FEDERAL MEDIATION AND CONCILIATION SERVICE

Arbitrator, Roberto G. Chavarry

FMCS NO.09-517243

IN THE MATTER OF THE ARBITRATION BETWEEN:

AMERICAN FEDERATION OF	:
GOVERNMENT EMPLOYEES	:
LOCAL NO. 506	:
(Union)	:
and	:
DEPARTMENT OF JUSTICE,	:
FEDERAL CORRECTIONAL COMPLEX	:
COLEMAN, FLORIDA.	:
(Agency)	:

Representatives for the Agency:
John T. LeMaster, Assistant General Counsel
Davie Honsted, Assistant Human Resource Manager

Representatives for the Union:
Ken Pike, Lead Advocate
Jorge Furones, Co-Counsel

INTRODUCTION

The parties to this proceeding, the Department of Justice, Federal Correctional Complex in Coleman, Florida (hereinafter called the Employer or the Agency) and the American Federation of Government Employees, Local No. 506 (the Union) have taken the grievance specified in Joint Exhibit 3 to arbitration. By mutual agreement, an arbitration hearing was held before the undersigned arbitrator on February 24, 2011, in Coleman, Florida. At this hearing, both parties were afforded the opportunity to present all the evidence they deemed appropriate and relevant. All testimony was taken under oath. The hearing was stenographically recorded

and a written record produced. Both parties provided post-hearing briefs, which were fully considered before the issuance of this decision.[1]

The parties stipulated that the collective bargaining agreement (known as the Master Agreement) negotiated in March of 1998 is still in effect (Jt. Exh. 10). This Agreement was entered into by the Federal Bureau of Prisons and the Council (hereafter referred to as the Council) of Prison Locals, of the American Federal of Government Employees. Under the terms of this Master Agreement, the Agency recognizes the Council as the exclusive representative of "all employees employed by the Federal Bureau of Prisons, with the exception of the employees of the Central Office".[2] The local involved in these proceedings, Local 506 is an affiliate of the Council representing all of the employees of the Agency in the described unit at its Coleman, Florida, facility.

ISSUES

The Union takes the position that the only issue to be arbitrated at this proceeding is whether or not the Agency violated the terms of the collective bargaining agreement by changing the long established past practice of having all officers armed when escorting an inmate off premises for medical reasons.

The Agency took a more expansive approach regarding the issues to be decided by this arbitrator. Thus, the Agency argues the 3 issues to be decided are:

1. Whether the grievance is procedurally defective (i.e., untimely)
2. Whether the grievance is arbitrable and/or

[1] At the outset, I wish to convey my sincere thanks to the parties and their respective representatives for the professionalism they exhibited at this hearing while at the same time strongly advocating and defending their respective positions.
[2] Jt. Exh. 10, Article 1. - Recognition

3. Assuming the grievance was timely filed and the matter subject to arbitrability, whether the Agency properly exercised its rights under Section 5, USC 7106 and Article 5 of the Collective Bargaining Agreement.

GRIEVANCE AND PERTINENT CONTRACT PROVISIONS

The parties jointly introduced the grievance filed on this matter (Jt. Exh. 3). The Union's grievance, in brief, alleges that the Agency violated the terms of the parties' collective bargaining agreement, specifically the following articles: Articles 3, section c; 4, sections b and c, and 27.

> 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 regulation 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 regulations, prior to implementation of any policies, practices, and/or procedures.

ARTICLE 4 – RELATIONSHIP OF THIS AGREEMENT TO BUREAU POLICIES, REGULATIONS, AND PRACTICES

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 the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.

ARTICLE 5 – RIGHTS OF THE EMPLOYER[3]

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

1. To determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and

2. in accordance with applicable laws-

   a. to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or to take other disciplinary action against such employees;

   b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which the agency's operations shall be conducted;

[3] The language quoted herein was extracted in its entirety from the Statute (5 U.S.C. 7106)

c. with respect to filling positions, to make selections for appointments from-

(1) among properly ranked and certified candidates for promotions; or

(2) any other appropriate source; and

d. to take whatever actions may be necessary to carry out the agency mission during emergencies.

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

1. At the election of the Agency, on the numbers, types, and grades of employees or positions assigned to any organizational sub-division, work project, or tour of duty, or the technology, methods, and means of performing work;
2. Procedures which management officials of the Agency will observe in exercising any authority under this Agreement; or
3. Appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

ARTICLE 27 – HEALTH AND SAFETY

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment; and

2. the second, which affects the safety and health of employees, involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated.

With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.

Section b. The parties agree that participation in and monitoring of safety programs by the Union is essential to the success of these programs. The Union recognizes that the Employer employs Safety and Health Specialists whose primary function is to oversee the safety and health programs at each institution.

1. it is understood by the parties that the Employer has the responsibility for providing information and training on health and safety issues. The Union at the appropriate level will have the opportunity to provide input into any safety programs or policy development; and

2. although the Employer employs Health and Safety Specialists whose primary function is to oversee the health and safety programs at each facility, representatives of the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), Centers for Disease Control (CDC), and other regulatory and enforcement agencies that have a primary function of administering the laws, rules, regulations, codes, standards, and executive orders related to health and safety matters are the recognized authorities when issues involving health and safety are raised.

ARTICLE 31 – GRIEVANCE PROCEDURE

Section d. Grievances must be filed within forty (40) calendar days of the date of

the alleged grievable occurrence. If need, 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.

PERTINENT FEDERAL STATUTE 5 U.S.C., SECTION 7106- EMPLOYER RIGHTS

Section 1 In accordance with the provisions contained in 5 U.S.C. § 7106, Management Rights, the Employer retains the right, consistent with applicable laws and regulations:

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws-

(a) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or to take other disciplinary action against such employees;

(b) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which the agency's operations shall be conducted;

(c) with respect to filling positions, to make selections for appointments from-

(i) among properly ranked and certified candidates for promotions; or

(ii) any other appropriate source; and

(d) to take whatever actions may be necessary to carry out the agency mission during emergencies

RELEVANT PROGRAM STATEMENTS

PROGRAM STATEMENT 5538.04 – December 23, 1996[4] - Escorted Trips
PURPOSE AND SCOPE – The Bureau of Prisons provides approved inmates with staff-escorted trips into the community for such purposes as receiving medical treatment not otherwise available, for visiting a critically-ill member of the inmate's immediate family, or for participating in program or work-related functions.

12. SELECTION OF ESCORTS. The Captain, in consultation with the Health Services Administrator, the Unit Manager, or others, as appropriate, selects escorting staff. The Captain shall indicate, on the approval form, the specific staff member, ordinarily escorting staff with the highest correctional services rank, who is to serve as the officer-in-charge (OIC). This person shall have decision-making authority and responsibility while on the escorted trip.

12(a)(2). Weapons. At least one staff escort must be armed. Staff in the follow vehicle must also be armed.

12(b)(1). A minimum of two staff escorts for the first inmate, with one additional staff member are required for each additional inmate. The Warden may require an additional number of escorts if he/she determines it is warranted. At least one of the staff escorts must be a non-probationary staff member.

[4] Jt. Exh. 7

12(b) (2). Weapons. The Warden has the authority to determine if the escorting staff will be armed. If weapons are authorized, a minimum of two staff escorts shall escort IN custody inmates with at least one staff member armed.

PROGRAM STATEMENT 5558.14 – August 24, 2000[5]

1. Purpose and Scope. To establish policy and procedures on the carrying and use of firearms by staff.

7. Carrying of firearms. When approved by the Warden, institution staff are permitted to carry firearms when transporting inmates or participating in escape hunts and when assigned to security posts requiring firearms as standard equipment.

FINDINGS OF FACT

The Coleman facility is one of 116 facilities operated by the U.S. Bureau of Prisons (BOP), a component of the United States Department of Justice. It commenced operations in 2001 (tr: 134). In total, BOP houses over 200,000 inmates (tr: 40) employing approximately 36,000 employees (tr: 41). The Agency's counsel, Mr. LaMaster represented at the hearing without contradiction that BOP is the largest agency within the Department of Justice.

The Federal Correction Complex (FCC) at Coleman Complex consists of two penitentiaries designated as USP-1[6] and USP-2 and houses inmates in three separate facilities designated as "Low Security", "Medium Security" and a "Camp" (tr: 175). Each facility has its own warden and these wardens report to the complex warden who, at all material times herein, was Warden Drew (tr: 59). The "Camp" houses inmates who are considered low risk. This

[5] Jt. Exh. 6

[6] The events leading to the grievance in this matter resulting in this arbitration occurred at USP-1.

"Camp" has no fence in which to keep inmates (tr: 83). The next higher level of inmates is housed in what is referred to as "Low End" (tr: 84). These inmates are considered higher risk and therefore are kept behind the fence of the FCC. Next, requiring higher security are those designated as "Medium End" and these inmates are behind what was referred to as a "double fence line" (tr: 84). The prison designated as "High End" houses those inmates classified as "high security inmates" (tr: 84) requiring the most care in handling. The record reflects, however, that as a result of lack of space and adjustment levels, the medium security prison has inmates considered "high security" inmates (tr: 85). Additionally, a medium security inmate is placed in the high security prison as a result of factors such as the inmate being part of a security threat group.

FCC at Coleman is part of the Southern Region of BOP. The Southern Region, operating out of Atlanta, Georgia, is supervised by a Regional Director who, at all relevant times herein, was a Mr. Holt (tr: 60).

Record evidence establishes that the "Security" facilities at FCC have procedures for escorting inmates who need medical treatment outside the facility. Under these procedures, if the clinical director determines that an inmate needs to leave the facility for medical reasons, Form 508 is prepared seeking concurrence to send the inmate for medical treatment outside the facility. From the medical section, Form 508 goes to the Case Management Coordinator (CMC) who evaluates Form 508 and the circumstances requiring the inmate to leave the prison. The CMC then includes in Form 508, his recommendation regarding the request. Afterwards, in sequential order, it goes to the special investigative supervisor, to the chief correctional supervisor (a supervisor with the rank of captain) and finally to the Associate Warden who on

behalf of the Warden, determines whether or not the inmate in question will leave the facility. [7] Part of the review conducted by the supervisory staff includes how many officers would accompany the inmate.

The record testimony also establishes that prior to the arrival of new Warden Scott Middlebrooks in May of 2008, the practice at the facility was that all officers escorting an inmate for medical treatment outside the facility, including the officer handling the inmate, would carry a firearm. For example, Senior Office Specialist at the USP1 Keith Bernard Green credibly testified that from the beginning of his employment, April 2001, until approximately 2008, the practice at the facility was that all officers escorting an inmate for medical treatment outside the facility would carry weapons, including the officer assigned to handle the inmate. This procedure was practiced regardless of whether two or more officers escorted the inmate (tr: 111-112). Officer Green's testimony regarding pre-May 2008 procedures for the number of officers carrying weapons to escort inmates outside the facility for medical treatment is supported by reliable testimony from other witnesses such as Senior Officer Specialist Mitchell D'Angelillo (tr: 134-135), Steve Pierson, Lock and Security Specialist (tr: 143-144) and Robert Edge, Senior Office Specialist (tr:150).

Warden Scott Middlebrooks also testified. He stated that upon his arrival at the USP-1, he was concerned about the officer escorting the inmate having a weapon in his possession. Mr. Middlebrooks credibly testified that one of the main reason(s) for his concern was a recent incident in Atlanta, Georgia, where an inmate in a courtroom took the gun away from the

[7] This narrative involving the procedures determining whether or not an inmate will leave the facility for medical reason is from the testimony of one of the witnesses to the proceeding, George Castro who was a captain at USP-1 from April 2008 to2010. See transcript pages 100-101. See also the testimony of Mr. Furones, Vice-President of the Union, on transcript pages 92-93. It should be noted that additional testimony by Mr. Steve Mora, who served as Associate Warden from January 2008 and served in that capacity until after the arrival of Warden Middlebrooks, seems to indicate that after the Associate Warden reviews the information pertaining the need and requirements for sending an inmate outside the facility for medical treatment, the Warden himself reviews the recommendations and makes the final decision. (See transcript 170).

escorting officer, killed the judge and shot several other people. Thus, Warden Middlebrooks testified that he instituted the current practice of having the officer handling the inmate be unarmed. No evidence was presented during the hearing to establish that the practice in existence, prior to Warden Middlebrooks' arrival, had resulted in any incident causing harm to the officers or members of the public.

The record indicates that by memorandum dated September 9, 2008 addressed to "Complex Warden" D. Drew and to Mr. Middlebrooks, Mr. Furones, attempted to resolve the matter giving rise to this procedure, in accordance with Article 31, Section d. (Jt. Exh. 1). In this memo, Mr. Furones took issue with what he asserted was a unilateral decision by management to replace its past practice of having two armed staff on escorted medical/hospital trips[8].

By memorandum dated September 18, 2008 (Jt. Exh. 2), Associate Warden/LMR Chairperson Mora, responded to Mr. Furones, asserting that the issue in question (the change in procedures regarding the escorting of inmates), was part of the Program Statement 5538.04, dealing with escorted trips, particularly section 12b(2) which confers upon the Warden, the authority to determine if escorting staff will be armed. In this memo, Associate Warden Mora further stated that the practice in question was covered under the Management Rights provision of Title 5, USC 7106, subsection (a)(1).

The grievance filed in this matter does not appear to contain a date as to when exactly it was filed[9]. Nevertheless, Jt. Exh. 3 shows it was received by Regional Director Holt on October 2, 2008. This grievance contains a rather extensive narrative which needs not be repeated here.

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[8] I note that Jt. Exhs. 1-18 were entered into evidence without objection. Thus, since no party is taking issue with their veracity and relevance, I have taken the liberty, whenever I deem it appropriate and necessary, to quote or to paraphrase from these documents.

[9] It is noted that although the grievance itself does not contain a filing date, Mr. Pike, in his written opening statement, stated that the Union had filed the grievance on October 1, 2008.

But in reading the grievance, it is clear that the Union is alleging that on August 29, 2008, an inmate "was escorted by two (2) staff officers with only one (1) weapon issued. It alleges that said action, among other things, violated "Past Practice" of having all escorting officers to be armed and thus this change of past practices is in violation of the contract.

By memorandum dated October 27 (Jt. Exh. 4), Regional Director Holt replied to, and rejected the grievance by asserting, among other things that the (1) grievance was defective in that it was not specific enough; (2), that Mr. Castro had verbally informed the Union of the change prior to implementation, and that the Union failed to provide the Agency with any "impact and implementation" (I & I) issues;[10] (3) that the procedure being grieved meet the requirements of Program Statement 5538.04, section 12(b)2 dealing with Escorted Trips. Furthermore, Mr. Holt advised the Union that in order to "foster positive labor-management relations", Mr. Castro would allow the Union with "another opportunity" to provide any I & I proposals the union may have, but that in order for those proposals to be accepted, they had to be submitted in writing within 10 days of the date of the letter[11].

By Memorandum dated November 12, 2008, Mr. Furones, on behalf of the Union, sent the Agency a series of proposals regarding what it considered to be a change in procedures involving armed escorts (Jt. Exh. 18). However, there is no evidence to establish that the Agency replied to the Union's memorandum.

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[10] I should note that the record is devoid of any evidence to establish that prior to the implementation of the new procedure in May 2008, the Agency advised the Union of its intent to have the officer handling the inmate be unarmed. Thus, based on the totality of the record, I conclude that prior to the October 27 memo, the Union had not been asked for I & I proposals.

[11] The bottom of Jt. Exh. 4 has a set of initials, presumably Mr. Furones and the date "10-30-08" underneath the initials, indicating that was the date it was received.

By memorandum dated November 25, 2008, Mr. Furones advised Warden Middlebooks of the Union's intent to arbitrate the dispute and again reiterated what it alleged to be contractual violations (Jt. Exh. 5).

TIMELINESS ISSUE

The Agency argues that because Warden Middlebrooks instituted the change giving rise to this dispute (i.e., requirement that the officer handling the inmate be unarmed) upon his arrival to the facility in May of 2008, the grievance herein, filed in October 2, 2008, is untimely (i.e., the arbitrable claim is procedurally defective).

The Union, on the other hand, takes the position that the grievance filed on October 2, 2008[12], was well within the 40 days of the August 29th incident required by Article 31 and thus was timely filed.

In support of its position that the grievance is procedurally defective, the Agency argues in its brief that the Union was aware of the institution of the new procedure soon after its implementation. In regards to when the Union found out about the change in procedures, the following testimony of Mr. Castro is instructive (tr: 156).

Q. Mr. Castro, do you recall an incident that occurred August 29, 2008, where a high end inmate was transported to a local outside hospital and only one escort was on (sic)?

A. No.

Q. Do you recall if the Union had ever been advised of there being any changes to how many officers would go out prior to, I'm going to say August 29, the day of the incident?

A. August 29, '08?

[12] For purposes of this discussion, I am assuming that the Union meant October 1, 2008, October 2 being the date received by Regional Director Holt. However, whether the grievance was filed on the first or the second of October, will not have a bearing on my determination of this particular issue.

Q. Right. Prior to that had the Union been advised of any impending changes in those procedures?

A. No.

DECISION AND RATIONALE REGARDING THE TIMELINESS ISSUE

After a careful review of the entire record, including the testimony of Mr. Mora and Mr. Castro, as well as the exhibits herein[13], I fail to find any clear and convincing evidence to establish that the Union was made aware of the change of procedures prior to the August 29, 2008 incident which is discussed in the grievance in this matter. None of the Agency's witnesses were able to testify to having made the Union aware of the implementation of the change of procedures soon after the change took place.

The contract's grievance procedures, Article 31, Section d indicates, in part that grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence or within 40 calendar days from the date the party filing the grievance could reasonably be expected to have become aware of the occurrence. In this particular instance, the incident giving rise to the grievance filed just prior to October 2, 2008 (date indicating receipt by Regional Director) Holt was the August 29, 2008, incident, clearly within 40 days from when the Union become aware of the (August 29, 2008) occurrence. Accordingly, and in the absence of any probative evidence to establish that the Union was aware of the changes in escorting prisoners, the grievance filed on October 1 clearly met the timeliness requirements of Article 31, Section d and is hereby deemed to have been timely filed.

[13] The parties submitted 18 Joint Exhibits in these proceedings. I have carefully reviewed all of these in order to ascertain their relevancy to the issues leading to this arbitration, including, but not limited to the issue of timeliness. While I do not plan to make extensive reference to all of these Joint Exhibits I will, for the purpose of clarity and amplification cite from these exhibits when the need arises.

ARBITRABILITY AND MERIT ISSUES

The Agency takes the position that the grievance in this matter must be dismissed on substantive as well as contractual grounds. It asserts that the grievance attempts to challenge the substantive management right to determine its internal security practices as per 5 USC, Section 7106, which was incorporated into the parties CBA. The Agency argues that this right is not negotiable and by extension, the implementation of said decision related to internal security practices is not arbitrable. The Agency further argues that even if it were to be found that the grievance is arbitrable notwithstanding U.S.C. 7106, it should still be dismissed on contractual grounds, specifically Article 5 which incorporates U.S.C 7106.

The Union in its brief does not appear to take issue with the Agency's assertion that it is within its managerial prerogative to determine internal security practices, in accordance with 5 USC 7106, or that pursuant to Program Statement 5538.05,[14] it is up to the Warden to determine if the escorting officers will be armed. Rather, the Union argues that while the Agency had the "substantive" right to determine its internal security policies, it was obligated to advise the Union of the proposed change and to provide the Union the opportunity to negotiate procedures prior to implementation (I & I).

As previously noted, by memorandum dated September 9, 2008 (Jt. Exh. 1), the Union took issue with the implementation of the Agency's decision to change what it alleged was the previous practices of having all escorting officers armed and requested that "management return to the practice of two armed staff for medical/hospital trips".

[14] The Program Statement in effect at the time of the incident was Statement 5538.04 already cited in the body of this report and introduced into the record as Jt. Exh. 7. I should note that because Program Statement 5538.05 became effective on October 6, 2008, post-incident, it is irrelevant to my decision in this matter. This determination, however, will not affect my ultimate decision inasmuch as Jt. Exh. 7 contains the pertinent and relevant language involving the Warden's authority regarding the number of escorting officers and weapons used in a trip.

DECISION AND RATIONALE REGARDING THE ARBITRATIBILITY AND MERIT ISSUES

After careful analysis of the pertinent contractual clauses, the relevant statute and the Agency's Program Statements, particularly Program Statement 5538.04, I find that the Agency violated its contractual obligation by not providing the Union with a real opportunity to engage in I & I prior to implementing the new procedure in May 2008.

Under § 7106(a)(1) of the Statute and Article 5 of the Agreement, the right to determine internal security practices includes an agency's right to determine the policies and practices that are necessary to safeguard its personnel, physical property, or operations against internal and external risks. **AFGE, Fed. Prison Council 33, 51 FLRA 1112, 1115** (1996) (AFGE-FPC 33). Internal security practices may also include safeguarding the public. **NTEU,** 59 FLRA 978, 981 (2004). Thus, it is clear that the Agency was within its rights, both statutorily and contractually, to effectuate changes to the procedures involving the handling of the inmate (i.e. from armed to unarmed). In fact, the Union readily concedes this matter.

I am also mindful of the Agency's rationale for instituting the change. Based partly on the Atlanta, Georgia, incident, Mr. Middlebrooks was concerned for the safety to the employees and the public at large. It was this concern that led Mr. Waldenbrooks to institute the changes immediately upon arriving at USP-1.

On the other hand, one can also understand the Union's concern that having the officer handling the inmate unarmed may result in an increase in danger to the officer. Thus, the Union's argument that the Agency's change of policy without providing the Union with I & I opportunity tended to increase, not decrease, the danger to the officers and was thus violative of

Article 27 which states, in part that "the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5USC 7106". It is noteworthy that the record is devoid of any evidence to show that the previous practice of having the officer handling the inmate had resulted in any serious incident. Thus, it would be difficult for the Agency to argue (which it does not do) that the change in procedure was necessary to deal with an actual and imminent danger rather than with an attempt to avoid a "potential" one.

The issue before me is not whether the Agency was within its rights to change the existing procedure. Rather, the issue before me is whether the Agency was bound, statutorily and/or contractually to provide the Union with an opportunity to engage in meaningful I & I. By Mr. Castro's own admission, prior to the implementation, at no point in time had the Union been advised of the proposed procedural changes or given a chance to provide meaningful input into how the decision would impact bargaining unit employees. In fact, Mr. Castro first testified that the reason why no negotiations took place regarding the Union's November 12, 2008 proposals was because the proposals were "late" (tr: 158). But subsequently, he provided a different rationale by testifying that the reason why I & I negotiations had not taken place was because there had been no change in procedures or past practice and therefore there was no need to negotiate (tr: 162).

Whatever the Agency's rationale for not providing the Union with a reasonable opportunity to engage in meaningful I & I bargaining, the fact of the matter remains that by not engaging in I & I bargaining, the Agency violated the terms of the Agreement particularly Section Article 3, Section 1c. Neither USC 5, 7106, nor Article 5 incorporating said article prohibits the Agency from engaging in I & I bargaining.

It is acknowledged that a decision to change conditions of employment (including past practices) of unit employees may be protected by management's Section 7106(a) rights. However, management still has a duty to notify the union, and, upon request, bargain on the procedures it will follow in implementing its protected decision which may have an adverse impact on unit employees. No argument can be made that the change in procedures did not impact how officers, especially those handling the inmates, performed their duties. It is a long established principle that "the duty to bargain requires that a party meet its obligation to negotiate prior to making changes in established conditions of employment". ***Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 18 FLRA 466**. Even where the underlying management decision (in this case, changing the procedures for officer handling the inmate), is not negotiable, the Agency is still required to provide advance notice to the Union as well as an opportunity to bargain over the impact of the changes to previously established practices on bargaining unit employees. **Scott Air Force Base,** 35 FLRA 844; **Internal Revenue Service**, 29 FLRA 162, 166 (1987). It does not matter whether a working condition is specified in the contract or merely a past practice which has developed over time. In either case, failure to afford the union advance notice of an intended change constitutes bad faith bargaining. **Internal Revenue Service**, 27 FLRA 322. In this case, the practice of the officer handling the inmate being armed goes back to when the prison was first opened. The Authority has made clear that established working conditions are to be respected in all but in the most rare circumstances. In fact the FLRA has found that even though an agency's practice of permitting officers to transport their weapons between home and work was illegal and, as a result, the agency was privileged to discontinue the practice, the agency was still required to bargain over

the impact and implementation of the discontinuance of the (illegal) practice on the unit employees' conditions of employment. **General Services Administration**, 52 FLRA 563. **U. S. Marine Corps,** 34 FLRA 635.

It is accurate, as the Agency states, that Program Statements 5538.04 as well as 5558.14 give the Warden ample authority to determine the level of escort as well as the number of armed guards involved. 5558.04, section 12(a)(2) specifically states that "at least one staff escort must be armed"; but the issue, as I see it, is not whether the Warden had that authority. The issue is whether the Warden had the obligation, prior to the change, to provide the Union with I & I as per Article 3, Section a of the contract, which clearly states that the Agreement takes precedence over any Agency policy, procedure and/or regulations not derived from higher government-wide laws, rules, and regulations. Additionally, Section c. of this same article further provides that the parties, when notified by the other party will meet and negotiate on any and all policies, practices, and procedures which impact on the employees conditions of employment. Clearly, the Agency's decision to change the armed status of the officer handling the guard (from armed to unarmed) constitutes a change requiring negotiations prior to implementation in accordance with the above-cited cases.

AWARD AND ORDER

For the reasons expressed above, I find that the grievance in this proceeding is arbitrable, both procedurally and substantively. Turning to the merits, and based on all of the evidence presented by the parties, I find that the Agency's implementation of the new procedures of having the officer handling the inmate unarmed without providing the Union the opportunity to

engage in I & I bargainging to be in violation of the parties' Agreement, requiring remedial action.

Accordingly, the Agency is required to do the following:

CEASE AND DESIST FROM:

(a) Failing and refusing to bargain with the Union, to the extent permissible by law, over the impact and implementation of its May 2008, decision requiring the officer handling the inmate to be unarmed.

(b) Continuing to implement the May 2008 change which required the officer handling the inmate to be unarmed without first notifying the Union, the American Federation of Government Employees Local NO. 506 the exclusive representative of its employees, and fulfilling its obligation to bargain, to the extent permissible by law, regarding the procedures for implementing such change.

TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(a) Return to the pre-May 2008 procedures which required that the officer handling the inmate be armed just like all other officers escorting the inmate.

(b) Bargain with the Union, the American Federation of Government Employees Local NO. 506, the exclusive representative of its employees, to the extent permissible by law, concerning the procedures for implementing the changes regarding the officer handling the inmate being unarmed.

The Agency is to take the above-mentioned remedial actions within 30 days from the issuance of this decision.

Respectfully submitted,

Roberto G. Chavarry Dated May 3, 2011

Labor Arbitrator