

FEDERAL MEDIATION & CONCILIATION SERVICE
In the Matter of the Arbitration between:

**DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS,
FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA**

"The Agency"

and

**AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES LOCAL NO. 506, FEDERAL
CORRECTIONAL COMPLEX COLEMAN, FLORIDA**

FMCS NO. 12-53432-3

**Grievance: Refusal to Bargain
Cleaning of Ready Room Gear**

**OPINION
AND
AWARD**

BEFORE: Haydeé Rosario, Esq., Arbitrator

APPEARANCES:

For the Agency:

By: Loretta Burke, Agency Representative

For the Union:

By: Ken Pike, Executive Vice-President
Counsel for the Union

BACKGROUND

Pursuant to the terms of the collective bargaining agreement ("the Master Agreement") between the Department of Justice, Federal Bureau of Prisons, Federal Correction Complex of Coleman, Florida ("FCC Coleman" or the Agency"), and American Federation of Government Employers, Local 506, Federal Correctional Complex Coleman, Florida ("the Union"), I was selected to serve as Arbitrator and to render a final and binding decision and award concerning the grievance in this case which alleges the Agency violated the Master Agreement and the Standard Ground Rules For Negotiations of Bargaining Issues ("the Ground Rules"), when it changed the procedures for cleaning the protective equipment stored in the ready rooms located in the various Special Housing Units ("SHUs"), at FCC Coleman, without providing the Union with notice and an opportunity to meet and bargain over said change in working conditions.

The hearing in this case was held on December 19, 2012, at the offices of the FCC Coleman located at 846 N.E. 54th Terrace Coleman, Florida. The parties were represented and were afforded a full and fair opportunity to present relevant documentary evidence, examine and cross-examine witnesses and to make arguments in support of their respective positions. Neither party objected to the fairness of the proceeding.

ISSUE¹

1. Whether the Agency violated the Ground Rules and the Preamble and Articles 3, 4, 5, 7, 27 and 36 of the Master Agreement when it changed its procedures for cleaning the protective equipment stored in the ready rooms located in the SHUs at FCC Coleman to abate citations issued by OSHA without providing the Union with notice and the opportunity to meet and bargain over said changes of cleaning procedures?

If so, what shall be the remedy?

BACKGROUND

On the entire record produced, I find the following relevant facts: FCC Coleman is part of the Federal Bureau of Prisons ("BOP"). FCC Coleman consists of two Penitentiaries (a low and a medium institution) and a Camp. There is a SHU located at each Penitentiary. The Union represents all employees employed at FCC Coleman, excluding all supervisors or management officials, as defined by 5 USC Chapter 71.² Further, the Agency and the Union have a long standing collective bargaining relationship and the parties' commitment in maintaining a good working relationship built on mutual trust and respect is embodied in the Preamble of the Master Agreement; and their commitment to foster good communication among all the staff is contained in Article 36, the Human Resource Management provision.

From September 9, 2009 to February 12, 2010, the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA"), conducted a wall-to-wall inspection of FCC Coleman Complex. On March 3, 2010, OSHA issued a Notice of Unsafe or Unhealthy Working Conditions to FCC Coleman citing numerous health and safety violations.³ A violation of CFR 1910.132 relating to the personal protective equipment stored in the ready rooms located in the various SHUs at FCC Coleman was among the various violations cited by OSHA.

Specifically, this citation states the following:

On or about October 28, 2009, protective gear such as but not limited to helmets, protective masks and vests were not maintained in a sanitary condition. Employees wore the unsanitary equipment without the equipment having been cleaned.⁴

At the time, OSHA required the Agency to abate the protective equipment violation by April 5, 2010.

¹ The parties did not agree on the framing of the issue. Thus, they requested for the Arbitrator to frame the issue.

² Joint Exhibit 1

³ Agency Exhibit 2

⁴ Agency Exhibit 2

On March 12, 2010, Jose Rojas ("President Rojas"), the Union's President, requested the Agency to provide the Union with a complete copy of the report issued by OSHA. The same day, the Agency, by Joseph Pitts ("Manager Pitts"), the Occupational Safety Health Manager at the FCC Coleman, provided a copy of the OSHA report to President Rojas.⁵

Thereafter, Captain Clinton Smith ("Captain Smith"), who was Captain for the FCC Coleman Complex at the time, Associate Warden Louis Williams ("AW Williams"), also a Captain until August 2012, and Manager Pitts were assigned to implement corrective measures to abate the violations found by OSHA.⁶ The group implemented new procedures to clean the protective equipment in question. The new cleaning procedures were outlined in two Memorandums issued by Captain Smith on May 3, 2010 and on June 8, 2011, respectively.⁷ Also, on March 31, 2010, Manager Pitts submitted an Abatement Certification to OSHA certifying that the Agency corrected the health & safety violations relating to the protective equipment.⁸

On September 20, 2011, OSHA conducted a follow-up visit to FCC Coleman to inspect the conditions previously cited and to ensure the violations were corrected. Manager Pitts and James Seidel ("VP Seidel"), the Union's Vice-President for FCC Coleman, were among the representatives who attended the meeting. On September 21, 2011, OSHA issued a report finding the new procedures for the cleaning of the protective equipment in the SHUs were in compliance with OSHA's rules and regulations.⁹

By letter dated October 14, 2011, VP Seidel invoked the Union's right to negotiate over any and all changes in the cleaning procedures of the protective equipment located in the ready rooms located in the various SHUs at FCC Coleman.¹⁰ The Union also included the following four proposals in its letter:

1. A designated cleaning area with pressure washes, hanging racks and a large humidifier/drying circulating fan.
2. A review or rewrite of all cleaning procedures.
3. A review of all cleaning chemicals to ensure they are designed to clean all bodily fluids exposures.

⁵ Agency Exhibit 4 and Tr. 127-129, 132

⁶ Tr. at 139, 151

⁷ Joint Exhibits 9 and 10 and Tr. 140

⁸ Agency Exhibit 5

⁹ Agency Exhibit 6 and Tr. 141

¹⁰ Joint Exhibit 8

4. For the Agency to maintain the status quo until all phases of bargaining are complete, to include mediation and impasse.¹¹

By memorandum dated October 26, 2011, sent to VP Seidel, the Agency by Captain Clinton Smith responded to the Union's request to bargain by scheduling the start of negotiations for Monday, December 5, 2011. In his Memorandum, Captain Smith informed VP Seidel the Management negotiating team will consist of up to four members as provided by the Ground Rules. Captain Smith also requested the following information from the Union to be provided to him: (1) to submit by November 3, 2011, the names of the members for the Union's negotiating team and their request for official time; and (2) to submit by the close of business (4:00 p.m.) November 22, 2011, the Union's proposals for the negotiations over the new cleaning procedures of the protective equipment.¹²

By email dated November 3, 2011, which contained an attached memorandum, VP Seidel submitted the Union's request for official time for the members of the Union's negotiating team to prepare for negotiations and provided the names of the Union's negotiating team to Captain Smith.¹³ Seidel's email states, in part, "*Captain this is my team but we have to talk about dates, these are only tentative. Remember we have two weeks of SIS blitz¹⁴ and then Thanksgiving. We have to talk ASAP! Please call.*"¹⁵ After the November 3rd email, VP Seidel and Captain Smith had two telephone conversations in early December 2011, wherein the Union's request to negotiate was discussed. See their testimony as part of the Testimonial Section.

By Memorandum dated December 6, 2011, VP Seidel sought to clarify with Captain Smith the status of the Union's request to negotiate with the Agency over the change of new cleaning procedures.¹⁶ Seidel's Memorandum states he sought clarification because he had been informed the Union missed the deadline for the submission of its proposals as required by the Ground Rules and told that negotiation was "a dead issue."¹⁷ The same day, Roy C. Cheatham ("AW Chetham"), the Associate Warden, along with other Captains at the Agency, assigned all of the cleaning and disinfecting of the protective equipment and clothing in question to the

¹¹ Joint Exhibit 8

¹² Joint Exhibit 7

¹³ Union Exhibit 2

¹⁴ SIS Blitz was described by VP Seidel as a time when the Union representatives were assisting with the representation of numerous disciplinary cases and were not available for negotiations.

¹⁵ Union Exhibit 2

¹⁶ Joint Exhibit 6

¹⁷ Join Exhibit 6

Lieutenants who are supervisory personnel not included in the bargaining unit of employees represented by the Union.¹⁸

Thereafter, the Union filed its initial grievance in this case alleging the Agency failed to provide the Union with notice and an opportunity to bargain over the change of the procedures for cleaning the protective equipment stored in the ready rooms at the SHUs. On January 18, 2012, the Agency denied the grievance asserting the Union failed to provide the Agency with its proposals within the time frame provided by the Ground Rules.¹⁹ On February 10, 2012, the Union filed the Demand for Arbitration in this case.²⁰

THE GROUND RULES

Issue 5: Proposals

Proposals will be drafted by both sides and be exchanged no less than seven (7) working days prior to commencement of negotiations. Each proposal will be negotiated separately. Proposals for the negotiations will be considered in numerical order. Either party may move to table a proposal or any part of a proposal, but the tabling of a proposal will only be done by mutual consent of both parties.

MASTER AGREEMENT PROVISIONS (in pertinent parts)

ARTICLE 3- GOVERNING REGULATIONS

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

Section b. 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 and regulations, prior to implementation of any policies, practices, and/or procedures.

Section e. Negotiations under this section will take place within thirty (30) calendar days of the date that negotiations are invoked.

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 recognized its responsibility for informing the Union of changes in working conditions at the local level.

¹⁸ Agency Exhibit 1 and Tr. at 94-96,103-104,106-108

¹⁹ Joint Exhibit 3

²⁰ Joint Exhibit 4

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

In accordance with applicable laws:

Section 2(b). to assign work, to make determinations with respect to contracting out, and to determine the personnel by which the Agency operations shall be conducted.

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

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

3. appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such Management officials.

ARTICLE 7 - RIGHTS OF THE UNION

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

ARTICLE 27 - HEALTH AD SAFETY

Section f. When a safety and health inspection is being conducted by an outside agency such as OSHA, the National Institution for Occupational Safety and Health (NIOSH), or a private contractor, the Union will be invited and encourage to have a local representative to participate.

TESTIMONIAL EVIDENCE

In support of its case, the Union presented VP Seidel who testified he worked at FCC Coleman as Correctional Officer at the time OSHA conducted its inspection in 2009. He worked at FCC Coleman until December 2012, when he transferred to the FCC Schuylkill facility in Pennsylvania. During the time in question, VP Seidel was the Union's Executive Vice-President at FCC Coleman. In 2010, VP Seidel testified he reviewed the report issued by OSHA. Throughout his testimony, VP Seidel maintained the first time he learned about the cleaning procedures implemented to abate the violations found by OSHA was on September 20, 2011, during the close-out meeting with OSHA and representatives of the Agency, including Manager

Pitts. VP Seidel explained that prior to the September 20th meeting, the Union had no knowledge about the cleaning procedures put in place to abate OSHA citations.²¹ Specifically, he testified that:

Because when the original letter²² was brought up there was instant chaos going on in their meeting because we said, well...this letter is not implemented. Nobody knows about this letter. They were trying to clean this up because the ready room gear was not cleaned. So they were trying to say that oh we have a procedure. And we said, no, there is no procedure. We knew there was no procedure.²³

At that time, VP Seidel testified, OSHA inspectors also conducted a walkthrough with the Agency and Union representatives to the various SHUs where the protective gear is stored to check if the new cleaning procedures were posted and to talk to the employees working in the SHUs. VP Seidel further testified OSHA inspectors allowed him to be present when they interviewed several employees in the ready rooms. VP Seidel explained he was not allowed to speak during the interviews but was able to listen to what employees told OSHA. VP Seidel further testified that several employees told the OSHA inspectors that the Memorandum outlining the new cleaning procedures were posted the day before the meeting with OSHA inspectors in September. VP Seidel consistently maintained he had not seen the Memorandums outlining the new cleaning procedures before the walk-through with the OSHA inspectors on September 20th. VP Seidel also described his concerns with the lack of notice as a "point of contention"²⁴ during the meeting with OSHA and the Agency's representatives. In view of the concerns raised by the Union, VP Seidel testified, the Agency representatives assured him at the meeting with OSHA they were willing to discuss the new cleaning procedures with the Union to address the concerns raised by the Union at the meeting.²⁵ Therefore, after the meeting with OSHA, VP Seidel testified he invoked the Union's right to bargain over the new cleaning procedures by letter dated October 14, 2011.²⁶

VP Seidel testified he submitted the names of members of the Union's negotiation team and submitted his request for official time for preparation by email dated November 3, 2011, as requested by Captain Smith.²⁷ Following his email, VP Seidel testified he tried to contact Captain Smith on various occasions to see if his request for official time had been approved. VP Seidel explained he requested official time for the same period he was scheduled to be in

²¹ Union Exhibit 1

²² VP Seidel described "the letter" as the Memorandum outlining the cleaning procedures.

²³ Tr. at 43

²⁴ Tr. at 22

²⁵ Tr. at 19-23, 38-39

²⁶ Joint Exhibit 8

²⁷ Union Exhibit 2

Pennsylvania on annual leave;²⁸ and maintained it was not the first time he requested official time during for a period of time when he was not scheduled to be at the Union's House at FCC Coleman. He further testified it was not unusual for him or other Union representatives to use official time when on leave status because occasionally it was necessary to conduct Union business even though he was not at FCC Coleman.

In early December, VP Seidel testified he had two telephone conversations with Captain Smith about the negotiations scheduled for December 5, 2011. According to VP Seidel, he inquired about the status of his request for official time and told Captain Smith the official time had not been approved and expressed concerned regarding a lapse in time. At the time, VP Seidel testified Captain Smith told him he, Captain Smith, did not know the status of his request for official time because he was on a hunting trip. At the time of this conversation, VP Seidel testified he was in Pennsylvania. VP Seidel further explained that because both Captain Smith and him were pressed for time, he suggested for the Union and the Agency to discuss the cleaning procedures as a work group rather than proceeding with the scheduled negotiations. VP Seidel testified Captain Smith was agreeable to the idea of starting to discuss the cleaning procedures on December 5th as a work group.²⁹

A day later, VP Seidel testified Captain Smith called him again to tell him "the entire negotiation was off" because the Union had not turned in its proposals by November 22nd, as required by the Ground Rules. At that time, VP Seidel testified Captain Smith told him he discussed the matter with Roy C. Cheatham ("AW Cheatham"), the Associate Warden, who instructed him not to proceed with the negotiations because the Union missed its dateline. VP Seidel further testified he tried to explain Captain Smith, to no avail, the Union was unable to prepare all of its proposals because the official time was never approved by the Agency.³⁰ After this conversation, VP Seidel testified he sought to clarify the status of the negotiations.³¹ In response, Larri Lee ("AW Lee"), an Associate Warden at FCC Coleman, confirmed to VP Seidel the Agency was not going to negotiate with the Union over the change in its cleaning procedures because the proposals were not submitted as required by the Ground Rules.³²

Captain Smith testified as follows: He has been employed by the Agency for about eighteen years. In 2009 until December 2012, he was a Captain for FCC Coleman Complex. Since January 2012, he has worked as an Associate Warden assigned to FCC Forest City. As of

²⁸ Tr. 51-52

²⁹ Tr. at 29-30

³⁰ Tr. at 31

³¹ Joint Exhibit 6 and Tr. at 32

³² Joint 5 and Tr. at 33

mid-December 2011, Captain Smith testified he was no longer at FCC Coleman. He corroborated VP Seidel's testimony that he was on a hunting trip when VP Seidel sent him the November 3rd email with the names of the members of the Union's negotiating team and his request for official time. Although he could not recall the email, he testified his work email address is listed in VP Seidel's November 3rd email. With regard to VP Seidel's request for official time, Captain Smith testified he was not the Captain responsible for approving the official time but explained he asked VP Seidel to submit the request to him to ensure the request would get to the right person.³³ He also testified that, if the supervisors are notified, the official time could be used outside the FCC Coleman Complex.³⁴ Captain Smith also corroborated that he and VP Seidel agreed to discuss the cleaning procedures in early December during their first telephone conversation. He further testified the two discussed the possibility of resolving the issue by meeting in a work group but claim he did not hear from VP Seidel after their telephone conversation.³⁵ Captain Smith also testified he never submitted any of the Agency's proposals to the Union and had no knowledge about any one else submitting the proposals to the Union on behalf of the Agency.³⁶

With regard to the posting of the new cleaning procedures in the SHUs, Captain Smith testified that after he drafted the Memorandum dated May 2010,³⁷ he asked the Captains under his supervision to post it in the ready room "where people can see it."³⁸ He further testified the Memorandum was initially posted but it did not remain posted. He described how he checked to see if it was posted and "sometimes it was there and sometimes it wasn't"³⁹ or he simply couldn't find it. Since it kept being removed, Captain Smith testified, a second Memorandum⁴⁰ was posted in a placard nailed up on the wall of the ready room in the SHUs.⁴¹ Other than the Memorandum that he posted, he did not know of any other notice given to the Union about the cleaning procedures put in place to abate the citations issued by OSHA.⁴²

AW Cheatham testified that on December 6, 2011, after discussing the issue of the cleaning procedures with the Warden at FCC Coleman, he made the determination to assign the cleaning of the protective equipment in the SHUs to his Lieutenants who are supervisory

³³ Tr. at 66, 70

³⁴ Tr. at 84

³⁵ Tr. at 70, 72

³⁶ Tr. at 73

³⁷ Joint Exhibit 10

³⁸ Tr. at 77

³⁹ Tr. at 78

⁴⁰ Union Exhibit 1

⁴¹ Tr. at 79

⁴² Tr. at 86

personnel and are not included in the bargaining unit represented by the Union.⁴³ As of the date of the arbitration hearing in this case, AW Cheatham testified the Lieutenants were still performing the cleaning of the protective equipment in question.⁴⁴ AW Cheatham also testified he was not aware of the status of the negotiations or about the Union's request to bargain over the procedures for cleaning the protective equipment at the time he assigned the work to his Lieutenants.⁴⁵

AW Lee testified that in December 2011, she was the interim LMR Chair when VP Seidel requested clarification about the status of the Union's request to bargain. Because she held the LRM Chair position for a short period of time, she testified she was not fully aware of what transpired between the Union and the Agency prior to VP Seidel asking for clarification about the Agency's position. After discussing VP Seidel's request with the Executive Staff, AW Lee testified she sent a memorandum dated December 14, 2011, to VP Seidel asserting the Agency had no duty to bargain over the cleaning procedures because the Union failed to submit its proposals within the required time frame.⁴⁶

The Agency presented Manager Pitts who testified his primary job responsibility is to ensure the Agency's compliance with OSHA's rules and regulations, the National Fire Codes, and other occupational safety and environmental rules and regulations. With regard to the violations found by OSHA, Manager Pitts testified his primary responsibility was to abate all of the violations by April 5, 2011, as requested by OSHA. He worked with AW Williams to ensure the new cleaning procedures were in place. He further testified he had no knowledge of the Union's request to negotiate over the cleaning procedures or what transpired between the Union and the Agency regarding the Union's request to bargain over the new cleaning procedures implemented to abate OSHA's citations.⁴⁷ With regard to OSHA's follow-up visit on September 20th, Manager Pitts testified OSHA's inspectors talked to the employees in the ready rooms located in the SHUs to see if the new cleaning procedures were posted and testified OSHA inspectors inquired if the employees had received the proper training. Manager Pitts testified that he was not allowed to be present when the OSHA inspectors interviewed the employees.⁴⁸

Similarly, AW Williams, who was a Captain at FCC Coleman during the time in question, testified he was involved in the abatement process relating to the cleaning of the

⁴³ Agency Exhibit 1 and Tr. at 96, 106

⁴⁴ Tr. at 108

⁴⁵ Tr. at 101

⁴⁶ Tr. at 117 and Joint Exhibit 5

⁴⁷ Tr. at 143

⁴⁸ Tr. at 145

protective equipment but had no knowledge of the issues or proposals submitted by the Union regarding the new cleaning procedures.⁴⁹ AW Williams also testified that other than the posting of the cleaning procedures by Captain Smith, he had no knowledge of any notice sent to the Union about the cleaning procedures put in place to abate the violations found by OSHA.⁵⁰ In December 2011, AW Williams testified he also instructed all of the Lieutenants, as directed by the Executive Staff, to clean all the protective equipment in the ready rooms. He also testified VP Seidel was approved for official time during the period of October 28th to November 22nd⁵¹ but explained he did not know why VP Seidel requested official time during said period of time.⁵²

THE UNION'S POSITION

Pursuant to Article 4 of the Master Agreement, the Union asserts, the Agency is contractually required to provide the Union with notice and to bargain with the Union over changes in the employees' working conditions. The Union indicates Article 4 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 provision of this Agreement.*" The Union argues the credible record evidence shows the Agency did not notify the Union of the cleaning procedures outlined in the Memorandums dated May 3, 2010 and June 8, 2011, respectively. The Union also argues VP Seidel credibly testified the first time the Union learned about the changes in the cleaning procedures was during the meeting with OSHA inspectors and the Agency representatives in September 2011. There is no record evidence, the Union maintains, to support the contention that the Union knew or should have known about the changes in the cleaning procedures implemented by the Agency to abate the violations found by OSHA. The Union argues the Agency's suggestion that the Union waived its rights because it did not invoke its right to bargain until October 14, 2011, is without merit because the Agency never provided the Union with the required notice about the cleaning procedures put in place by Manager Pitts, AW Williams and Captain Smith. The Union also argues VP Seidel's credible testimony shows the procedures were not posted in the SUHs as the Agency claims.

After the Union learned of the cleaning procedures, the Union asserts it promptly invoked its right to bargain over the cleaning procedures and submitted the four (4) proposals contained in VP Seidel's Memorandum dated October 14, 2011. The Union asserts it is clear the Agency

⁴⁹ Tr. at 154-155

⁵⁰ Tr. at 164

⁵¹ This was not the same period requested by VP Seidel for preparation of the negotiations relating to the new procedures of the protective gear.

⁵² Tr. at 157, 162

intended to negotiate as evidenced by Captain Smith's Memorandum scheduling the start of negotiations for December 5, 2011. The Agency's expressed reason for cancelling negotiations, the Union argues, is an arbitrary interpretation of the Ground Rules. In this regard, the Union points out the documentary evidence shows the Union initially submitted four of its proposals and its request for official time to prepare for negotiations in a timely manner. Moreover, the Union contends the Standard Ground Rules apply to both sides; and indicates Issue 5 of the Ground Rules provide, in part, that: "*Proposals will be drafted by both sides and be exchanged no less than seven (7) working days prior to commencement of negotiations.*" Said language, the Union argues, provides it is the responsibility of both parties to submit the proposals seven (7) working days before negotiations and the record evidence shows the Agency never submitted any of its proposals to the Union. To insist it is the Union's sole responsibility to submit its proposals, the Union posits, is completely arbitrary.

Further, the Union concedes the Agency has the managerial right to (1) determine internal security practices and (2) the means and methods of achieving those rights provided by the law. Nonetheless, the Union asserts, even when the Agency's decision is within its managerial rights, the Agency must give notice to the Union and provide them with the opportunity to bargain over the impact of such change. In this regard, the Union also posits that pursuant to Article 5 Section b(2)(3) of the Master Agreement, the Agency is required to negotiate over the impact of changes in the working conditions. This Article, the Union indicates, provides the following:

- b. Nothing in this section shall preclude any agency and any labor organization from negotiating:
 - (2) procedures which Management Officials of the Agency will observe in exercising any authority under this Agreement; or
 - (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such Management officials.

In sum, the Union contends the contract as well as the law requires the Agency to provide the Union with notice and the opportunity to bargain over the change of its procedures for cleaning the protective equipment. The Union asserts it has met its evidentiary burden of proof by establishing the Agency failed to provide the Union with notice and with the opportunity to meet and bargain over the change of its cleaning procedures. For all the foregoing reasons, the Union asks the Arbitrator to grant its grievance and as a remedy to direct the Agency as follows: (1) to negotiate with the Union about the cleaning procedures of the protective equipment in the ready rooms located in the SHUs and negotiate over the appropriate arrangements for employees

affected by the change in its cleaning procedures; (2) for the negotiations to take place thirty (30) days from the issuance of the Arbitrator's award; (3) for negotiations to take place in accordance with the Ground Rules For Local Negotiations at FCC Coleman; and (4) for the cleaning procedures to be negotiated until the Federal Services Impasses Panel asserts jurisdiction over the matter or bargaining is otherwise complete pursuant to the Federal Service Labor-Management Relations Statute; (5) to direct the Agency to send an electronic copy of the Arbitrator's Award; and any other remedies deemed appropriate and necessary by the Arbitrator.

AGENCY'S POSITION

The Agency asserts the evidence is insufficient to establish a violation of the Ground Rules or the Master Agreement when it changed its procedures for the cleaning of the protective equipment in the ready rooms, as alleged by the Union. First, the Agency contends, the Union knew or should have known about the change in the cleaning procedures that were in place for about a year before the Union invoked its right to bargain over the issue. The Agency argues since March 2010, when Manager Pitts provided President Rojas with the report issued by OSHA, the Union was fully aware the Agency was required to abate the violations by April 5, 2011. The Agency also argues the Union knew or should have known the Agency changed its procedures for cleaning the protective equipment because the new cleaning procedures were posted in May and June 2011 as evidenced by Memorandums issued by Captain Smith and by his credible testimony. Thus, from early 2010 until October 14, 2011, when the Union invoked its right to bargain, according to the Agency, the Union did nothing to assert its contractual rights regarding the cleaning procedures implemented to abate the violations found by OSHA. Based on this reasoning, the Agency suggests the Union waived its contractual rights to bargain over the matter.

Secondly, as required by Article 27 of the Master Agreement, the Agency argues, the Union was invited to the OSHA inspections and provided with a full copy of the OSHA report. In this regard, the Agency argues that VP Seidel's testimony shows he participated in the September 20th meeting with OSHA and received OSHA's reports. Thus, the Agency posits, it complied with the requirements provided in Article 27 of the Master Agreement.

Thirdly, the Agency contends in October 2011, when the Union invoked its rights to bargain over the changes in the cleaning procedures, the Agency provided the Union with the opportunity to bargain over the matter, as required by the Master Agreement. The Agency argues that Captain Smith's credible testimony as well as the record documentary evidence shows the Agency agreed to bargain and it promptly scheduled the start of negotiations for

December 5, 2011, within the thirty (30) days as required by the Master Agreement. The Agency also points out Captain Smith, in his initial written response to VP Seidel, asked the Union to provide him with a complete list of its proposals and its request for official time by November 22nd prior to the commencement of negotiations. The Agency posits the Union was required to provide the full lists of its proposals by November 22nd, because the Ground Rules require the submission of all proposals within (7) seven working days prior to the commencement of negotiations.

The Agency contends the credible record evidence is sufficient to establish the Union failed to submit a complete list of its proposal by November 22nd, as required by the Ground Rules. In this regards, the Agency argues Captain Smith credibly testified he did not recall the email or the Memorandum attached to the November 3rd email sent by VP Seidel. The Agency also argues Captain Smith credibly testified the request for official time should not have been sent to him because he was not the Agency official responsible for approving such requests. Furthermore, the Agency suggests the request for official time sent by VP Seidel on November 3rd is questionable because VP Seidel admitted he was scheduled to be on annual leave during the same time period. The Agency also notes VP Seidel's requests for official time states he could be reached at the Union's House or at the FCC Coleman even though at the time he was in Pennsylvania. The Agency also indicates VP Seidel only asked for clarification about the status of negotiations on December 6, 2011, when he returned from his annual leave. The Agency argues by December 6th VP Seidel only asked for clarification because by then he knew negotiating over the change in cleaning procedures was no longer an option. Also, according to the Agency, VP Seidel's request for the parties to establish a work group instead of negotiations constitutes a clear waiver of the Union's rights to bargain over the change in cleaning procedures.

Lastly, the Agency asserts the duty to bargain over the change in cleaning procedures ceased to exist on December 6, 2011, when AW Cheatham assigned the cleaning of the protective equipment in question to the Lieutenants who are supervisory personnel not included in the bargaining unit of employees represented by the Union. It argues AW Cheatham credibly testified that on December 6, 2011, he reviewed the issue with the cleaning procedures and decided to assign the work to his Lieutenants. The Agency posits it is a well-established principle that the obligation to bargain only extends to matters affecting the working conditions of bargaining unit employees.

For all the foregoing reasons, the Agency asks the Arbitrator to deny the Union's grievance in this case.

OPINION

After a careful review of the entire record evidence, I find the Agency failed to provide the Union with the contractually required notice regarding the cleaning procedures outlined in Captain Smith's Memorandums dated May 3, 2010 and June 8, 2011, which were implemented to abate the citations issued by OSHA. I also find the Agency's refusal to meet and bargain with the Union over the change of its cleaning procedures violated the Ground Rules and the Master Agreement.

The clear and unambiguous language of the Master Agreement states the Agency has an obligation to provide the Union with notice and the opportunity to negotiate over changes in the working conditions of employees in the bargaining unit. This obligation is provided in Article 3, 4, 5 and 7 of the Master Agreement. Specifically, Article 4 Section (c) of the Master Agreement states that: "*the Employer will provide expeditious notification of the changes to be implemented in working conduction at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.*" Furthermore, as provided by Article 3 Section (b) of the Master Agreement, the requirement to provide the Union with notice and to negotiate changes in working conditions includes, "*applicable government-wide laws and regulations, prior to implementation of any policies, practices and/or procedures.*" Thus, as clearly stated in Article 3 Section (b), the obligation to provide notice and to negotiate with the Union prior to the implementation of any changes in policies or practices includes any changes made to abate violations of OSHA's rules and regulations. Also, Article 3 Section (c) of the Master Agreement requires for the negotiations relating to any changes in policies, practices and procedures to take place within thirty (30) calendar days. Similarly, the Agency's obligation to notify the Union and to negotiate over conditions of employment is also outlined in Article 7 Section (f), the Rights of the Union provision, which clearly states the Agency is required to adhere to "the obligations to notify the Union and the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority..."

I also considered that even if the Agency was acting within its Managerial Rights to change its cleaning procedures to abate the violations found by OSHA, Article 5 of the Master Agreement, which covers the Rights of the Employer, provides that nothing in the Rights of the Employer's provision shall preclude the Agency and the Union from negotiating the following:

(2) procedures which Management officials of the Agency will observe in exercising any authority under the Agreement; and

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such Management officials.

Therefore, the Agency's obligations to provide notice and to bargain over changes in the working conditions of its employees are clearly articulated in the Master Agreement. In this case, the Agency concedes it has the contractual obligation to notify the Union and to negotiate over the changes of the cleaning procedures implemented to abate the violations found by OSHA. Notwithstanding, it argues notice to the Union was provided because a copy of the OSHA report was given to President Rojas in March 2010 and because the Memorandums issued by Captain Smith outlining the cleaning procedures were posted in the various SHUs. I disagree. A review of the OSHA report issued after the initial wall-to-wall inspection does not contain any information about the changes in the cleaning procedures implemented to abate the violations cited in the report. Therefore, the fact that the Agency provided the Union with a copy of the report does not serve to establish notice was given the Union. Further, the credible record evidence does not support the Agency's claim that the Union knew or should have known about the changes because the Memorandums outlining the cleaning procedures were posted in the ready rooms located in the various SHUs. In this regard, I find VP Seidel credibly testified the first time he learned about the cleaning procedures was on September 20, 2011, during the close-out meeting with OSHA.

I credit VP Seidel's testimony in its entirety. His testimony was detailed, forthright and supported by the totality of the record evidence. He credibly described the "chaos" that took place at the close out meeting when the Agency began to discuss the new cleaning procedures. He maintained throughout his testimony none of the Union representatives knew about the cleaning procedures and testified they had not seen them posted at the SHUs. Also, VP Seidel credibly testified he was present when the employees at the SHU told the OSHA inspectors the Memorandum was posted a day before the OSHA close out inspection. Further, I believe Captain Smith's testimony tends to corroborate VP Seidel's testimony about the posting, or lack thereof, of the cleaning procedures. In this regard, I considered Captain Smith credibly testified that he asked for the Memorandums to be posted in the SHUs. However, he readily admitted they did not remain posted and on various occasions when he checked to see if they were posted, "sometimes it was there and sometimes it wasn't" or he simply could not find the Memorandums. I also considered Manager Pitts, who was the individual primarily responsible for putting the

cleaning procedures in place, had no knowledge about the Union being notified about the changes of the cleaning procedures.

Therefore, I find there is no merit to the Agency's claim that the Union knew or should have known since March 2010 about the changes in the cleaning procedures nor do I find merit to the contention that the Union waived its contractual rights because it waited more than a year before it invoked its right to bargain over the issue. In sum, I find the Agency failed to provide the Union with the contractually required notice as alleged in the grievance.

Similarly, I find the Agency asserted reason for refusing to negotiate with the Union, i.e., that the Union failed to submit its proposals by November 22nd, is not supported by the language of the Ground Rules or the Master Agreement. In this regard, I considered the Union submitted four of its proposals when it invoked its right to bargain. Thus, at a minimum, the Agency had a duty to meet and bargain over the proposals submitted on October 14, 2011, more than a month before the scheduled negotiations. I also considered that the Ground Rules provide, in pertinent parts, as follows: "*Proposals will be drafted by both sides and be exchanged no less than seven (7) working days prior to commencement of negotiations.*" Thus, the obligation to submit the proposals seven (7) working days prior to negotiations applies to the Union as well as to the Agency. Here, VP Seidel's testimony that the Agency never submitted its proposal to the Union is un rebutted. In this context, I believe the Agency's insistence for the Union to submit all of its proposals, while completely ignoring its obligations to submit its proposals, was arbitrary and a violation of the parties' commitment to maintain a good working relationship as described in the Preamble of the Master Agreement.

I also find the Agency failed to approve the official time requested by VP Seidel for the Union negotiating team to prepare for negotiations, as required by the Ground Rules. By email dated November 3rd, VP Seidel provided the Agency with the names of the members of the Union negotiating team and requested the official time for his team to prepare for negotiations, as requested by Captain Smith. Thereafter, it is evident from VP Seidel's email, and his credible testimony, he called Captain Smith several times seeking to ascertain the status of his request for official time; and letting Captain Smith know time was of the essence. Specifically, his email to Captain Smith states: "*Remember we have two weeks of SIS blitz and then Thanksgiving. We have to talk ASAP! Please call.*" Although Captain Smith did not recall the November 3rd email, he confirmed the email address listed on VP Seidel's email was his work email address. Thus, the Union also complied with this requirement as provided by the Ground Rules.

I considered the Agency's claim that the requested time should not have been submitted to Captain Smith. I find this claim without merit. Captain Smith, in his written response, asked VP Seidel to submit the request for official time to him. Captain Smith also testified he asked VP Seidel to submit the request for official to him because he wanted to ensure the request would get to the right person. I also considered the Agency's contention that VP Seidel's request for official time was questionable because he was scheduled to be in Pennsylvania on annual leave during the same period of time. In this regard, I credit VP Seidel's testimony that it was not unusual for him to request or use official time when he was on leave outside FCC Coleman. Captain Smith also credibly testified the use of official time outside FCC Coleman is allowed as long as the supervisors are notified about such matters. I also considered AW Williams credibly testified VP Seidel was approved numerous hours of official time during the period of October 28, 2011 to November 22, 2011. However, AW Williams admitted he did not know the reason for VP Seidel's request for official time during that period of time. I also note the period reviewed by AW Williams during his testimony is not the same period requested by VP Seidel to prepare for the negotiations relating to the change in the cleaning procedures. Under these circumstances, I find there is nothing suspect or questionable about VP Seidel's request for official time. I also find, on this record, there is no justification for the Agency's failure to approve the Union's request for official time to prepare for negotiations.

Most importantly, it is clear from the credible testimony of VP Seidel and Captain Smith that they were both in the midst of transitioning to a different work site while they were preparing for the negotiations scheduled for December 5, 2011. Captain Smith testified by mid-December he had already left FCC Coleman and VP Seidel testified he left FCC Coleman at the end of December 2011. This is why, I believe, they discussed the possibility of dealing with the issue about the cleaning procedures as a work group rather than a formal negotiations process. Both of them testified they discussed the possibility of discussing the matter as a work group rather than negotiations because both of them were had little time available to address the negotiation issue. I credit VP Seidel's testimony that a day after discussing the work group, Captain Smith called him back to let him know the negotiation was "a dead issue." In these circumstances, I find the Agency's decision to cancel the negotiations scheduled for December 5th and its decision to cease discussing the matter, even as a work group, was arbitrary and in complete disregard of what had already transpired between VP Seidel and Captain Smith as well as a violation of its contractual obligation to bargain with the Union over the matter. For all the foregoing reasons, the Union's grievance is granted.

I find the record evidence is not sufficient to establish a violation of Article 27 of the Master Agreement. VP Seidel credibly testified the Union was invited and participated in the meetings with OSHA, as required by this provision.

As for the remedy, generally when the violation established involves a failure to provide the Union with notice and the opportunity to meet and bargain over changes in the working conditions of employees, the appropriate remedy is an order directing the Agency to meet and bargain with the Union, upon request, about the change in the policies and practices in question. However, in this case, I considered the un rebutted record evidence shows the cleaning of the protective equipment alleged in the grievance is no longer performed by any of the employees represented by the Union. Therefore, in this case, I believe it would be inappropriate to require the Agency to bargain with the Union over the cleaning procedures assigned to supervisory employees who are not represented by the Union.

Notwithstanding, as an appropriate remedy, the Agency is directed to take the following actions: (1) Notify the Union of any current or future assignment relating to the cleaning of protective equipment in the ready rooms located in the various Special Housing Units at FCC Coleman Complex to any employee covered by the bargaining unit represented by the Union; (2) Afford the Union, upon request, the opportunity to negotiate in good faith in accordance with the Standard Ground Rules for Local Negotiations over the procedures relating to the cleaning of the protective equipment to be performed by any employee covered by the bargaining unit and the appropriate arrangements for any bargaining unit employee adversely affected by the assignment of such cleaning procedures, within thirty (30) days of the Union's request to bargain; (3) Send an electronic copy of this Award to the employees in the bargaining unit represented by the Union who were assigned to perform the cleaning of said protective equipment during the period March 1, 2010 to December 6, 2011 and post and maintain a copy of this Award for sixty (60) consecutive days in conspicuous places, including bulletin boards, where the cleaning of the protective equipment is performed. I shall also retain jurisdiction for a period of one year after the issuance of this Opinion and Award with regard to any dispute concerning the implementation of this award.