, its grievance is untimely.

- Regarding Officer JR. [Officer JR] alleges he was denied light duty in early October 2010, although . . . Warden McGrew states she never received a request for light duty. [Officer JR] returned to full duty at the Agency on October 14, 2010. As the grievance was filed on December 14, 2010, . . . [Officer JR] was allegedly denied light duty more than two months prior to the filing of the Union's grievance, and not the requisite forty days under the Master Agreement. However, the triggering event for a claim of past practice is the date of the occurrence of the change. The occurrence of the change was with [Officer KA on August 10, 2010] making the entire grievance untimely with respect to each and every individual bargaining unit member allegedly denied light duty thereafter.

- Regarding Officer RR. The only things that occurred with respect to [Officer RR], prior to the Union's grievance being filed on December 14, 2010, had to do with his Worker's Compensation claim for a work-related injury, which is outside the scope of this grievance.

Part Three - Agency's Conclusions

Agency concludes and requests the grievance be denied as follows:

In light of the foregoing, there was no binding past practice among the parties.

This very matter was contemplated by the parties when they negotiated the Master Agreement and is covered by the Master Agreement in Article 18. Article 18 itself is the product of impact and implementation bargaining. Moreover, even if the

matter were not covered by the Master Agreement, the fact is that a discretionary function directly related to the safety and security of a federal correctional facility rightfully overcomes any claim of a binding past practice.

Finally, the facts of the case show that the only time the Warden denied a bargaining unit member light duty prior to [the] December 14, 2010 [filing date of the grievance], was with respect to [Officer KA on August 10, 2010]. As that denial allegedly broke a past practice, the Union's grievance is untimely because filed more than 40 days from the date this occurred. As a result, the Agency respectfully asks that the Arbitrator declare this matter unarbitrable as outside his jurisdiction.

In the alternative, the Agency respectfully requests that the Union's grievance be denied on the merits.

DISCUSSION

The essence of Agency's case in opposition to the merits of the grievance centers on essentially two broad and overlapping positions. Agency contends and argues a "binding past practice" was not violated or proven, or even existed among the parties regarding employee light duty. Agency also argues that Warden McGrew's (or her staff's) denials of light duty triggered no contractual duty to notify or bargain/negotiate with AFGE over her denials since light duty is "covered by" Article 18, and specifically the first sentence of Article 18's Section L-1. It states, "employees . . . may voluntarily submit written **requests** to their supervisors for temporary [light duty] assignment[s] to other duties" (emphasis added).

The undersigned, however, finds, credits and sustains AFGE's case that a binding past practice was violated by Warden McGrew's or her staff's light duty denials, and further, that said light duty denials also violated Articles 4 & 3 for the following reasons.

Agency's/Warden McGrew's or her Staff's Charged Violation(s) of a Binding Past Practice

The term "binding past practice" (a/k/a "past practice" or "practice"), has over the years been the subject of countless grievance/arbitration disputes whether in the public or private sectors. To sustain a binding past practice violation, the underlying practice must be clearly shown or established as a binding and enforceable unwritten contractual right. And to establish the same, the party alleging

the violation, here AFGE, must prove up or show with strong and convincing evidence the following three overlapping conditions: First, the practice is long standing; second, the practice is mutual, meaning the practice was jointly initiated and/or mutually agreed upon and/or mutually accepted by both parties as an unwritten and binding term and condition of employment; and third, the practice is not at variance or in conflict with any of the clear and explicit written terms and conditions of the parties' collective bargaining agreement.

The Elkouri & Elkouri treatise, *How Arbitration Works*, (6th ed., 2003) at page 606 ("Elkouri treatise"), further recognizes and discusses the level of proof needed to sustain or prove-up a binding past practice grievance violation as follows:

> It is generally accepted that certain, but not all, clear and long-standing practices can establish conditions of employment as binding as any written provision of the agreement. [*Alpena General Hospital*, 50 LA (BNA) 51 (Arbitrator Jones, 1967)].
>
> In cases where the contract is completely silent with respect to a given activity, the presence of a well-established practice, accepted or condoned by both parties may constitute in effect, an unwritten principle on how a certain type of situation should be treated. *[Texas Utilities Generating Division*, 92 LA (BNA) 1308 (Arbitrator McDermott, 1989)].
>
> * * *
>
> [I]t is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations. [*Metal Speciality Company*, 39 LA 1265 (Arbitrator Volz, 1962)].
>
> Custom can, under some unusual circumstances, form an implied term of a contract. Where the Company has always done a certain thing, and the matter is so well understood and taken for granted that it may be said that the Contract was entered into upon the assumption that the customary action would continue to be taken, such customary action may be an implied term. *[Beaunit Fibers*, 49 LA (BNA) 423 (Arbitrator McCoy, 1967)].
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> * * *

Citing to, among others, *Michigan Department of State Police*, 97 LA (BNA) 721 (Arbitrator Kanner, 1991), *City of York, Pennsylvania*, 103 LA (BNA) 1111 (Arbitrator DiLauro, 1994), and

North Slope Borough School District, 98 LA (BNA) 697 (Arbitrator Corbett, 1992), the Elkouri treatise similarly recites at pages 607-608, that:

> When it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence ordinarily will be required. Indeed, many arbitrators have recognized that, "In the absence of a written agreement, 'past practice', to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties."

The undersigned also takes notice of page 627 of the Elkouri treatise which recites under the heading "*Custom and Practice at Variance With Clear Contract Language*" the following:

> While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the "plain meaning" principle of contract interpretation will refuse to consider evidence of a past practice that is inconsistent with a provision that is "clear and unambiguous" on its face.
>
> > Plain and unambiguous words are undisputed facts. The conduct of parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator's function is not to rewrite the parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. [*Phelps Dodge Copper Products Corp.*, 17 LA 229, 233 (1951) (Arbitrator Jules J. Justin)].

Regarding AFGE's binding past practice charge and the facts and circumstances of the case, the undersigned credits Mr. Young's unchallenged testimony as to the existence of a jointly administered, well known and long standing/fourteen-year practice at FDC Miami of allowing all bargaining unit light duty requests (including his own) without interruption from 1996 up to Warden McGrew's April 2010-arrival at FDC Miami.[10] However, whether such practice qualifies or rises to

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[10] As reflected by Mr. Young's unchallenged testimony, the record shows that all employee light duty approvals were known and jointly administered in the course of the parties' union/management Safety & Health and/or Roster Committee meetings during which all light duty employees were placed in sedentary jobs at FDC Miami; and, as testified to by Mr. Young - without opposition, - no employee light duty request (including his own) was denied or

the level of an actionable and/or binding past practice/unwritten contractual right, which AFGE contends Warden McGrew of her staff violated, falls to whether or not the CBA's applicable language clearly and explicitly, and, thus, contractually enabled Warden McGrew or her staff to disallow all bargaining unit light duty requests at FDC Miami.

The applicable CBA language is reflected in the first sentence of Section L-1 of Article 18 which states, "employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written **requests** to their supervisors for temporary assignment to other duties" (Emphasis supplied). Such language, however, clearly and explicitly recites and advises that bargaining unit employees may only voluntarily submit written **requests** to their supervisors for temporary light duty assignment to other duties (emphasis added) (hereinafter for brevity, "request language"). Stated differently, such request language, the undersigned finds, fails to override or trump the existence of the binding past practice which AFGE alleges in this matter since all that it clearly and explicitly states are that written "requests" for light duty may be voluntary submitted to the employee's supervisor. The request language, nor any other language of the parties' CBA, the undersigned observes, contains no light duty approval or disapproval language.

On the other hand, if, *arguendo*, and by way of example, the second sentence of Section L-1 of Article 18 had been negotiated by the parties to state, "'*If employees are granted a temporary assignment to other duties by their supervisor*' such employees will continue to be considered for promotional opportunities for which they are otherwise qualified," such added italicized language

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disapproved during his 1996 to 2007 term serving as AFGE Local 501's Shop Steward, Chief Shop Steward and local President. Warden John Rathman's stipulated testimony (Joint #8), is also undisputed that during his 2007 to 2010 term as FDC Miami's Warden, "There was never an employee that was denied [a light duty] accommodation. . ."

would arguably qualify as the requisite clear and explicit contract language showing that Agency's warden or staff/supervisors may indeed grant or deny any or all employee light duty requests, which in turn, would arguably trump AFGE's binding past practice charge. However, no such language exists in the parties' CBA. It is silent regarding light duty approvals or disapprovals. Moreover, under Article 32-h's language, arbitrators are strictly prohibited from adding to, altering, reading into, or modifying any of the terms of the CBA.

> In its brief at page 14, Agency states and argues, among other things, that:
>
> Employees may make requests for temporary assignments based on illness or injury subject to medical review. Article 18 does not say that employees suffering from illnesses or injuries will automatically receive temporary assignments. It applies to both work-related and non-work related injuries and illnesses. Tr. Day 4 at 211. This is all the parties bargained for.

The above argument has merit since, while it is true that Article 18 does not say that employees suffering from illnesses or injuries will automatically receive temporary (light duty) assignments, it is also true, as noted above, that Article 18, nor any other articles or language of the parties' CBA contain language stating Agency may, at its discretion or otherwise disallow or deny, or approve light duty assignments. And again, the undersigned is contractually prevented by Article 32-h from reading into, or adding such language to the parties' CBA.

In summary, the preponderance of the evidence shows, thus, the undersigned so finds as follows: (1) all that was clearly and explicitly bargained for by the parties is encompassed by the above "request language" which only states that employees may "request" light duty; (2) the CBA contains no clear or explicit nor any light duty approval or disapproval language; (3) that while the CBA contains no approval or disapproval light duty language, it has been the knowing and mutual Agency and AFGE practice at FDC Miami that without interruption from 1996 up to Warden McGrew's April 2010-arrival at the institution, that all bargaining unit light duty was allowed; and

(4) commencing with Warden McGrew's April 2010-arrival at FDC Miami, no light duty was allowed by her or her staff which continued up to the December 14, 2010-filing of the instant grievance, which included the light duty denials of Officer KA on August 10, 2010, Officer JR on or about October 4, 2010, and Officer AD on November 15, 2010.

The above being found, the undersigned further finds the parties' above practice of allowing all light duty from 1996 up to Warden McGrew's 2010-arrival at FDC Miami constituted or was elevated to a binding past practice/unwritten contractual right of the bargaining unit, which in turn, was violated by Agency/Warden McGrew or her staff, as charged by AFGE in this matter. The undersigned, accordingly, sustains/awards AFGE's charge that Warden McGrew's or her staff's light duty denials violated a binding past practice.

Agency's/Warden McGrew's or her Staff's Charged Violation of Articles 4 & 3.

What remains to resolve is AFGE's alternative charge that Warden McGrew's or her staff's light duty denials also violated Articles 4 & 3.

As discussed and found above, nor disputed by the parties, Article 4-c's language incorporates Article 3-e & d's language, and when read together, they collectively state and require, in summary, that proposed Agency changes to "local working conditions" will not be implemented prior to Agency's notification and negotiation of such working condition changes with the bargaining unit's local President. That being the case, the awarding or denial of AFGE's alternative charge that Article's 4 & 3 were violated in this matter falls to whether or not the grieved light duty denials truly constitute a change in the bargaining unit's working conditions. Moreover, if a change in working conditions is proven, the grieved light duty denials would similarly, in turn, constitute a violation of Articles 4 & 3's notice and negotiation language - which the record shows, nor is it disputed, was at no time complied with by Agency/Warden McGrew or Warden McGrew's staff.

The undersigned takes notice the term "working conditions" as stated in Article 4-c is nowhere defined in the CBA, nor in the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq. ("the Statute"). On the other hand, the undersigned observes the Statute at 5 U.S.C. § 7103(a)(14) defines "conditions of employment," in relevant part, as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . "

Since the parties are subject to both the Statute and Federal Labor Relations Authority case law precedent, in order to resolve whether Warden McGrew's or her staff's light duty denials did or did not constitute a change in employee working conditions, the undersigned takes notice of and shall apply the meaning, intent and application of the words or term "working conditions" as stated and found in Authority's 2009 Decision and Order in *United States Department of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Arizona, and American Federation of Government Employees, Local 2924*, 64 FLRA 85, 89-90 (2009) ("*Davis-Monthan*").

In that decision, citing to it's and other applicable federal appellate court precedent regarding the meaning, intent and/or definition of working conditions, Authority found and held in relevant part as follows:

> Although courts and the Authority have not defined "working conditions," when faced with issues involving "working conditions," they have accorded the term a broad interpretation that encapsulates a wide range of subjects that is effectively synonymous with "conditions of employment." *See, e.g., Fort Stewart,* 495 U.S. at 646; *Antilles Consolidated Educ. Ass'n,* 22 FLRA 235, 237 (1986) (stating that, in examining whether a bargaining proposal affects "working conditions" of employees, the Authority examines the "work situation or employment relationship" of employees). Moreover, to the extent that courts and the Authority have attempted to make distinctions among conditions of employment, such distinctions arose in the context of assessing whether a change in conditions of employment was or was not *de minimis*. *See, e.g., AFGE, Nat'l Border Patrol Council V. FLRA,* 446 F.3d 162, 167 (D.C. Cir. 2006) (court found that a reduction in remedial training for employees was a change in conditions of employment that was not *de minimis*); *United States Dep't of the Treasury, IRS,* 62 FLRA 411, 414 (2008) (Authority found that agency's decision to discontinue past practice of granting leave to employees to attend annual

> employee appreciation day event was not *de minimis*). The foregoing establishes that, under court and Authority precedent, there is no substantive difference between "conditions of employment" and "working conditions" as those terms are practically applied.

64 FLRA 85 at 89-90.

Applying *Davis-Monthan* to the facts and circumstances of the case, the undersigned finds Warden McGrew's or her staff's disallowance of light duty following approximately fourteen years of uninterrupted light duty approvals at FDC Miami constitutes a substantial change in the pay and/or benefits of the employees disallowed or denied light duty in this matter, and thus, qualifies as a substantial change (i.e., much greater than a *de minimis* change) in their working conditions/conditions of employment. Indeed, the record shows that in the absence of approved or allowed light duty, those FDC Miami bargaining unit employees recuperating or suffering from temporary off-duty or non-work related illness or injuries, will no longer be allowed to return to the payroll performing productive work (such as monitoring inmate phone calls or other sedentary duties) at full pay. Instead, to maintain their pay will require the employees to utilize or continue to utilize, or even exhaust their bargained for and desirable employee benefits, such as their paid sick time or paid annual leave.

Agency, on the other hand, pointing to the Authority's decision in *Fairton*, 62 FLRA at 189, maintains, insists and counters that Warden McGrew had no duty to bargain with AFGE at any time over the grieved light duty denials in this matter on the grounds light duty is already "covered by" the current negotiated terms and conditions of the CBA's Article 18-L. The undersigned, it is sufficing to say, rejects Agency's "covered by" argument/affirmative defense since the cornerstone of the instant grievance was the disallowance or denial of all light duty, which, as noted and found above, the CBA's language contains no light duty approval or disapproval language, and, thus, the grieved disapprovals, the undersigned further finds, are not "covered by" the negotiated terms and conditions

of the parties' CBA.

The above being found, and in accordance with the Authority's *Davis-Monthan* decision, it follows, and the undersigned further finds that Warden Linda McGrew's, or her staff's ongoing and proven unilateral disallowance of light duty commencing on or about Warden McGrew's April 2010-arrival at FDC Miami, constituted a substantial change in working conditions for the FDC Miami bargaining unit employees, and, in turn, violated the mandatory above described notice and negotiation terms, conditions and language of Articles 4 & 3 of the CBA.

DISCUSSION AND FINDINGS REGARDING AGENCY'S POSITION THE GRIEVANCE IS UNTIMELY FILED AND, THUS, NOT ARBITRABLE

Regarding Agency's timeliness/arbitrability position and arguments, the undersigned rejects and denies the same based upon the following.

The record shows that the protested and grieved actions of Warden McGrew (or by her staff, e.g., Captain Darrol Acre and HRM Douglas Vonada) of not approving and/or disallowing light duty was not a single isolated or completed transaction, nor limited to one bargaining unit employee. To the contrary, the record shows, and thus, the undersigned so finds that Warden McGrew, or her staff repeatedly violated Articles 4 & 3 by:

(1) their ongoing unilateral acts of substantially changing the bargaining unit's working conditions as evidenced by her, or her staff disallowing Officer KA light duty on August 10, 2010, disallowing Officer JR light duty on or about October 3, 2010, and disallowing Officer AD light duty on November 15, 2010), and;

(2) their ongoing/day-to-day failure or refusal to comply with Article 4 & 3's combined mandatory notice and negotiation language.

The undersigned also finds that Warden McGrew or her staff repeatedly violated the above described light duty binding past practice of the parties by disallowing Officer KA light duty on

August 10, 2010, disallowing Officer JR light duty on or about October 3, 2010, and disallowing Officer AD light duty on November 15, 2010.

It is long standing and universally accepted that ongoing or repeating employer contract violations, as is the case here, is deemed by arbitrators as "continuing violation grievances" or "continuing violations" which may be contractually filed beyond the applicable CBA's negotiated time limits. On the other hand, it is also the case that all back or lost pay and other awarded contract violation remedies in continuing violation grievances will ordinarily begin to accrue or commence only from the filing date of the underlying grievance, which in this case was December 14, 2010.

The undersigned takes notice that continuing violation grievances are recognized in federal sector grievance arbitrations. One example is Arbitrator David Wilson's opinion and award in *AFGE Local 614 v. DOJ, United States Penitentiary-McCreary, Pine Knot, Kentucky*, FMCS Case No. 06-59305 (June 1, 2007). In that matter, as relevant to the instant case, the arbitrator explained that a continuing violation:

> . . . [I]s generally found where a policy or procedure is put in effect and by application of that policy or procedure on a daily basis, the alleged violation repeats and triggers a new time period under which to file a timely grievance at each implementation of the objectionable policy.
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> * * *
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> For example, a grievance by a physician assistant challenging the agency's continued refusal to allow him to wear scrubs at work was timely filed, even though it was not filed within contractual time limits, where each day the agency denied him [the] right to wear scrubs was a grievable occurrence, and continued refusal to allow him to wear scrubs was [a] continuing violation. *Federal Bureau of Prisons,* 117 LA 515 (Arb. 2002).

Arbitrator Allen Pool discussed the concept of a continuing violation stating:

> > Continuing violations (as opposed to a single, discrete transaction) give rise to continuing grievances in that the alleged act complained of may be said to have been repeated from day-to-day; that is, each day there has been a new occurrence. If such is the case, the filing of a grievance is usually permitted as of the last occurrence and is not deemed a violation of the specific time limit stated in the agreement (the caveat, though, is that any back pay remedy

> ordinarily runs only, from the date of filing). *New Haven Unified School District*, 105 LA 668 (Arb.1995).
>
> * * *
>
> Essential to a continuing violation is finding that by policy or procedure, the same violation, of the CBA repeats on a routine basis, whether daily, weekly or monthly . . .

The Elkouri treatise at pages 218-219, similarly explains and defines continuing violation grievances as follows:

> Many arbitrators have held that "continuing" violations of the agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new "occurrence." These arbitrators permit the filing of such grievances at any time, although any back pay would ordinarily accrue only from the date of filing. For example, where the agreement provided for filing "within ten working days of the occurrence," it was held that where employees were erroneously denied work, each day lost was to be considered an "occurrence" and that a grievance presented within 10 working days of any such day lost would be timely.

Applying the above to the facts and circumstance of the case, the undersigned finds that as a result of Warden McGrew or her staff's repeated violations of the above described light duty binding past practice of the parties and/or Articles 4 & 3, the instant matter constitutes a continuing violation grievance, which in turn, contractually defeats Agency's timeliness/arbitrability position.

But even assuming, *arguendo*, the instant grievance is not a continuing violation, the undersigned finds no compelling evidence in the record, nor language in the CBA, nor any Authority or arbitration case law or decisions in support of Agency's overall position(s) that Article 31's forty (40) calendar day time limit when applied to Officer KA's August 10, 2010-light duty denial, contractually bars all subsequent denied light duty grievances "for each and every individual bargaining unit member allegedly denied light duty ***thereafter*** (i.e., after August 10, 2010) (emphasis added). As noted above, Agency argues and insists:

> [T]he triggering event for a claim of past practice is the date of the occurrence of the change. The occurrence of the change was with [Officer KA on August 10, 2010] making the entire grievance untimely with respect to each and every individual

bargaining unit member allegedly denied light duty ***thereafter*** (emphasis added).

The undersigned rejects and denies Agency's above position. It is sufficing to say that even assuming, *arguendo*, a continuing violation was not found in this matter, under Article 31-d's time limitation language, all that could be arguably time barred would include only those grievances for bargaining unit employees whose light duty denials by Agency took place greater than forty (40) calendar days prior to December 14, 2010. (i.e., on or before November 4, 2010). And if that were the case, *arguendo*, only Officer KA's August 10, 2010, and Officer JR's October 3, 2010-light duty denials would be time barred. Officer AD's November 15, 2010-light duty denial, on the other hand, is obviously not time barred since the twenty-nine (29) calendar day time period between his November 15, 2010-light duty denial to the December 14, 2010-filing of the instant grievance is clearly **within** Article 31-d's forty (40) calendar day time limitation (emphasis added).

Moreover, since the instant grievance (as allowed by Section c of Article 31) is filed by AFGE on behalf of the entire bargaining unit, it follows, and the undersigned so finds that all Agency light duty denials which took place on or after November 5, 2010, going forward to the present time are similarly within and in compliance with Article 31-d's forty (40) calendar day time limitation, and, thus, all are arbitrable.

In summary, and in light of the above collective or individual findings, and since the instant grievance is deemed and found to be a continuing violation grievance, the undersigned rejects and denies Agency's position and argument the instant grievance is not arbitrable on the grounds it was untimely filed on December 14, 2010.

AWARD and REMEDY

1. On the record submitted and all of the above, the undersigned arbitrator finds and awards that

Agency's/Warden Linda McGrew's, or her staff's above described disallowance or disapproval of light duty violated the above described light duty binding past practice of the parties and the combined notice and negotiation terms, conditions and language of the CBA's Articles 4 & 3. To that extent, the instant grievance is sustained.

2. The undersigned arbitrator further finds insufficient evidence in the record to establish or prove that Agency's/Warden McGrew's, or her staff's above described disallowance or disapproval of light duty at FDC Miami violated Articles 38, 6, or 18 (with the possible exception of Officer RR, see footnote 4 below). To that extent, the instant grievance is denied.

3. On the record submitted, and for the reasons discussed above, the undersigned arbitrator further finds that Agency's/Warden McGrew's, or her staff's proven violations of the above described light duty binding past practice of the parties and/or Articles 4 & 3, also constitute a continuing violation which contractually defeats in its entirety Agency's timeliness/arbitrability position. Accordingly, the undersigned rejects and denies Agency's position that the instant grievance is not arbitrable on the grounds it was untimely filed on December 14, 2010.

4. Agency shall forthwith comply with the notice and negotiation language stated in Articles 4 & 3 of the CBA.

5. Retroactive to Warden McGrew's April 2010-arrival at FDC Miami, and continuing to the present time, Agency shall forthwith commence allowing or approving bargaining unit employee light duty requests at FDC Miami in the same manner, procedures and terms and conditions as did Warden John Rathman during the time frame he served as FDC Miami's Warden.

6. A. Subject to paragraph #6-B immediately below, in accordance and in compliance with applicable law/5 U.S.C. § 5596, any FDC Miami bargaining unit employee whose light duty request was denied or disallowed since Warden McGrew's April 2010-

arrival at FDC Miami, and continuing to the present time, shall forthwith be made whole by Agency for all lost or denied pay (including statutory interest) and/or benefits (such as, by way of examples, and not limited to lost paid sick leave or lost paid annual leave), which the bargaining unit employee normally would have earned, or received, or accrued as if Agency had not violated the above described light duty binding past practice of the parties and/or Articles 4 & 3 (in other words, as if the employee's light duty request had been timely allowed or approved by Agency/Warden McGrew or her staff from April 2010 to the present) less any amounts eared by the employee through other employment during that period. Copies of all Agency calculations, credits and payments shall be expeditiously provided to Local 501's President Arturo Reynaldo.

B. However, since the instant matter is deemed and found to be a continuing violation grievance, all lost or denied pay and interest and/or benefits for the time period prior to December 14, 2010 (i.e., the filing date of the instant grievance), is denied.

7. Jurisdiction is retained by the undersigned arbitrator to resolve any disputes over the above remedies on remand including, but not limited to, any request by AFGE for reasonable statutory attorneys fees.[11]

Signed and emailed to the parties' representatives this 7th day of September 2012

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Martin A. Soll, Esq., Arbitrator
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[11] As stated in footnote 4, above, the undersign's retention of jurisdiction also includes Officer RR's claim.