IN THE MATTER OF ARBITRATION	)	
	)	FMCS Case No. 15-02425-8
BETWEEN	)	
	)	
U.S. DEPARTMENT OF JUSTICE	)	
FEDERAL BUREAU OF PRISONS	)	Issue: Augmentation
FEDERAL CORRECTIONAL INSTITUTE	)	
BENNETTSVILLE, SO. CAROLINA	)	
and	)	
	)	
COUNCIL OF PRISONS LOCALS	)	
AMERICAN FEDERATION OF	)	
GOVERNMENT EMPLOYEES, LOCAL 2585	)	
BENNETTSVILLE, SOUTH CAROLINA	)	

HEARING DATES: November 16-17, 2016

SITE: Bennettsville, South Carolina

ARBITRATOR: Philip A. LaPorte

APPEARANCES

FOR THE AGENCY :

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ISSUES

Did the Agency commit an unjustified or unwarranted personnel action by violating the Master Agreement, laws, policy or binding past practices when it augmented bargaining unit personnel at FCI Bennettsville?
If so, was there a loss of pay or benefits to bargaining unit staff based on the Agency's unjustified or unwarranted personnel actions? If so, what shall be the remedy?

BACKGROUND

The Federal Bureau of Prisons ("Agency") operates numerous prisons throughout the country for the United States Department of Justice. The institution in this case is the Federal Correctional Institution Bennettsville ("FCI Bennettsville"). Employees are spread out through several departments. One of the departments at FCI Bennettsville is Correctional Services ("Custody") whose main job is direct supervision of the inmates. All other Departments at FCI Bennettsville are considered Non-Custody because their main duties involve providing a service to inmates or staff.

The American Federation of Government Employees, Local 2585 ("Union") is recognized as the sole and exclusive representative or bargaining agent for all bargaining unit employees as defined in 5 U.S.C. Chapter 71, and under the provisions of the Civil Service Reform Act, Title VII, and the Federal Service Labor Management Relations Statute, 5 U.S.C. S7101(a)(2), with respect to conditions of employment, pursuant to Article 1 of the Collective Bargaining Agreement ("Master Agreement").

On March 19, 2009, Associate Warden Michael Smith and William Dunbar, former President of Local 2585, entered into a Memorandum of Understanding ("MOU") entitled "Non-Correctional Services Staff Assignment to Correctional Services Posts.

This memorandum set forth the procedures which the parties agreed to utilize in situations when management determined that it was necessary to assign a non-correctional services employee to a correctional services post. Despite the open language of the agreement, testimony indicated that the purpose of the 2009 agreement was to provide for augmentation processes only during periods of heavy training. This intention was discussed throughout the arbitration and never rebutted by the Agency. The actions of the Agency show that following the

ratification of the MOU in 2010, FCI Bennettsville primarily augmented only during annual refresher training ("ART"), periods of heavy training, or with agreement with the Union.

Local Union President Clellan Tyson testified that between the years 2010 and 2014, augmentation occurred during annual refresher training, high-volume trainings where it took a lot of correctional officers off their posts. (Tr. pg.67:10 – 68:4) In March 2015, the Agency unilaterally changed this past practice without negotiating the change with the Union. Tyson testified as follows:

> Q. Mr. Tyson, has the Agency ever negotiated change in augmentation with you and come to any resolution?
>
> A. No. We never came to any resolution, no. (Tr. pg. 97:13 – 16)

Before beginning the informal resolution process, on March 20, 2015, at a Labor Management Relations ("LMR") meeting, the Union raised the issue of the Agency augmenting in improper and unequitable ways. Specifically, the Augmentation Roster was not followed correctly during the previous ART. The Union requested that the process be revisited after the LSA Negotiations; but failed to agree to maintain the status quo.

On April 3, 2015, the Union filed a grievance that requested the Agency provide compensation for all staff that signed up for overtime and missed overtime for the affected dates that all morning watch custody staff that were not required for mandatory overtime be compensated, as well as have their mandatory rotations dates adjusted to reflect each missed assignment; and all staff that signed up for overtime as was available to work during the day watch shift be compensated, because management at FCI Bennettsville continued to improperly augment.

On April 22, 2015, the Agency responded to the grievance, stating *inter alia*, that there have been no violations of the Master Agreement, or any applicable law, rule or regulation. On

May 13, 2015, the Union invoked arbitration as a result of the Agency's denial of the grievance and the Agency's continual violation of the Master Agreement.

On May 22, 2015, at a LMR meeting, the Union voiced its concerns regarding unauthorized and abusive augmentations, specifically the Union expressed concern that the augmentation procedure was not being followed.

On July 17, 2015, the Union and the Agency management met to discuss augmentation issues. However, neither party made progress during the meeting. Mr. Tyson testified about his perception of what occurred at this meeting.

> Q. Can you tell me the tenor of the Agency's discussion with you? What were they telling you?
>
> A. The Agency pretty much told us that we were there to the table just to discuss the procedures on how it's going to be done. We didn't have any other input. (Tr. pg. 97:19-24)

On July 30, 2015, M. Travis Bragg, Warden, issued a memorandum for all staff that addressed augmentation of the correctional services roster. This memo identified "overtime expenditures have exceeded the allotted budget for this fiscal year, by over $144,000.00. As a result, we must continue with augmentation to supplement the Correctional Services roster in an effort to not increase our overtime budget deficit." (Jt. Ex. 7)

On November 20, 2015, Captain William Hicks sent notice via electronic mail that "[s]tarting Monday, November 23rd, we will not be using the augmentation roster to cover Correctional Service posts. All shortages on the roster that cannot be covered by Correctional Services Staff are to be covered using the established overtime procedures." (Un. Ex. 12)

On June 1, 2016, Thomas R. Kane, Acting Director of the Bureau of Prisons, issued a Memorandum for All Chief Executive Officers concerning Augmentation. (Jt. Ex. 6) In this memorandum, Acting Director Kane addresses one of the Agency's primary arguments that all

institution staff are correctional officers first. Acting Director Kane asserted that although "it has long been the positions of this Agency that while all institution staff are "correctional officers first," non-custody staff should not be asked to fill correctional officer posts on a routine basis." (Jt. Ex. 6) Acting Director Kane acknowledged that "augmentation was originally intended to be used only for mandatory training and emergency situations." (Jt. Ex. 6) Acting Director Kane indicated that the "the reality is, augmenting custody staff with non-custody staff interferes with reentry and other important work these staff perform; they are unable to complete their regularly assigned duties when they are working correctional officer posts." (Jt. Ex. 6) Acting Director Kane ordered all Chief Executive Officers (Wardens) to "[p]lease ensure that augmentation is used only as a last resort and in considerations of the workloads of non-custody staff. (Jt. Ex. 6)

The Union submitted a Formal Grievance on April 13, 2015, and stated the facts as follows:

> On Monday, March 9, 2015, the Agency started using an augmentation roster of non-custody staff to cover day watch custody overtime. The Union and the Agency have a Memorandum of Understanding in place for augmentation of non-custody staff. This augmentation was supposed to be for periods of training lasting more than three days. The Union on occasion has agreed to augmentation in periods of one time high volume training days. However, the Union has never agreed to the use of augmentation to cover standard overtime. Also, the sick and annual roster was adjusted to remove more custody sick and annual staff from day watch to evening and morning watch. The Union brought to Management's attention during LMR on March 20, 2015 that through this process the Agency is creating a shortage of custody staff available on Day Watch to cover any potential vacancies and that this is a method of circumventing the Overtime procedures. The Past Practice established at FCI Bennettsville, S.C. since the signed Memo dated September 19, 2009 by Associate Warden Michael Smith and William Dunbar form[er] Union President, was the Non-Custody Staff working Correctional Post Roster would only be used for Trainings assigned for more than three (3) days. On occasion the Union has agreed to high volume training that involved mostly Correctional Services Staff. For example, during Disturbance Control Team Training non-custody staff are augmented due to the fact that majority of the team are custody staff.

In the grievance, the Union requested the following remedies as a result of the above actions affecting bargaining unit employees:

- All evening and morning watch custody staff and all other staff from other Disciplines within the Institution that has signed up for overtime are compensated for missed overtime for the effected dates.

- All morning watch custody staff that were not required for mandatory overtime be compensated, as well as have their mandatory rotation dates adjusted to reflect each missed assignment.

- All Staff signed up for Overtime and was available to work during the Day watch shift be compensated.

The grievance was processed through the grievance procedure without resolution. The grievance was heard in arbitration proceedings held at the Federal Correctional Institution in Bennettsville, South Carolina on November 16th and 17th, 2016. The grievance is now timely and properly in arbitration for a final and binding decision.

APPLICABLE PROVISIONS OF THE MASTER AGREEMENT AND 2009 MOU

PREAMBLE

The Federal Bureau of Prisons acknowledges that the participation of its employees in providing input into the development of personnel policies, practices, and procedures which affect conditions of employment, and their assistance in the implementation of policies, practices, and procedures contribute to the effective operation of Bureau facilities. The Bureau of Prisons will develop and maintain constructive and cooperative relationships with its employees, through their exclusive representative, where applicable, the Council of Prison Locals and the American Federation of Government Employees. The parties respect the rights granted to Management, employees, and the Council of Prison Locals by the Civil Service Reform Act of 1978, as amended.

The parties recognize that efficient and effective service is paramount requirement and that public interest requires the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency.

Moreover, the parties recognize that the administration of an agreement depends on a good relationship. This relationship must be built on the ideals of mutual respect, trust, and commitment to the mission and the employees who carry it out. Therefore, the Federal Bureau of Prisons and Federal Prison Industries, Inc. Hereinafter referred to as "the Employer" or the

"Agency," and the Council of Prison Locals and the American Federation of Government Employees, hereinafter referred to as "the Union" or the "exclusive representative," do hereby agree to:

(A) Focus on problems and ways to deal with them;

(B) Recognize the needs of the other party;

(C) Consider collective bargaining as an opportunity to improve the relationship between the Agency and the Union; and

(D) Recognize that the employees are the most valuable resource of the Agency, and are encouraged, and shall be reasonably assisted, to develop their potential as Bureau of Prisons employees to the fullest extent practicable.

This Agreement and such supplementary agreements and memorandums of understanding by both parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union.

ARTICLE 1 – RECOGNITION

Section a. The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71.

Section b. The Employer recognizes the Union as the exclusive bargaining agent under the provisions of the Federal Service Labor Management Relations Statute, 5 USC, Chapter 71 7101 et seq., hereinafter referred to as "the Statute," and the Civil Service Reform Act of 1978, of all of the employees in the unit, as the recognized Union for bargaining purposes with respect to conditions of employment of employees represented by the Union. The Union has the full authority as provided by Statute to meet and confer with the Agency for the purpose of entering into negotiated agreements, concerning changes, in conditions of employment covering bargaining unit employees and to administer this Collective Bargaining Agreement.

Section c. The former Director, Bureau of Prisons, Commissioner, Federal Prison Industries, Inc., Myrl E. Alexander, in a letter dated January 17, 1968, said letter being issued in accordance with Executive Order 10988, did certify the Council of Prison Lodges (currently known as the "Council of Prison Locals") exclusive recognition as representatives of all employees employed by the Federal Bureau of Prisons, with the exception of the employees of the Central Office. Since March 31, 2006, the Council of Prison Locals became the exclusive representative for Central Office employees. The term "employee" as used in this Agreement means any employee of the Employer represented by the Union and as defined in 5 USC, Chapter 71.

Section d. The Union will have access, using predetermined entry procedures, to properly represent bargaining unit employees located in contract/privatized facilities, in accordance with this Agreement and applicable laws, rules and regulations

The Agency will provide a list of all bargaining unit employees working in a contract facility to the Council of Prison Locals President and appropriate Regional Vice President upon request, but no more frequently than every six (6) months.

ARTICLE 3 – GOVERNING REGULATIONS

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulations 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 govern-

ment-wide regulations in existence at the time this Agreement goes into effect.

Section c. The Union and the 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 regulations, prior to implementation of any policies, practices, and/or procedures.

Section d. All proposed national policy issues, 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 Prisons Locals, each member of the Executive Board of the Council of Prisons Locals, and each Local President receives a copy of the proposed policy issuance by electronic message, reply requested. The Council President will provide email addresses for him/herself and the members of the Council Executive Board. Receipt will be assumed if not reply is received with three (3) business days. Delivery to Local Presidents will be to the Local's BOP Union Resource e-mail box.

   Council of Prison Locals 33 (CPL33) Executive Board (e-board) members will receive printed copies of Limited Official Use Only (LOUO) proposed national policy issuances in person, from the Chief, Labor Relations Office (LRO) or designee. Upon receipt, each e-board member will sign for receipt of the proposed LOUO policy issuance and agree not to further reproduce and/or distribute it, except as may be mutually agreed otherwise between the President, CPL33, and Chief, LRO.

   Local Union Presidents will be notified of LOUO proposed national policy issuances by e-mail, with instructions to obtain a printed copy from the Chief Executive Officer's office at their locations, after signing the same receipt and agreement (above) not to further reproduce and/or distribute it, and to return the copy once the

policy is issued and implemented, except as may be mutually agreed otherwise between the President CPL33, and Chief, LRO.

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.

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 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

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 take other disciplinary action against such employees;

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

c. With respect to filling positions, to make selections for appointment from:

(1) Among properly ranked and certified candidates for promotion; 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.

Section c. The preferred practice whenever Bureau of Prisons positions are announced under Section a (2) ©, above is to select from within the Bureau from all qualified applicants. This shall not be construed as limiting the recruiting function or any other rights of the Employer.

\ In accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance.

ARTICLE 6 – RIGHTS OF THE EMPLOYEE

Section a. Each employee shall have the right to form, join, or assist a labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided by 5 USC, such right includes the right:

1. To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organizations to heads of agencies and other officials of the executive branch of government, the Congress, or other appropriate authorities; and

2. To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees in accordance with 5 USC.

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

1. To bring any matters of personal concern to the attention of any Management official, any other officials of the executive branch of government, the Congress, and any other authorities. The parties endorse the concept that matters of personal concern should be addressed at the lowest possible level; however, this does not preclude the employee from exercising the above-stated rights;

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

3. To be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, disabling condition, genetic information, participation in protected activity, Union membership, or Union activity.

4. To direct and pursue their private lives without interference by the Employer or the Union, except in situations where there is a nexus between the employee's conduct and their positions. This does not preclude a representative of the Employer or the Union from contacting bargaining unit staff or legitimate work-related matters;

5. To become or remain a member of a labor organization; and

6. To have all provisions of the Collective Bargaining Agreement adhered to.

Section c. The Employer agrees to distribute to all employees its understanding of legal protections that can be furnished to employees. Updates will be provided as necessary. Distribution will be in handout form and provided to current employees upon the effective date of this Agreement, and to new employees at the time they are hired.

Section d. If an employee has a problem or situation which the employee desires to discuss with the Union during working hours, upon request to their supervisor in advance and workload permitting, the employee may report to the Union official as approved. If the employee cannot be made available at that time, the supervisor will inform the employee when he/she can be made available. Perceived abuse of this section will be discussed and resolve at the local level. Frequent and repeated requests by the same employee may not be approved if perceived as abusive. When this occurs, the local Union President or designee will be informed.

Section e. Preferences regarding hairstyle and facial hair are a matter of individual concern. Employees will maintain a neat appearance and dress, considering the correctional environment, and such appearance and dress will not interfere with the security or safe running of the

institution. The wearing of jewelry is a gender-neutral issue. In the event of disputes, and prior to an employee being required to change their dress or appearance, alternatives will be explored.

Section f. Unit employees, including probationary employees, have the right to a Union representative during any examination by, or prior to submission of any written report to, a representative of the Employer in connection with an investigation if:

1. The employee reasonably believes that the examination may result in disciplinary action against the employee; and

2. The employee requests representation.

The Employer recognizes the Union's right to appoint and designate the Union representative of its choice.

Employees will be notified of their right to a Union representative by the Employer if an official examination authorized and/or initiated by the Warden or higher authority of the Bureau of Prisons could potentially lead to disciplinary action of said employee. This notification will be given prior to examination or submission of any written report by the employee. This is not intended to interfere with the routine questions supervisors ask employees in the normal course of a workday nor the routine memorandums that employees are asked to submit. The failure of the Employer to so inform the employee shall not affect the Employer in taking administrative action against the employee.

Section g. The Employer recognizes its statutory duty to annually inform its employees of their rights under Section 7114 of 5 USC.

Section h. If the employee requests a Union representative under Sections f. or g., no further questioning will take place until the representative is present, provided that if the representative is not available within a reasonable period of time, the questioning and/or submission of a written report may proceed without the representative being present. Questioning and/or submissions of a written report without a Union representative may go forward only where urgent circumstances could interfere with the sage and orderly running of the institution. Such questioning may proceed only when these urgent circumstances are documented and presented to the employee and/or his representative.

Reasonable time is defined as that time necessary for the designated representative from the local Union to travel to the site of the examination. The Union will promptly designate its representative and make reasonable efforts to avoid delay.

For those locations which have no representatives (e.g. residential reentry offices, new BOP facilities, etc.), reasonable time is the time necessary for the Union designated representative to travel to the examination site.

Section i. Employees being questioned by representatives of the Employer will be informed of the identity of the investigator, unless already known by the employee, and the investigator will present their credentials to the employee being interviewed and their Union representative, if applicable, prior to the commencement of the face-to-face questioning.

1.investigations/examinations under Section f. above will not take place at the residence of the employee without the consent of the employee;

2. time spent in investigations/examinations will be compensated in accordance with applicable pay regulations; and

3. no employee will be required to sign statements or affidavits that the employee believes to be inaccurate or incorrect.

ARTICLE 7 – RIGHTS OF THE UNION

Section a. There will be no restraint, interference, coercion, or discrimination against any employee in the statutory exercise of any right to organize and designate representatives of their own choosing for the purposes of collective bargaining, presentation of grievances, labor management related activity, representation of employees before the Employer, or upon duly designated Union representatives acting as an agent of the Union on behalf of an employee or group of employees in the bargaining unit.

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.

Section l. The Union will be given the opportunity to be present at formal discussions and meetings between the Employer and employees covered by this Agreement concerning grievances, personnel policies and practices, and any other matter affecting general working conditions of employees covered by this Agreement.

The following procedures will be used in providing notice of a formal discussion/meeting to the Union:

1. Whenever possible, the Employer will notify the local Union president, or his/her designee, at least twenty-four (24) hours prior to the scheduled discussion/meeting: and
2. Notification will include the date, time and location of the discussion/meeting. Whenever possible, the notification should also include a brief description of the topic(s) to be discussed.

The Union will inform the Employer of who will represent the Union at the discussion/meeting.

Relief for the Union representative will be accomplished in accordance with Section e. of this article.

ARTICLE 18 – HOURS OF WORK

Section a. The basic workweek will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minute non-paid, duty-free

lunch break. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break.

Employees on shifts which have a non-paid, duty-free lunch break will ordinarily be scheduled to take their break no earlier than three (3) hours and no later than five (5) hours after the start of the shift. It is the responsibility of the Employer to schedule the employee's break, taking into consideration any request of the employee. The Employer will notify the affected employee of the specific anticipated time that the employee will be relieved for his/her lunch break. Any employee entitled to a non-paid, duty-free lunch break who is either required to perform work or is not relieved during this period will be compensated in accordance with applicable laws, rules, and regulations. The Employer will take the affected employee's preference into consideration in determining the manner of compensation (i.e., overtime versus compensatory time or early departure), except in cases where compensation is at the election of the employee. Management will not, without good reason, fail to relieve employees for a duty-free lunch break.

There is will be no restraint exercised against any employee who desires to depart the institution/facility while the employee is on a non-paid, duty-free lunch break. For the purposes of accountability, the employee leaving the institution/facility will leave word with his/her supervisor.

Section b. The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 USC.

1. Any agreement reached by the local parties will be forwarded to the Office of General Counsel in the Central Office who will coordinate a technical and legal review. A copy of this agreement will also be forwarded to the President of the Council of Prison Locals for review. These reviews will be completed within thirty (30) calendar days from the date the agreement is signed;

2. If the review at the national level reveals that the agreement is insufficient from a technical and/or legal standpoint, the Agency will provide a written response to the parties involved, explaining the adverse impact the schedule had or would have upon the Agency. The parties at the local level may elect to renegotiate the schedule and/or exercise their statutory appeal rights; and

3. Any agreement that is renegotiated will be reviewed in accordance with the procedures outlined in this section.

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

1. A roster committee will be formed which will consist of representative(s) of Management and the Union. The Union will be entitled to two (2) representatives. Management will determine its number of representatives.

2. Seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all

correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally, there will be no changes to the blank roster after it is posted.

a. employees may submit preference requests for assignments, shift, and days off, or any combination thereof, up to the day before the roster committee meets. Those who do not submit a preference request will be considered to have no preference. Preference requests will be made on the Employee Preference Request form in Appendix B or in any other manner agreed to by the parties at the local. The Employer will ensure that sufficient amounts of forms are maintained to meet the needs of the employees;

b. employee preference requests will be signed and dated by the employee and submitted to the Captain or designee. Requests that are illegible, incomplete, or incorrect will be returned to the employee. In order to facilitate Union representation on the roster committee, the employee is also encouraged to submit a copy of this request to the local Union President or designee;

c. if multiple preference requests are submitted by an employee, the request with the most recent date will be the only request considered; and the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts mean that Management will not arbitrarily deny such requests. (Seniority is defined in Article 19).

3. The roster committee will meet and formulate the roster assignments no later than five (5) weeks prior to the effective date of the quarter change;

4. The committee's roster will be posted and accessible to all Correctional Services employees no later than the Friday following the roster committee meeting:

5. Once the completed roster is posted, all Correctional Officers will have one (1) week to submit any complaints or concerns. Correctional Officers will submit their complaints or concerns in writing to the Captain or designee. The employee may also submit a copy to the local President or designee. No later than the following Wednesday, Management and the Union will meet to discuss the complaints or concerns received, and make any adjustments needed;

6. The roster will be forwarded to the Warden for final approval;

7. The completed roster will be posted three (3) weeks prior to the effective date of the quarter change. Copies of the roster will be given to the local President or designee at the time of the posting; and

8. The Employer will make every reasonable effort, at the time of the quarter change, to ensure that no employee is required to work sixteen (16) consecutive hours against the employee's wishes.

Section e. Nothing in this article is intended to limit an employee from requesting and remaining on a preferred shift for up to one (1) year. In this regard, no employee may exceed one (1) continuous year on a particular shift, and all officers are expected to rotate through all three (3) primary shifts during a four (4) year period.

Section f. Roster committees outside the Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedures in Section d. be utilized. These rosters will be posted three (3) weeks prior to implementation. Copies will be given to the local President or designee at the time of posting.

Section g. Sick and annual relief procedures will be handled in accordance with the following:

1. When there are insufficient requests by employees for assignment to the sick and annual relief shift, the roster committee will assign employees to this shift by chronological order based upon the last quarter the employee worked the sick and annual relief shift;
2. Assignment to the sick and annual roster satisfies the requirement for rotation through the three (3) primary shifts;
3. No employee will be assigned to sick and annual relief for subsequent quarters until all employees in the department have been assigned to sick and annual relief, unless an employee specifically requests subsequent assignments to sick and annual relief;
4. Employees assigned to sick and annual relief will be notified at least eight hours prior to any change in their shift; and
5. Reasonable efforts will be made to keep sick and annual relief officers assigned within a single shift during the quarter

Section l. The Employer is committed to its responsibility regarding the health of all employees.

Section m. Employees may request to exchange work assignments, days off, and/or shift hours with one another. Supervisory decisions on such requests will take into account such factors as security and staffing requirements and will ensure that no overtime cost will be incurred.

Section n. The Employer agrees to consider the circumstances surrounding an employees' request against reassignment when a reassignment is necessary.

Section o. Employees shall be given at least twenty-four (24) hours' notice when it is necessary to make shift changes, except for employees assigned to the sick and annual leave roster [as specified in Section g (4).], or when the requirement for prior notice would cause the vacating of a post. For the purpose of this Agreement, a shift change means a change in the starting and quitting time or more than two (2) hours. Work assignments on the same shift may be changed without advance notice.

Section p. Specific procedures regarding overtime assignments may be negotiated locally.

1. When Management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these overtime assignments, which will be distributed and rotated equitably among bargaining unit employees; and

2. Overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and the Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be retained by the Employer for two (2) years from the date of said record.

Section q. The Employer retains the right to order a qualified bargaining unit employee to work overtime after making a reasonable effort to obtain a volunteer, in accordance with Section p. above.

Section s. Notification of shift or assignment changes for employees not assigned to sick and annual relief will be confirmed in writing and signed by the Employer, with a copy to the employee.

Section t. Ordinarily, scheduled sick and annual relief assignments will be posted at least two (2) weeks in advance.

Section u. Except as defined in Section d. of this article, the words ordinarily or reasonable efforts as used in this article shall mean: the presumption is for the procedure stated and shall not be implemented otherwise without good reason.

ARTICLE 27 – HEALTH AND SAFETY

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

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

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

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

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

ARTICLE 32 – ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. 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. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

Section b. When arbitration is invoked, the parties (or the grieving party) shall, within three (3) working days, request the Federal Mediation and Conciliation Service (FMCS) to submit a list of seven (7) arbitrators.

1. A list of arbitrators will be requested utilizing the FMCS Form R 43.

2. The parties shall list on the request any special requirements/qualifications, such as specialized experience or geographical restrictions;

3. The parties shall, within five (5) workdays after the receipt of the list, attempt to agree on an arbitrator. If for any reason either party does not like the first list of arbitrators, they may request a second panel.

4. If they do not agree upon one of the listed arbitrators from the second panel, then the parties must alternately strike one (1) name from this list until one (1) name remains; and

5. The arbitrators selected shall be instructed to offer five (5) dates for a hearing.

Section c. The grieving party will be able to unilaterally select an arbitrator if the other party refuses to participate, only if the grieving party:

1. Gives written notification to the HRM of its intent to unilaterally select an arbitrator; and

2. Allows a time period of two (2) workdays for the HRM to participate in the selection after the written notification.

Section d. The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne by the Employer and the Union.

1. The Employer will pay travel and per diem expenses for:

    a. Employee witnesses who have been transferred away from the location where the grievance arose;

b. Employee witnesses who were temporarily assigned to the location where the grievable action occurred; and

c. Employee witnesses where the parties mutually agree to hold the hearing at a site outside the commuting area;

2. The Employer will determine the location of the arbitration hearing; however, in the event that the Union, in good faith, advises the Employer that the designated location is unacceptable, the hearing will then be held at a mutually agreed upon neutral site; and

3. In Council-level grievances, the Employer will determine the location of the hearing. The Employer will pay the travel and per diem expenses for the Union witnesses and one (1) Council representative. The Employer will not be responsible for the travel and per diem expenses of more than five (5) Union witnesses unless mutually agreeable to the parties or ordered by the arbitrator

Section e. The arbitration hearing will be held during regular day shift hours, Monday through Friday. Grievant(s), witnesses, and representatives will be on official time when attending the hearing. When necessary to accomplish this procedure, these individuals will be temporarily assigned to the regular day shift hours. No days off adjustments will be made for any Union witnesses unless Management adjusts the days off for any of their witnesses.

1. The Union is entitled to the same number of representatives as the Agency during the arbitration hearing. If any of these representatives are Bureau of Prisons employees, they will be on official time.

2. The Union is entitled to have one (1) observer in attendance at the hearing. If Management has an observer, the Union's observer will be on official time.

Section f. The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration.

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by Statute. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of;

1. This Agreement; or
2. Published Federal Bureau of Prisons policies and regulations.

Section i. A verbatim transcript of the arbitration will be made when requested by either party, the expense of which shall be borne by the requesting party. If the arbitrator requests a copy, the cost of the arbitrator's copy will be borne equally by both parties. If both parties request a transcript, the cost will be shared equally including the cost of the arbitrator's copy.

NON-CORRECTIONAL SERVICES STAFF ASSIGNMENT TO CORRECTIONAL SERVICES POSTS March 19, 2009

In situations when management determines it is necessary to assign a non-correctional services employee to a correctional services post, the below procedures will be utilized. It should be noted that work assignments will be made commensurate with an employee's qualifying experience.

Management and the Union are responsible for composing and maintaining a Master Roster of all departments to be affected by these procedures (Attachment A). This roster is to be updated when affected by changes in departmental complements or other changes which may affect or compromise equitable assignment criteria. Inasmuch as this roster is an official record, it is to be maintained consistent with provisions associated with overtime assignment records noted in the Master Agreement. Technology and policy permitting, the roster (Attachment A) will be maintained on a shared directory. On Management (Correctional Supervisors) will have the ability to make daily changes to the aforementioned roster. Other staff will have "read only" access and capabilities.

Management is also responsible for composing and maintaining a Departmental (inverse seniority) Roster of staff (Attachment B) for each department. This roster is to include the names of employees assigned to the department, their entry on duty (EOD) date, post assignment date, and supervisory remarks. This roster is to be updated when affected by changes in the departmental complement or changes to employee information which may affect or compromise equitable assignment criteria. Inasmuch as this roster is an official record, it is to be maintained consistent with provisions associated with overtime assignment records noted in the Master Agreement.

In situations when management determines it is necessary to assign a non-correctional services employee to a correctional services post, management (i.e. Correctional Supervisor, etc.) will contact the department head of the first department identified on the Master Roster (Attachment A). In the interest of equality, the frequency of departmental assignment should be commensurate with the personnel resources, as well as demands of each department. Whenever possible, non-correctional services staff will be notified by their respective department head or acting department head, via a Correctional Supervisor, the day prior to the anticipated assignment.

Utilizing the Departmental Roster (Attachment B), the department head will select the next available employee in sequence of appearance. Once the employee completes the assignment, a notation will be made by the employee's name indicating the date and assignment worked. The employee's assignment is to be equally recorded on the Correctional Services Roster. To ensure assignments are distributed and rotated equitably, the employee should not be assigned to work a correctional services post until all other available qualified employees in the department

have been given such an assignment. Non-correctional services staff will only be given credit (Attachment B) for working a correctional post for assignments of five (5) hours or more. Absent an emergent situation, non-correctional services staff duty free lunch reliefs will be provided as mandated in the Master Agreement. Typically, the respective department head or acting department head will ensure lunch reliefs are provided.

Note: Nothing in these procedures shall affect management's right to take whatever actions may be necessary to carry out the agency's mission during emergencies.

POSTION OF THE UNION

Augmentation is the process by which non-custody workers are assigned to custody shifts because of a vacancy in the custody shift for whatever reason. Director of the Federal Bureau of Prisons, Charles E. Samuels, Jr., testified before Congress that; "[w]hen insufficient Correctional Officers are available to cover an institution's security posts on any given day, we must use non-custody institution staff to make up the difference." (Un. Ex. 2 pg. 3) Employees of the Bureau of Prisons who work in Correctional Services ("Custody") Department are tasked with the duties of directly supervising inmates for the safe running of the institution. (Un. Ex. 2)

Outside of the Custody Department are various other Departments such as Education, Food Services, Recreation, and Medical Services (all known as "Non-Custody") who provide a different and necessary type of service to the inmates. It is without dispute that the Custody Department requires more vigilance, interaction with more inmates, and as a result is more dangerous than the Non-Custody Departments. Improper augmentation increases the inherent hazards of the institution.

Ideally, when a shift ("post") becomes empty or vacant within the custody department, someone who typically works in custody, with sufficient experience to handle potential emergencies, should fill that post. Since 2010, Management and the Union at FCI Bennettsville have engaged in a "binding past practice," in which the management augmented only during

Annual Refresher Training (ART), periods of high volume training, or with agreement of the Union. Augmentation is where Management fills custody posts with inexperienced non-custody employees. An example would be removing a teacher from the classroom to monitor inmates in a housing unit.

The Union asserts that bargaining unit employees were affected when the Agency committed the following unjustified and unwarranted personnel actions:

a. The Agency committed an unjustified or unwarranted personnel action when the Agency failed to follow binding past practices at FCI Bennettsville and violated Article 4 of the Master Agreement, by unilaterally changing working conditions, while failing to bargain these changes with the Union;

b. The Agency committed an unjustified or unwarranted personnel action when the Agency violated Article 18 and Article 6 of the Master Agreement by failing to properly augment; and

c. The Agency committed an unjustified or unwarranted personnel action when the Agency violated Article 27 of the Master Agreement by failing to properly augment, which increased the inherent hazards of the institution.

As a result of these aforementioned unjustified and unwarranted personnel actions, bargaining unit employees were denied overtime opportunities, causing the withdrawal or the reduction of the bargaining unit employees' pay, allowances, or differentials.

Because the aggrieved employees were affected by the Agency's unjustified or unwarranted personnel action and the personnel action resulted in the withdrawal, or the reduction of the bargaining unit employees pay, allowances, or differentials, the requirements for liability under the Back Pay Act are met.

Therefore, the Union asserts that the Agency is liable under the Back Pay Act.

In order to find liability by the Agency under the Back Pay Act, the Arbitrator must find:

1. The aggrieved employees were affected by an unjustified or unwarranted personnel action; and

2. The personnel action resulted in the withdrawal, or the reduction of an employee's pay, allowances or differentials.

It is well-settled by the Federal Labor Relations Authority (FLRA) that any violation of a collective bargaining agreement or other rule, policy, or statute constitutes an unjustified or unwarranted personnel action.

The Union asserts that bargaining unit employees were affected by the Agency when the Agency committed the following unjustified and unwarranted personnel actions.

I. FCI Bennettsville has committed numerous unwarranted and unjustified personnel violations.

a) The Agency committed an unjustified or unwarranted personnel action when the Agency failed to follow binding past practices at FCI Bennettsville and violated Article 4 of the Master Agreement, by unilaterally changing working conditions, while failing to bargain these changes with the Union.

The Union asserts that management and the Union established a binding past practice regarding the use of augmentation. The Union further asserts that management failed to follow these binding past practices when it unilaterally changed working conditions at FCI Bennettsville, by disregarding binding past practices and augmented by using an augmentation roster of non-custody staff to cover day watch custody where no ART or high volume training occurred and without the approval of the Union.

i. **Binding Past Practice**

It is well established that parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this like other established terms and conditions of employment may not be altered by either party in the absence of agreement or

impasse following good faith bargaining. (See Department of the Navy, Naval Underwater Systems Center, Newport Naval Base and Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, 3 FLRA 413 (1980)) Past practices generally include all conditions of employment not specifically covered in the parties' collective bargaining agreement which are followed by both parties, or followed by one party and not challenged by the other party over a period of time. (See U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II and American Federation of Government Employees, AFL-CIO, 38 FLRA 193, 207 (1990)) Past practices may also include the actual practice being followed, regardless of the contractual agreement. In order to constitute the establishment by practice of a term or condition of employment the practice must be consistently exercised for an extended period of time with the Agency's knowledge and express or implied consent. (See Internal Revenue Service, Brookhaven Service Center and National Treasury Employees Union, Chapter 99, 6 FLRA No. 127 (1980)) Essential factors in this regard are that the practice must be known to management, responsible management must knowingly acquiesce, and such practice must continue for some significant period. (See U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II and American Federation of Government Employees, AFL-CIO, 38 FLRA 193, 207 (1990))

Management at FCI Bennettsville was aware of the practice of augmenting only during ART, high volume training, or with approval of the Union. In the instant case, Lt. Allen Rowe testified as to management's awareness at FCI Bennettsville of the past practice of augmentation

only during ART, high volume training, or with the approval of the Union. Lt. Rowe was a former employee at FCI Bennettsville and is currently management at USP McCreary. Lt. Rowe testified that while he was employed at FCI Bennettsville, in 2009, 2010, 2011, 2012 and 2013, augmentation was only used during ART or high volume training. Lt. Rowe testified as follows:

> Q. Isn't it true, sir, that during 2009, that the process of using augmentation occurred during annual refresher training (ART) or heavy volume training?
>
> A. Yes. Yes.
>
> Q. I want to be clear on your testimony. If augmentation was only used during ART or heavy volume training, which means three days or more, was that the practice at this institution?
>
> A. Yeah
>
> Q. Was the intent of the MOU to be used only for training—
>
> A. Correct (Tr. pg. 189:25 – 190:2)

Lt. Rowe's testimony is echoed by Acting Director Kane's Memorandum for All Chief Executive Officers regarding Augmentation. Acting Director Thomas acknowledged that "augmentation was originally intended to be used only for mandatory training and emergency situations." (Jt. Ex. 6) Local Union president Clellan Tyson testified that from 2009 until March 2015, augmentation was only used for ART or high-volume training that took a lot of correctional officers off their post.

> Q. Mr. Tyson, you just mentioned that there's a past practice over the last five years and that management has been violating. What past practice are your referring to?
>
> A. Augmenting outside of annual refresher training, high volume trainings. Just continue to augment on a daily basis to non-custody staff working correctional services post.
>
> Q. Okay and you're saying that the past practice was for training only.
>
> A. Annual refresher training, high-volume trainings, and management would come to the union in situations where it was if it was less than three days or so, they would come to the union and ask did we have a problem with them doing this training to help out staff-

to benefit the staff. And the union always wanted to do anything for the best interest of staff, and we agreed to it. (Tr. pg. 132:20 -133:4

The testimony of Lt. Rowe and Officer Tyson was undisputed by the Agency. The Agency failed to offer any witness to testify as to the knowledge of management regarding the Agency's past augmentation practices, even the former Union President, now Lt. Dunbar. The only witness the Agency produced to testify as to past practices of FCI Bennettsville did not begin his employment at FCI Bennettsville until March 2015. How could he have the requisite knowledge of the Agency's past practice to offer any meaningful testimony.

Management at FCI Bennettsville knowingly acquiesced to the practice of augmenting only during ART, high-volume training, or with the approval of the Union. The unrefuted testimony of Officer Clellan Tyson set forth the manner in which the Agency only augmented during ART, high-volume training, or with approval of the Union.

Q. Did you continue to ever have discussion about management about when they were augmenting?

A. Didn't have to need to (sic)

Q. Then were you ever approached during that five-year period about trying to augment for something special?

A. I mean, if it was another training. If it was a training they feel they needed to augmentate (sic), management was open to dialogue with the union to discus to see what did we decide. If it benefited the staff and it was a training that benefited staff, staff didn't mind knowing – didn't mind being augmented to do that.

Q. But they came to you for that, didn't they?

A. They did.

The practice of augmenting only for ART and high-volume training at FCI Bennettsville continued for five years. Again, the unrefuted testimony of Clellan Tyson set forth the augmentation practices at FCI Bennettsville that continued from 2010 through March 2015.

Q. – five years, the practice at Bennettsville was only ART and high-volume training for augmentation; s that correct sir?

A. Correct. (Tr. pg. 69:8-22

Former Union President William Dunbar, now Lt. Dunbar was present at the arbitration hearing and was on the Agency's witness list. Lt. Dunbar would have been in the best position to rebut the Union's claim. However, the Agency failed to call Lt. Dunbar to testify. The Agency did not call him, as no rebuttal existed.

Therefore, because management at FCI Bennettsville were aware and acquiesced to the practice of augmenting only during ART, high-volume training, or with the approval of the Union, and this practice continued for five years, a binding past practice was established at FCI Bennettsville.

ii. **Breach of Contract – Failure to Bargain as Required by the Master Agreement**

Article 5 of the Master Agreement provides that management of the Agency has the right to assign work, to make determinations with respect to contracting out and to determine the personnel by which Agency operations shall be conducted. However, Article 4 of the Master Agreement provides that 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 4 of the Master Agreement incorporates Article 3 of the Master Agreement, which provides that "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 manuals 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.

When read together Article 3 and 4 of the Master Agreement, they collectively require that proposed Agency changes to local working conditions will not be implemented prior to the Agency's notification of such working conditions with the Union. (See *United States Department of Justice Federal Bureau of Prisons Federal Detention Center Miami, Florida and American Federation of Government Employees, Council of Prison Local 33, Local 501*, 68 FLRA 61 (2014).) In other words, the Agency has a duty to bargain.

In *United States Department of Justice Federal Bureau of Prisons Federal Detention Center Miami, Florida and American Federation of Government Employees, Council of Prison Local 33, Local 501* ("Miami"), the Federal Labor Relations Authority upheld Arbitrator Martin A. Soll's decision, which found that the Agency violated the parties' collective bargaining agreement when it unilaterally changed a past practice. (Miami) In Miami, the Arbitrator found that that no employee was denied or disapproved a request from 1996 to 2010, which "gave rise in the Arbitrator's opinion to a binding past practice and unwritten contractual right [of the bargaining unit] to approve such requests." The Arbitrator resolved the Union's charge that the Agency's denials also violated Articles 4 and 3 of the Master Agreement and found a violation of those contract provisions. The Arbitrator found:

> [t]hat Article 4c's language incorporates Article 3-e [and] d's language, and when read together, they collectively…require…that proposed Agency changes to local working conditions will not be implemented prior to [the] Agency's notification and negotiation of such working condition[s] with the [Union].

The Arbitrator further found that the Agency's disallowance of a practice follow 14 years of

Uninterrupted approvals constitue[ed]...and qualify[ed] as a substantial change...in ...working conditions and that the Agency's unilateral change in turn, violated the notice and negotiation term, conditions, and language of Article 4 [and] 3 of the Master Agreement.

In the present case, from 2010 through March 2015, the Agency augmented only for ART, high volume training, or with approval from the Union (a binding past practice). On March 9, 2015, the Agency unilaterally changed a binding past practice where the Agency began using an augmentation roster of non-custody staff to cover day watch custody overtime. Here the Agency did not notify the Union of the change, nor did the Agency engage in negotiations prior to changing the working conditions. Because the Agency made a substantial change in the working conditions at FCI Bennettsville without notifying the Union of the change prior to implementation, and without negotiating the terms of the change with the Union, the Agency breached the terms of the Master Agreement by its failure to notify and its failure to bargain. The Agency may contend that it is management's right to assign work and thus may determine when it will or will not augment staff. Even if the Agency's right to assign did apply:

> Where an agency exercises a reserved management right and the substance of the decision is obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the effect or the reasonably foreseeable effect of the change in conditions of employment is more than de minimis...Further, any changes that adversely affect an employee's ability to earn overtime and differential pay is more than de minimis and this change reduced the potential for premium overtime pay. (See Fed. Bureau of Prisons, MDC Guaynabo, PR and AFGE, Local 4052, 114 LRP 46225 (2014))

The Guaynabo case, while dealing with an unfair labor practice charge, also dealt with the Agency unilaterally changing overtime procedures developed by "past practice" at the institution. The ALJ ultimately found the Agency had both a duty to bargain and that it failed to meet that duty prior to unilaterally changing past practice.

Therefore, the Agency committed an unjustified or unwarranted personnel action when the Agency at FCI Bennettsville failed to follow binding past practices by unilaterally changing working conditions, which adversely affected employees by denying them overtime opportunities.

b) The Agency committed an unjustified or unwarranted personnel action when the Agency violated Article 27 of the Master Agreement by failing to properly augment, which increased the inherent hazards of the institution.

Article 27 of the Master Agreement, titled "Health and Safety," makes provisions for the health, safety and well-being of employees. It provides generally that the Agency is obligated to lower inherent correctional hazards to the lowest level possible without relinquishing its rights under 5 U.S.C. S 7106. (Jt. Ex. 1, Article 27(a)) The Union contends that the Agency's augmentation practices contribute to the presence of inherent hazards above the lowest possible level allowed.

In the Custody Department, employees are tasked with directly supervising inmates and ensuring the safe running of the institution. At FCI Bennettsville inmates are convicted of murder, assault, drug dealing, terrorism, and crimes against children.

Augmentation is a serious issue because it first takes away the amount of staff that one has working inside of a prison housing unit. The Agency will say that everyone is a correctional worker first, but the fact of the matter is if you are a teacher, nurse, or secretary now augmented in a housing unit with 140 to 160 convicted felons: (1) you have not regularly worked without prior notice, (2) you do not know your keys, and (3) you do not know the inmates, the inherent risk becomes much greater. This issue was brought up at a May 22, 2015, Labor Management Relations meeting, "Non-Custody staff are augmented when they arrive at work at 7:30 a.m.

(Lack of a 24-hour notice by their supervisor). (Jt. Ex. 2) Janice Farmer testified as to her experience being augmented.

> Q. When you are augmented, do you ever – do you know what – when does that happen, when you show up at work or the day before? When do you know you're going to be augmented?
>
> A. to my recollection, each time I've been augmented I don't get advance notification I pretty much walk in, before I can even get to the metal detector, that's happened a few times. I've been in the office preparing my day, getting ready to start to do my job, an I'm getting a phone, "Hey, you need to go to such and such a unit." Normally that's how it's done for me. I'm made aware after I either start my job or when I'm walking in the door.
>
> Q. Okay. Ma'am, do you get a chance to read the post orders before you go on that post?
>
> A. In the daytime when I'm augmented, no, sir.
>
> Q. Are you given a key briefing?
>
> A. No, sir.
>
> Q. Are you given equipment to use?
>
> A. I get the equipment and most of the times when I get the equipment is, "Hey, the base count is this." "You need anything?" "NO." "What's going on?" "Well, nothing happened." That's normally my briefing each time I've been augmented on day shift because the person is ready to go. (Tr. 242:13-244:14

FCI Bennettsville currently has an occupancy of 1,700 inmates. The effect of this overcapacity creates the potential for more violence. (See Un. Ex. 2) As the prison population was increasing, the amount of staff watching them was decreasing. (Un. Ex. 2) When an insufficient number of correctional officers are available to cover an institution's security posts on any given day [the Agency] must use non-custody institutional staff to make up the difference," this process is known as augmentation." (Un. Ex. 2) It cannot be emphasized enough that the staff that are non-custody staff, teachers, psychologist case managers, re-entry coordinators, and chaplains. "As a result, these staff – teachers, psychologist case managers, re-entry coordinators, chaplains, etc. – are pulled away periodically from their duties of providing

offenders with programs and services…These challenges also affect institution safety." (Un. Ex. 2)

Many times, augmented staff are sent to posts that are normally staffed by correctional officers without being given the opportunity to read post orders. (Testimony of Debra Laughlin, Tr. 226:8-12) Frequently staff are augmented with no notification and are unprepared for the position they are sent to fill. The augmented staff members whose usual job might be a teacher or an accounting technician is handed a set of keys and told to report to a correctional post overseeing inmates. They may not have a clear idea of the duties of that post and worse yet, are not familiar with which keys are which. Debra Laughlin testified as to her experience with being augmented to work a custody position.

> Q. Now, were you augmented – did you know about it – generally, as a general rule, when did you find out that you were being augmented?
>
> A. I usually found out I was being augmented on the day I was augmented.
>
> Q. Are you given a chance to read your post orders before you go, ma'am?
>
> A. No. (Tr. 225:7-13)
>
> Q. If you want to reach the post orders, when do you have to read them? After you're there right?
>
> A. Yes.
>
> Q. What about keys?
>
> A. I usually get the keys when I get to the unit.
>
> Q. Do you know what the keys are for? How do you figure out what keys are there?
>
> A. I figure it out during the course of a day. (Tr. 226:8-21)

This situation is obviously dangerous if the staff person had an emergency arise.

Janice Farmer, Debra McLaughlin, and Amanda Thurman, all testified that generally they had no prior notice that they were going to be augmented. Ms. Farmer, Ms. McLaughlin, and

Ms. Thurman testified that because they are not notified prior to being augmented, they do not have the correct boots and are generally in street clothes. Moreover, Ms. Farmer, Ms. McLaughlin, and Ms. Thurman testified as to the stress caused by being augmented to a custody post with no prior notice. Ms. Farmer further testified that every time she is augmented to work custodial posts, she has been subject to lewd conduct by male prisoners.

> Q. Have you ever witnessed or been subject to – and tell this arbitrator, this is very unladylike but I have to ask. If I said the word "jacking," what does that mean here at this institution in regard to male inmates?
>
> A. That they're stroking, rubbing their penises in order to ejaculate.
>
> Q. And they do that looking at female officers?
>
> A. Yeah. They do it looking at female officers.

Amanda Thurman testified to experiencing the same.

> Q. You know what the word when an inmate is jacking, you know what we're talking about?
>
> A. I do, yes sir. (Tr. 245:17-25)
>
> Q. Now, the record has already established what goes on, and I'm not going to ask you to repeat that.
>
> A. Okay
>
> Q. But have you ever witnessed other staff members being subject to jacking?
>
> A. Yes, sir.
>
> Q. How do you feel as a woman when that occurs?
>
> A. It's offensive. It's offensive as it would be in any line of duty. (Tr. 316:3-14)

In Am. Fed'n of Gov'r Emp. Council of Prison Local, Local 919 and U.S. Dept. of Justice, Bureau of Prisons, Fe. Corr. Complex, Leavenworth, Kansas, Arbitrator Cynthia Stanley found that "employees were assigned to cover areas for which they had little or no skills or training, raising the inherent hazards to well beyond the lowest possible level. Custodial and non-

custodial employees are not always interchangeable, especially in assignments such as a special housing unit." (Leavenworth) Arbitrator Stanley further reasoned:

> All employees receive the same entry level and annual refresher training required to work for the Bureau of Prisons or when necessary, work a correctional post. This minimal training does not qualify all employees to work the most difficult posts in the prison.

Acting Director Thomas Kane mirrored this position in his memorandum, when he pointed out "non-custody staff should not be asked to fill correctional officer posts on a routine basis. (Jt. Ex. 6) In this case, Ms. Farmer, Ms. McLaughlin, and Ms. Thurman are non-custodial employees. As in Leavenworth, FCI Bennettsville has continued to augment employees "to cover areas that they have little or no skills or training." (Jt. Ex. 6)

The Agency offers little to dispute that augmenting non-custody employees, who have little or no experience in working custody posts, increases the inherent hazards of the institution.

c) The Agency committed an unjustified or unwarranted personnel action when the Agency violated Article 18 and Article 16 of the Master Agreement by failing to properly augment.

Articles 18(p) and 6 of the Master Agreement were violated by the Agency in its inequitable distribution of overtime. In AFGE, Local 3974 and Federal Bureau of Prisons, Federal Correctional Institution, McKean, Arbitrator James A. Brown, held that the Agency committed an "unwarranted personnel action which resulted in the reduction of pay for those bargaining unit members who were eligible to receive, but lost, overtime during improper augmentations." (See AFGE, Local 3974 and Federal Bureau of Prisons, Federal Correctional Institution, McKean, FMCS Case No. 16-50364 (2017) (Arb. Brown)) Arbitrator Brown reasoned:

> To be clear, the Agency may always exercise its managerial right to address staffing vacancies by using options other than assigning overtime. However, where the Agency declined those other options and instead improperly augmented, back pay is appropriate and well within the Arbitrator's broad remedial powers.

Therefore, where overtime is to be applied, it must be allocated in accordance with the Master Agreement and other local agreements.

II. FCI Bennettsville's unjustified and unwarranted personnel actions, described in detail above, results in the withdrawal or the reduction of an employee's pay, allowances, or differentials, specifically, bargaining unit members are denied overtime opportunities.

Once a determination has been made that the Agency has committed an unjustified or unwarranted personnel action, the Arbitrator must find that such an action resulted in a reduction in pay.

As for whether the unjustified and unwarranted personnel action directly resulted in a reduction in pay, withdrawal of pay, allowances, or differentials, under 5 U.S.C. S 5596, the quoted term is defined as "pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation..." (5 C.F.R. S 550.803)

In Am. Fed'n of Gov'r Emp. Council of Prison Local, Local 919 and U.S. Dept. of Justice, Bureau of Prisons, Fed. Corr. Complex, Leavenworth, Kansas, Arbitrator Cynthia Stanley, held the Agency violated the Master Agreement when it unilaterally changed conditions of augmentations without giving the Union an opportunity to negotiate concerning changes in conditions of employment and awarded employees adversely affected, back pay under the Back Pay Act. (Leavenworth)

In United States Department of Justice Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida and American Federation of Government Employees Council of Prison Locals, Local 506, the FLRA held that an Arbitrator's award of backpay was not contrary to law where the Arbitrator found an unjustified personnel action when the Agency violated the parties' agreement and but for the Agency's unjustified or unwarranted personnel action, the grievant would have worked overtime. (Coleman) In Coleman, the Arbitrator reasoned that "the Agency's denial of overtime opportunities to the grievant violated the parties' agreement and determined that an appropriate remedy would be an award for lost overtime opportunities calculated past records of performance and in response to the actual monetary loss of income by the grievant. (Coleman)

In the current case, bargaining unit members were denied overtime opportunities because management at FCI Bennettsville unilaterally discontinued a binding past practice by changing a condition of employment at FCI Bennettsville, an unjustified or unwarranted personnel action. Similar to the grievant in Coleman, bargaining unit members at FCI Bennettsville were denied overtime opportunities because of an unjustified or unwarranted personnel action.

In the Pollock decision, the FLRA ruled that the Management at USP Pollock improperly bypassed bargaining unit members for overtime when it augmented non-custody staff in violation of the parties' agreement. (U.S. Dep't of Justice Bureau of Prisons, Fed. Corr. Complex, Pollock, La. 68 FLRA 151 (2015)) In Pollock, the Administrative Law Judge found that Management had the duty to utilize overtime procedures and not augmentation procedures to fill open slots in the Custody Department. (Pollock) The instant case is factually similar to Pollock,

in that non-custody staff are augmented to fill custody positions, resulting in denied overtime opportunities for bargaining unit members.

Furthermore, as in *Coleman*, *Pollock*, and the instant case, the bargaining unit employees were ready and willing to work overtime shifts if offered. Testimony and Exhibits show bargaining unit employees were willing and able to work overtime for the shifts that were augmented. Toriano Fletcher, Robert Earl Quick, and Christopher Tarleton, each testified that when they sign up for overtime, they are ready, willing, and able to work overtime shifts.

Officer Toriano Fletcher stated that he was ready, willing and able to work overtime and that he needs the money to cover his financial obligations. Upon review of Union Exhibit 8, it was found that Officer Fletcher was bypassed to work overtime on June 10, 2015, August 5, 2015, August 14, 2015, August 24, 2015, October 7, 2015, November 5, 2015, April 22, 2016, May 3, 2016, May 16, 2016, July 11, 2016 and July 27, 2016. (See Union Ex. 8)

Officer Robert Earl Quick testified that he likes working overtime because it provides him with more money and he has children; however, since FCI Bennettsville began augmenting in 2015, his salary has decreased by $7,000 to $10,000. (Tr. 308:16 – 309:3) Officer Quick further testified that if he signed up for overtime, he was ready, willing, and able to work. Upon review of Union Exhibit 8, it was found that Officer Quick was bypassed to work overtime on March 19, 2015, June 10, 2015, July 30, 2015, August 12, 2015, August 24, 2015, August 28, 2015, September 1, 2015, October 8, 2015, October30, 2015, November 6, 2015, November 17, 2015, April 22, 2016, May 4, 2016, May 13, 2016, June 15, 2016, June 24, 2016 and July 22, 2016. (Tr. 326:7 -326"14)

Officer Christopher Tarlton testified that since March 2015, he began to receive less overtime and that he needs the overtime due to financial obligations. (Tr. 324:7-326:14) Officer Tarlton further testified that he is worried because his budget and savings are affected when the institution augments instead of giving overtime and he even stopped signing up. Officer Tarleton testified that he works a compressed scheduled (four 10-hour shifts) so he has a day available to work overtime and would still have the weekend to spend with is family. Upon review of Union Exhibit 8, it was found that Officer Tarlton was bypassed to work overtime on July 27, 2015, August 10, 2015, August 18, 2015, August 26, 2015, October 5, 2015, October 9, 2015, November 9, 2015, November 2, 2015, and November 18, 2015.

Additionally, Shawn A. Brock, testified that he was ready, willing and able to work overtime shifts and upon reviewing evidence testified that he had been bypassed for overtime. Officer Brock was bypassed for overtime on July 27, 2015, August 7, 2015, August 10, 2015, August 18, 2015, and August 26, 2015.

Therefore, the second prong under the Back Pay Act is met.

In the instant grievance, the Union has shown that when FCI Bennettsville augments, it is in violation of a binding past practice and the Master Agreement, thus committing an unwarranted and/or unjustified personnel action. Thus, the first prong under the Back Pay Act is met. Additionally, the Union has shown that because FCI Bennettsville violated binding past practices, bargaining unit members are denied overtime opportunities. The denial of overtime opportunities results in the reduction of the bargaining unit members pay. Thus, the second prong under the Back Pay Act is met. Therefore, this Honorable Arbitrator must find the Agency liable under the Back Pay Act.

REMEDY

All bargaining unit members bypassed should be made whole through back pay and interest to remedy the missed overtime opportunities. It is undisputed that this remedy has been held appropriate. In *AFGE, Local 3974 and Federal Bureau of Prisons, Federal Correctional Institution, McKean,* Arbitrator James A. Brown, ordered the Agency to pay back pay to bargaining unit employees who were eligible to work overtime shifts, but were bypassed due to improper augmentation.

In the current case, the Union prepared binders that outline how many shifts are due to each affected employee, the date the shift was augmented, and the length of the shift. The spread sheets outlined all dates and posts of violations and persons augmented and bypassed. (Un. Ex. 8) The evidence is cross referenced with supporting documentation and was unchallenged by the Agency.

THE BACK PAY ACT

Once the Arbitrator has determined liability under the Back Pay Act, the final issue is determining the appropriate remedy. The Back Pay Act, 5 U.S.C. S 5596(b) provides that:

> An employee of an agency who…is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials or the employee…is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect…an amount equal to all or any part of the pay, allowances, or differentials…which the employee normally would have earned or received during the period if the personnel action had not occurred…[and] reasonable attorney fees related to the personnel action.

In addition, the employee is entitled to interest which begins to accrue on the date or dates on which the employee would have received the pay if the unjustified or unwarranted personnel action had not occurred. 5 U.S.C. S 5596(b)(2)

Therefore, if it is determined that Management improperly denied overtime opportunities to bargaining unit employees, they are entitled to have the award backdated and to receive any interest which accrued. During the arbitration hearing, testimony was presented by three affected bargaining unit members. In addition, the Union introduced Union Exhibit 8, which outlines all affected bargaining unit employees.

ATTORNEY FEES AND COSTS

The Union also requests that the Arbitrator issue an award for Attorney fees as required by the Back Pay Ac.

The Back Pay Act, 5 U.S.C. S 5596 (b) provides that:

> An employee of an agency who ...is found ... to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay...is entitled...reasonable attorney fees related to the personnel action.

It is well-settled law that an award of attorney fees is mandatory under the Back Pay Act when the employee is the prevailing party and such an award is found to be in the interest of justice. Fee awards satisfy the interest of justice test in "any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." This includes attorney fees incurred on any matter related to the personnel action, including motions dealing with the eligibility and/or amount of attorney fees due. (See United States Department of Homeland Security United States Customs and

Border Protection and National Treasury Employees Union, 66 FLRA No. 104 (2012)) A determination under the interest of justice test only requires a singular finding under any one of the Allen factors:

1. The Agency engaged in a prohibited personnel practice.
2. The Agency's actions are clearly without merit or wholly unfounded, or the employee is substantially innocent of charges brought by the agency;
3. The Agency's actions are taken in bad faith to harass or exert improper pressure on an employee.
4. The Agency committed gross procedural error which prolonged the proceeding or severely prejudiced the employee; or
5. The Agency knew of should have known it would not prevail on the merits when it brought the proceeding.

The Union submits that multiple factors are met in this case, however, factors two and five are the most applicable.

The Agency's actions are without merit or wholly unfounded. The Agency does not dispute that it agreed to only augment for mandatory training or emergency purposes. The Agency knowingly violated this agreement when it augmented staff when no training or emergency was occurring. No credible defense as to the Agency's actions were presented during the course of the arbitration hearing besides Management has the exclusive right to assign work. This is a right that the Agency fails to admit is restricted by their agreement to only augment in certain situations.

Next, the Agency know or should have known it would not succeed on the merits of the present claim. The FLRA has long held that when a decision is rendered based solely on evidence available to the Agency at the time of the action, then the Agency should be presumed

to know or should know that it would not prevail on the merits. (See Am. Fed. Gov'r Emp., Local 3294 and U.S. Dep't of Hous. & Urban Dev., 66 FLRA 430 (2012))

While not a disciplinary case, no evidence, not available to the Agency, was presented at this arbitration. The Union presented unrefuted testimony that a binding past practice exists at FCI Bennettsville, in which augmentation is used only for ART, high volume training, or with prior approval from the Union. Therefore, it is clear that the Agency knew it was in violation of a binding past practice when non-custody employees were augmented to custody posts.

As stated above, affected bargaining unit members are entitled to reasonable attorney fees if one of the five Allen factors are met. In this matter, two of the five Allen factors are clearly met, and therefore the affected bargaining unit members are entitled under the Back Pay Act to reasonable attorney fees

The Union has outlined how and why the Agency was in violation of a binding past practice when it augmented non-custody employees and denied overtime to the bargaining unit members. The U.S. Court of Appeals for the Federal Circuit has stated:

> The federal fee-shifting statutes recognize that awarding compensation to the prevailing party plays an important role in allowing clients to secure counsel in the first place. The Supreme Court has, on numerous occasions, explained that the "fundamental aim of fee shifting statutes is to make it possible for those who cannot pay a lawyer for his time and effort to obtain competent counsel, this by providing lawyers with reasonable fees to attorneys practicing before federal agencies would discourage such representation by attorneys. (Augustine v. Dep't of Veterans Affairs, 429 F.35 1334 (Fe. Cir. 2005))

A determination of reasonable attorney fees is based on multiplying a reasonable hourly rate times the reasonable hours expended. A determination of reasonable rate is based on a statement of the attorney's customary billing rates for similar services in the community in which

the attorney ordinarily practices. Similarly, attorney fees are warranted for the services of law clerks, paralegals, or law students, when assisting members of the Bar. (See 5 C.F.R. 550.807(f))

Because the Agency's augmentation violation is wholly without merit and the Agency knew it would not prevail on the merits, the Union is entitled to reasonable attorney fees in the interest of justice. Union's counsel will file their request for attorney fees, along with the contract and billing statement, within thirty (30) days of the arbitrator issuing his ruling.

CONCLUSION

For the foregoing reasons and arguments and based on all the exhibits, testimony, and argument presented during the course of this arbitration, the Union prays that the arbitrator issue findings of fact and rulings as follows:

1. The Agency committed multiple unjustified and/or unwarranted personnel actions, as found below:

    a. The Agency committed an unjustified or unwarranted personnel action when the Agency failed to follow binding past practices at FCI Bennettsville and violated Article 4 of the Master Agreement, by unilaterally changing working conditions, while failing to bargain these changes with the Union;

    b. The Agency committed an unjustified or unwarranted personnel action when the Agency violated Article 27 of the Master Agreement by improperly augmenting, which increased the inherent hazards of the institution;

    c. The Agency committed an unjustified or unwarranted personnel action when the Agency violated Article 18 and/or Article 6 of the Master Agreement by improperly augmenting and filling the vacant posts;

2. The Agency's unjustified and/or unwarranted personnel actions as found above resulted in the loss of pay or benefits to bargaining unit employees as a result of the Agency's failure to follow its normal overtime hiring procedures by fairly and equitably filling the

vacant posts with bargaining unit employees who were qualified, willing and able to work.

3. The Agency shall immediately pay back pay, interest and attorney fees to all affected bargaining unit employees as will be identified by the Union at a later hearing on damages.
4. The Agency shall cease and desist from augmenting in the absence of mandatory training and emergencies.
5. The Arbitrator shall retain continuing jurisdiction for 120 days after the ruling to resolve any disputes that may arise in addition to any claims for attorney fees which may arise.

POSITION OF THE AGENCY

The Agency has the legal and contractual right to direct the workforce. Federal law, 5 USC 7106. Management rights, gives the Agency the right to;

> (1) Determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
>
> (2) In accordance with applicable laws-
>
> > (A)to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
> >
> > (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.

Article 5 – Rights of the Employer, of the parties Master Agreement, provides in part that;

...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 take other disciplinary action against such employees;
b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operation shall be conducted;
c. with respect to filling positions, to make selections from:
    (1) among properly ranked and certified candidates for promotion; or
    (2) any other appropriate source
d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

The March 19, 2009 Memorandum of Understanding (Un. Ex. 5) concerning the use of Non-Correctional Services Staff Assignment to Correctional Services Posts provides that;

> "...when management determines, it is necessary to assign a non-correctional services employee to a correctional post..."

This language demonstrates that to establish the use and implementation of the roster is left to the discretion of Management. There is no mention in the Memorandum of Understanding that limits the use of Non-Custody staff working a Correctional Post Roster to Annual Refresher Training (ART), Firearms Training, or training assigned for more than three (3) days. Non-custody staff are augmented to Correctional Posts during ART, Firearms Training, and on other occasions when there is particular need as determined by Agency management.

Every Bureau of Prisons (BOP) employee is charged with the responsibility for maintaining security of the institution. All staff have correctional responsibilities that precede all others required by their position and these duties are performed on a regular and recurring basis. BOP employees hired as teachers, treatment specialists, counselors, accountants or administrative assistants have correctional responsibilities. (See Ag. Ex. 3) Management has the right to take whatever actions may be necessary to carry out the Agency's mission during emergencies. This right is recognized legally, contractually, and specifically in the March 19, 2009 Memorandum of Understanding.

Article 18 – Hours of Work, of the parties' Master Agreement, under Section o., provides that;

...Work assignments on the same shift may be changed without advance notice. Non-Correctional staff who report to work expecting to perform their usual job duties can be assigned to a Custody post without advance notice. The authority to determine that it is necessary to assign a non-correctional services employee to a correctional services post is a recognized Management right. Employees are aware of this possibility and should be prepared to respond should such a situation arise.

Management has the responsibility of carrying out the Agency's mission. There are situations where staff shortages arise. and Management must act to staff a critical custody post. The Agency has the authority under Article 18, Hours of Work, under the Master Agreement, to act to reassign employees to staff critical posts. The Union seeks to tie Management's hands and take away their discretionary authority to assign employees in meeting critical staffing needs. The Union's proposed remedy for the alleged violation of missed overtime opportunities contradicts the express provisions of 5 USC 7106 that provides Management with the exclusive right to determine the personnel by which agency operations shall be conducted.

The evidence shows that there were no violations of the controlling statute, the express provisions of the Master Agreement, nor any local agreement. Therefore, the Agency respectfully submits that the grievance must be denied in its entirety.

DISCUSSION AND OPINION

The central question in this case is whether or not the Agency violated the Master Agreement and a binding past practice by unilaterally changing the way in which non-correctional services staff were "augmented" to correctional services posts beginning in March of 2015. The Union asserts that the March 19, 2009 Memorandum of Understanding (Un., Ex. 5) outlines the procedures that will be utilized should it become necessary to assign a non-correctional services employee to a correctional services post. The final sentence of the first paragraph of this document provides that "...work assignments will be made commensurate with an employee's qualifying experience." (Un. Ex. 5)

The Union contends that the practice of the Agency in augmenting non-correctional services staff to correctional services posts had been limited to Annual Refresher Training (ART), periods of high volume training or with the agreement of the Union. The evidence shows that this was the practice at FCI Bennettsville from 2010 through 2015. The parties engaged in a mutually recognized practice of handling the augmentation of non-correctional services staff to a correctional post under these limited circumstances. The Agency did not present any credible evidence to contradict the Union's assertion that a binding past practice concerning augmentation practice and procedures had been established at FCI Bennettsville.

The evidence shows that that the Agency was aware that the Union was concerned that the Augmentation Roster was not followed properly as early as March 20, 2015. Union Exhibit 6 is the March 20, 2015 minutes from the FCI Bennettsville Labor-Management Relations Meeting. These minutes reflect that Agency Management acknowledged that the Augmentation Roster needs to be revisited and that management did not wish to make any changes to the

augmentation roster until the LSA negotiations. Article 4, Section b. of the Master Agreement provides that;

> 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.

The Agency's unilateral change in the way in which non-correctional services staff were being used to staff correctional posts violated a binding past practice and was subject to the explicit requirements of Article 4, Section b. that this practice not be changed unless agreed to in writing by the parties. There was no agreement reached by the parties concerning the changes made in how the augmentation roster was to be utilized.

Article 27 – Health and Safety, of the Master Agreement, provides that the Employer agrees to lower the inherent hazards of a correctional environment to the lowest level possible. The Agency's efforts in this regard is reflected in a June 1, 2016 Memorandum from Acting Federal Bureau of Prisons Director, Thomas R. Kane regarding Augmentation. (Jt. Ex. 6)

Acting Director Kane wrote in this memo that;

> It has long been the position of this agency that while all institution staff are "correctional officers first," non-custody staff should not be asked to fill correctional officer posts on a routine basis. This practice which has come to be known as "augmentation" was originally intended to be used only for mandatory training and emergency situations. But, as the Agency has faced tight budgets and relative reductions in staffing over the past many years, increasingly wardens have had to rely on augmentation along with overtime to fill critical custody posts. The reality is, augmenting custody staff with non-custody staff interferes with reentry and other important work these staff perform; they are unable to complete their regularly assigned duties when they are working correctional officer posts.
>
> As we approach the final quarter of Fiscal Year 2016, some institutions are facing shortfalls of funding available to pay overtime, and they are relying on augmentation to fill mandatory posts. Please ensure that augmentation is used only as a last resort and in consideration of the workloads of non-custody staff...

> The Executive Staff and the Council of Prison Locals Executive Board have identified augmentation as one of the critical issues facing the agency, and we are committed through our partnership relationship to explore long term solutions to avoid relying on augmentation other than during mandatory training, limited periods of custody staff shortages, or institution emergencies.

Acting Director Kane's memo supports the Union's position that augmentation is to be utilized for mandatory training such as ART, limited periods of custody staff shortages such as high volume training, or institution emergencies. The evidence shows that the Union has consistently agreed to limited periods of augmentation when requested by Agency management. However, after five years of adhering to this well-established past practice, Agency management began using augmentation in March of 2015 to staff custody posts as a preferred option rather than a last resort.

The impact of the Agency's actions affected both non-correctional support staff and correctional staff who had a reasonable expectation of overtime opportunities. The testimony of Janice Farmer, Debra Laughlin, and Amanda Thurman confirms that non-correctional services staff who are augmented to a correctional post without prior notice do not have appropriate clothing and/or shoes for these assignments and have little if any time to read post orders, receive key instructions or receive briefings on the 140 to 160 convicted felons they were responsible for supervising. These women have been subjected to inmate behavior that was described as lewd, offensive and worse. The impact of the Agency's decision to augment such employees without advance notice and adequate preparation does not meet the contractual standard under Article 27 of the Master Agreement for the Agency to lower the inherent hazards of a correctional environment to the lowest level possible. The Agency's unilateral change to routinely augment non-correctional services staff to correctional posts increased the inherent hazards of the

correctional environment while taking these employees away from their primary job duties providing support services to inmates and the institution.

After a thorough review of all the evidence, documents, testimony and arguments presented in this case, it is my finding that the Agency committed a number of unjustified and unwarranted personnel actions.

1. The Agency committed an unjustified or unwarranted personnel action when the Agency failed to follow a binding past practice at FCI Bennettsville and violated Article 4 of the Master Agreement, by unilaterally changing working conditions, while failing to bargain these changes with the Union.

2. The Agency committed an unjustified or unwarranted personnel action when the Agency violated Article 27 of the Master Agreement by improperly augmenting, which increased the inherent hazards of the correctional environment at the institution.

3. The Agency committed an unjustified or unwarranted personnel action when the Agency violated Articles 6 and 18 by improperly augmenting and filling the vacant posts.

The Agency's unjustified and unwarranted personnel actions as found above resulted in the loss of pay or benefits to bargaining unit employees as a result of the Agency's failure to follow its normal overtime procedures by fairly and equitably filling the vacant posts with bargaining unit employees who were qualified, willing and able to work.

The Union is seeking that all bargaining unit members bypassed for overtime opportunities they qualified for when the Agency engaged in improper augmentation should be made whole through back pay and interest to remedy their missed overtime opportunities. The Union contends that such a remedy is appropriate as Arbitrator James A. Brown ordered the Agency to pay back pay to bargaining unit who were eligible to work overtime shifts, but were bypassed due to improper augmentation. The evidence shows that Agency Management

improperly denied overtime opportunities to bargaining unit employees. Therefore, these employees are entitled to back pay and to receive accrued interest.

The Union has also requested that Attorney fees be awarded as required by the Back Pay Act. The Union, as the exclusive recognized representative of bargaining unit employees, is the prevailing party in this case. The Agency has been found to have engaged in a prohibited personnel practice by violating multiple Articles of the parties' Master Agreement by improperly augmenting non-correctional services staff to correctional posts, failing to bargain over changes in conditions of employment, and denying overtime opportunities to bargaining unit employees willing, ready and able to perform such overtime assignments. The Agency's actions are without merit as they were fully aware of the existing, long-standing, binding past practice regarding augmenting non-custody staff and they choose to ignore this binding practice and unilaterally change it. The Union has shown that affected bargaining unit members are entitled to reasonable attorney fees based on the Agency's actions which satisfy the Allen factor requirements that trigger the awarding of attorney fees

AWARD

The grievance is sustained.

The Agency committed multiple unjustified or unwarranted personnel actions as outlined supra.

The Agency's unjustified and unwarranted personnel actions as found above resulted in the loss of pay or benefits to bargaining unit employees as a result of the Agency's failure to follow its normal overtime hiring procedures by fairly and equitably filling the vacant posts with bargaining unit employees who were qualified, willing and able to work.

The Agency shall make a back pay award, with interest and attorney fees to all affected bargaining unit employees as will be identified by the Union at a later hearing on damages.

The Agency shall cease and desist from augmenting in the absence of mandatory training, high-volume training, approval by the Union, or emergencies.

The Arbitrator shall retain jurisdiction for one-hundred-twenty (120) days after the date of this award, May 1, 2017, to resolve any disputes that may arise in addition to any claims for attorney fees that may arise.

So Ordered, this the 1st Day of May, 2017

Philip A. LaPorte

Philip A. LaPorte, NAA
ARBITRATOR

May 1, 2017

May 1, 2017