FEDERAL MEDIATION & CONCILIATION SERVICE

In the Matter of Arbitration	)	
	)	
between	)	
	)	
Federal Bureau of Prisons, Federal Correction Institution Miami, Florida	)	
	)	
and	)	Case No: FMCS 06-00504-3 (Bargaining Grievance)
	)	
American Federation of Government Employees, Local 3690	)	

Before: Robert B. Hoffman, Arbitrator

Appearances:
For the FBP: Elizabeth Kay Blackmon
For the Union: Jeffrey Van Brusselen

Place of Hearing: Miami, Florida
Date of Hearing: October 19, 2006
Briefs Received/Hearing closed: November 20, 2006
Date of Award: December 19, 2006

OPINION AND AWARD

A. Introduction

American Federation of Government Employees, Local 3690 ("the Union") maintains that Federal Bureau of Prisons, Federal Correction Institution, Miami, Florida ("the Agency") violated the Master Collective Bargaining Agreement ("MCBA"), laws and regulations when it refused to engage in impact bargaining concerning an Agency decision that would eliminate four custody posts. The Agency contends that, apart from some procedural arbitrability issues, the Agency had no obligation to negotiate inasmuch as the issue was expressly covered by the MCBA.

On January 5, 2005 Agency Director Lappin sent a written message to all staff regarding reduction in costs that the Agency had initiated earlier due to budget and deficit concerns and now sought to extend further for 2005. He noted that the identification of "mission critical posts" on the custodial quarterly roster would save overtime costs without reducing the number of correctional positions. One month later Warden Grayer implemented this phase by notifying all staff of modifications to the current custody posts for the quarterly roster that would take effect in March 2005. Relief positions would be established on all three shifts to reduce overtime and one Correctional Officer per two housing units would be assigned Sunday through Thursday on the morning watch. The latter constituted a change from assigning one officer per unit. In February 2005 the Union sought to invoke negotiations. The Agency replied that it had not duty inasmuch as the procedures for the roster are covered under Article 18.d.2 of the MCBA. The Warden stated that the roster would be evaluated at the end of the first six month period.

The Union then grieved and the Agency gave a similar response. On March 31, 2005 the Union retracted its grievance. On April 1, 2005 the Union filed another grievance over this action; The Agency rejected it procedurally as it had previously been withdrawn and on the merits for the reasons it rejected the first grievance. In each instance the Agency requested that the Union provide specific impact and implementation issues in writing, which the Agency never received. The status of that grievance is unknown in this record.

The facts leading to this instant grievance concern additional changes made on the next quarterly roster in August 2005 – the same change to one Correctional Officer per two housing units, but this time for the day watch, as described in the next section.

B. Threshold Issues

There are two issues raised by the Agency: Whether in accordance with Article 31.B of the MCBA the Union engaged in a "reasonable and concerted effort" to resolve the dispute before filing its formal written grievance; whether the grievance complied with the requirement of the grievance form per Article 31.f to specify the violation. Before embarking on whether one or both of these issues are sufficient to preclude the grievance on the merits, the sequence of events leading to the grievance will be examined.

On August 10, 2005 Warden Pastrana wrote a memorandum to all staff that included a number of "procedural changes," including "effective next quarter, the housing unit day watch will be comprised of one officer per two units, Monday through Friday." On August 11, 2005 the Warden notified the Union in a memorandum:

> Elimination of Posts. This is to officially notify you that the West Gate post along with three day watch Housing Unit Officer positions will be eliminated. These changes will take effect next quarter. As such, the posts have been removed from then upcoming quarterly roster. Should you have any questions please feel free to contact me.

The following day the Agency announced that the West Gate post was removed from the quarterly roster; one officer would be assigned to both units and three officers from three units would be assigned to sick/annual for the Day Watch. The roster committee would meet on August 31. Also on August 12 Union President Soto wrote the Warden as follows:

> Letter of Intent. This is to inform you of the [Union's] intent to invoke Impact and implementation negotiations on the memorandum provided to the Union on August 12, 2005 regarding the "Elimination of Posts."
>
> . . .
>
> The Union is requesting to meet with management to discuss ground rules for Impact and Implementation negotiations to include the scheduling of dates for the negotiations. . . .

On August 16, 2005 the Warden replied to President Soto that "the issue is expressly contained in the current Master Agreement . . . Article 18.d.2 . . . there is no duty to bargain at the local level." On August 17, 2005 Soto wrote a detailed memorandum to the Warden petitioning for an informal resolution. He cited four provisions of the MCBA and two USC

sections; he stated its position as to what "conditions of employment" changed by this unilateral action meant; Soto requested copies of documents that affected the decision, time to examine them, return to status quo ante and impact and implementation bargaining.

On September 23, 2005 Captain Byrne announced the changes. In the meantime, the Union's grievance, filed on behalf of all bargaining unit employees, reiterated in Block 6 the August 11, 2005 notice and the changes; the August 12, 2005 notice of intent to invoke negotiations; its request for a meeting; the Warden's decision on August 16 not to bargain citing Article 18.d.2. The Union then wrote:

> The Union holds that "conditions of employment" is a term of art expressly defined in Sec. 7103(a)(14) that means "policies, practices and matters established by rule, regulation or otherwise, affecting working conditions." The Union holds that Article 18.d.2 has no bearing on the issue and is not related to management's' duty to bargain on the proposed changes.
> The Union holds that where a decision to change conditions of employment of the bargaining class is protected by the Employees' 5 USC Sec. 7106 (a) rights, there is a duty to notify the Union on the Sec. 7106(b)(2) procedures the employer would follow in implementing its protected decision. Management's improper unilateral decision to implement a new roster on September 25, 2005, that changes working conditions, without the benefit of bargaining or negotiation violates the Sec.7114.b.2 statutory duty to discuss or negotiate on any condition of employment. Management's intent to implement the new roster on the fixed date . . . and its claim of having no duty to bargain over implementation of the roster clearly ascertains that management never intended to engage in I & I bargaining.

Finally, the Union requested the same four-prong remedy from its notice: status quo ante by reestablishing the posts; copies of all documentation regarding changes of working conditions; official time to examine the information; bargaining on all "I&I" issues germane to the new roster.

The Agency's Regional Director responded on October 13, 2005 that the Union failed to identify how the Agency violated Sec. 7114.b.4 and the cited provisions of the MCBA. He stated:

> The Agency is not charged with the responsibility of going through each and every section to determine the grievant's claim not to assume knowledge of claimed violations that are not clearly stated. It is the responsibility of the grieving party to point out clearly and precisely what is being claimed.
> . . . The Agency asserts that it has no duty to bargain over the removal of posts from the quarterly roster [citing Art. 18.d.2]. The roster issue, and the procedures for posting a roster,

needed to respond to this opening effort to informally resolve the grievance. Only then would it become "concerted;" it would be the next step in the informal resolution process. There was not much more the Union could do without the information needed to intelligently participate in the process. Suggesting that it propose some options in the face of these obstacles (i.e., the legal position that it had no obligation to bargain and its refusal to reply to the request for information about the decision and its impact) made little sense. To judiciously gauge the effects of this decision at the very least required the Agency to provide basic information about the decision. Its outright silence in not replying to the Union's request, and doing so in the face of its straightforward position that it had no contractual obligation to bargain, closed the door on any effort to informally resolve this grievance.

Whether the Agency provided the information or not, its position that it had no obligation to bargain and would not do so, meant that no reasonable effort could be made for an informal resolution. And even if the Union had taken another step and actually proposed some options for impact and implementation, it appeared fruitless. Thus, to maintain that it is the Union who thwarted efforts at informal resolution is misplaced and rejected.[2]

The Agency next maintains that the Union's claims are not clearly stated in block 6 of the grievance form as to how each of the cited codes and contract provisions were violated. As this arbitrator recently ruled in FBOP and AFGE, Local 3844, FMCS 051004-00017-3, (2006), where the Agency raised the same issue:

> It is true that the grievance is not artfully drawn up as a legal document that specifies with exactness the violation sections. The references are to Article 18, Hours of Work, in addition to "Local Supplements, overtime signing procedures and 5 USC." But the body of the grievance itself, the reference to soliciting employees for overtime with compensatory pay, and the

[2] The Agency's reliance on FBOP and AFGE Local 405 , FMCS 04-07975-3 (2005) is distinguishable. There the Agency sought examples from the Union of violations so it could discuss resolution. The Agency in the instant grievance well knew that the violations alleged involved its unilateral changes in the roster. It did not need examples. And even if it wanted the Union to make proposals, unlike the cited case, it still in effect maintained by its responses to the petition and the grievance that it had no contractual obligation to bargain with the Union.

> reference to Article 18, is sufficient enough to direct the Agency to Section "p," the only section within Article 18 that deals with overtime, as well as the two supplements the local parties negotiated concerning overtime . . . . The reference in the grievance to 5 USC obviously lacks specificity, with the Union omitting the section number, 5543(b) of this Title. But in so doing it clearly did not detract from the Agency's ability to discern that its conduct violated that very section, as seen in its acknowledgement set forth in the above grievance reply from Warden Drew.

The Agency should not have to guess as to what it allegedly did wrong. This certainly means writing a grievance that can be fully understood. As will be seen, this grievance is as relatively clear-cut as the above cited case. There the issue was soliciting compensatory time in lieu of paid overtime, an issue that management had no trouble acknowledging as well as its obligation not to do so. The issue here is also unambiguous – unilateral change without bargaining, facts that the Agency readily acknowledges, as well as unwaveringly maintaining that it had no obligation contractually to bargain. The Union's grievance could not be any more apparent: management unilaterally eliminated three duty posts in its August 2006 announcement and the Union sought bargaining over impact and implementation.

Although, as stated above, specificity seems inherent in any charge of wrongdoing, it cannot go unnoticed that Article 31.f, relied upon by the Agency, contains no reference to specificity; it only refers to the forms used for filing the grievance – "BOP 'Formal Grievance' forms . . . . " Those forms, in block 6, ask, "In what way were each of the above [in block 5] violated?"[3] With no reference to contract violations in block 5, the Union is left with providing a grievance on a form that is incomplete in expressing what information is needed. Nonetheless, the Union provided reasonable and adequate information in this grievance in both blocks 5 and 6 that enabled the Agency to knowingly respond to the statutory and contractual allegations.

[3] Block 5 calls for: "Federal Prison System Directive, Executive Order, or Statute violated." There is no reference to the MCBA. However, from this arbitrator's experience with the parties the Unions they usually include such contract sections in this block, as the local Union did here, along with two Code sections.

Thus, the Union included in block five two contractual violations along with code or statutory violations. In block 6 it set forth two paragraphs called "Digest of Facts" that specified the chronology leading up to the changes, as well as the Agency's responses to the Union Petition and Notice that it had no duty to bargain. The Union then included a section in block 6 called "Violations," and here it provided the basis for the code violations it cited in block 5. As a result, it is a grievance with much specificity that would enable management to reasonably comprehend it.

And, as noted, while the obligatory grievance form does not specifically require the contractual sections, and the Union did not argue them in block 6, it is most obvious from these simple and up-front facts that the Agency could reasonably conclude from the two cited contract sections that the Union believed the Agency violated its contractual duty to bargain over effects and implementation of that August 2006 roster decision.[4] The argument is straightforward enough as to not require any speculating or guessing by the Agency as to how the violations occurred – it unilaterally made the decision to do so, which it has the right to do, and it decided not to bargain over the implementation and impact regarding a matter that affected working conditions, according to the grievance, whereas Article 3.c requires such negotiations. Unmistakably and convincingly, the Agency understood these facts and argument as the violation when it responded that it had no contractual obligation based on the "covered by" doctrine and Article 18.[5] This position is rejected.

[4] Article 3.c refers to the impact bargaining duty prior to implementation where required by 5 USC 7106, 7114 and 7117. The Union cited the first two sections.

[5] So, too, its reliance on FBOP and AFGE Local 922, FMCS 01-14974 (2002) is misplaced. There the arbitrator found general allegations that lacked names and a time frame did not have the specificity needed to respond or resolve the grievance. That is not the case here, as seen by the above.

C. Merits

As seen, the sequence of facts are set forth as a prelude to the arbitrability section. Those facts are not in dispute. In addition, there is testimony that correctional officers had an increased burden after management implemented the change. The Union contends that by eliminating one officer an additional burden under Post Orders for housing units is placed on the remaining officer. One officer testified that it takes much longer to complete many of her duties, such as area searches, random rounds, inventory and inspection of equipment, supervising visiting inmates, controlling inmate movement, sanitary inspections, official counts and contraband searches. She testified that she must violate orders at times to cover both entrances. She further related that she is delayed in receiving keys from the previous watch officer because of the added responsibilities, which includes the exchange of additional information or incidents from both units. This delay also creates some time beyond her shift when making exchanges – five to ten minutes. A lieutenant testified that the door between units is supposed to be locked so there is no movement between units. He testified that the officer assigned to two units is stationed between the two units when inmates return from the compound. He recognized that this process can create a dilemma for officers.

1. Positions of Parties

a. The Union

The evidence indisputably establishes that the Agency refused to bargain on changes in working conditions. The Agency alleges that its protected decision is "covered by" the parties' contract, and, therefore, there is no requirement to bargain over the matter again. It relies upon Article 18.d.2, but there is nothing in this provision which expressly or tacitly covers the decision to eliminate posts from the quarterly roster. It deals with those procedures which the Agency will exercise when filling assignments on the quarterly roster. Not a single

Agency witness provided testimony to substantiate their interpretation of Section d. This section is a plain language reading with one notable exception; the phrase "that are available." Lieutenant Wenzler's testimony established that the Agency interprets this to mean that certain staff is precluded from bidding for some assignments because they are not qualified to work specific positions.

The Agency's internal policy triggered a requirement for bargaining when changes in Housing Unit Post Orders affected conditions of employment. Officer Colon and Lieutenant Vaughan testified that the change in working conditions adversely affected staff. For example, Colon indicated that staff was required to improvise and or take "shortcuts" in carrying out the described duties in Housing Unit Post Orders. She attributed these conditions to the elimination of staff from an adjoining housing unit. Vaughan testified that staff engaged in pre-shift and/or post shift duty related activity (inventory, briefing, key exchange, etc.) exceeding ten minutes per housing unit.

The Agency's decision in this matter is nothing new. In 1980, it implemented changes in working conditions at another correctional institution. Among other things it enacted changes which eliminated officers from Housing Units and required officers in adjoining units to provide coverage of both units. Local 2052 requested to bargain on the matter and the Agency refused. The Authority found the Employer violated the statute by refusing to negotiate. (FLRA Case 3-CA-861). The Union notes that even though the refusal had a *de minimus* impact on working conditions and did not warrant a return to status-quo ante, here there is extensive evidence of impact. Colon testified about staff having to improvise and/or take short-cuts in carrying out post order duties. The Arbitrator witnessed first hand one of these short-comings upon observing two unit entrance doors open, with staff posted at one entrance, leaving the other unattended in violation of post order procedures. Vaughan testified

that he interpreted the post order instructions to mean that the officer should position themselves midway between the unit entrances. This lack of clear and unambiguous procedures subjects staff to potential performance or disciplinary sanctions due to subjective interpretation by staff or supervisors.

b. The Agency

The procedures utilized when changing the Correctional Services Roster are "covered by" the MCBA. As such, no bargaining is required. An Agency has no statutory duty to bargain where the express language of the contract reasonably encompasses the subject in dispute; or if the subject in dispute is inseparably bound up with, or commonly considered to be an aspect of the matter in the contract provision, such that the negotiations will be presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in a provision of the contract. Social Security Administration, 47 FLRA 1004 (1993). Even assuming that the Union wanted to negotiate the health and safety of the staff working in the institution this matter is also covered in the MCBA under Article 27.

The correctional services rosters have existed since the implementation of the MCBA on March 8, 2001. Article 18, outlines the various steps which must be followed when assigning staff to posts on the quarterly roster. These steps were followed and the grievance is "covered by" the Agreement. If the arbitrator rules that the matter is not expressly covered, there can be no question that the issue is "inseparably bound up with" the matter mutually agreed upon in Article 18.

Quarterly rosters are prepared in accordance with the implementing procedures listed in the Master Agreement. A roster committee was formed consisting of representatives of management and the Union. The Union signs-off on the Quarterly Employee Preference Request Form during the meeting. The procedures previously used to post the quarterly

rosters were the same procedures used in implementing the quarterly rosters prior to the elimination of posts. At no time has the Union stated that these provisions outlined under Article 18 were not adhered to. In FLRA Case No. DA-CA-04-0202 (2004) the union alleged a statutory violation when the Agency pulled employees from assigned posts to circumvent overtime, without providing the Union notice and an opportunity to negotiate. The Authority stated:

> Article 18, Section o . . . expressly contains a provision that "work assignments on the same shift can be changed without advance notice." Other sections of Article 18 also address the issue of temporary changes to employee shifts or assignments (Section r and s) and employee overtime procedures (Section p). In this case, even assuming that the Agency's decisions on post assignments represented a change from those on the roster with actual or foreseeable impact on employees, the matter is expressly covered by the negotiated agreement and no additional bargaining obligation would have arisen.

Moreover, this issue has been raised previously by this local Union in prior grievances. Although it argued that the prior grievances were not similar, all grievances regard the correctional services roster and the duty to bargain over implementation of this roster. In those grievances the Agency requested I&I issues and the union did not provide the information, as here.

The Union asserts that bargaining unit staff has been harmed not one union witness showed how they were hurt. Although the issue is non-negotiable due to the "Covered By" doctrine, it would still be found non-negotiable if not "covered" due to management's right to assign work, and to also determine its internal security practices under Section 7106(a)(1) of the Statute and Article 5.a.1. of the Master Agreement. As to the remedy sought, i.e., status quo and compensation, such an award would be impracticable; it would result in a delay of what ultimately will be the same outcome and it would be unduly disruptive to the institution. The Union has not shown one employee who lost pay as a result of this change.

2. Decision

Article 3.c of the parties' contract clearly provides for the Agency to do the following:

> When notified by the other party, [to] 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.

And Article 4.c of the MCBA further provides:

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.

Finally, Article 7 obligates the Agency to notify the Union of 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.

There can be no question that the Agency provided the Union with timely notice of the changes well before implementation. And there is little doubt that once the Warden announced changes on the day watch that eliminated one officer per unit, an additional burden was placed on the remaining officers to perform more duties than those from the previous rosters. The evidence clarify points to what duties involved additional work, e.g., double inventory, a larger number of incidents to record and double the number of inmates to be accountable for. These are working conditions that changed from previous conditions that had one officer for each housing unit.

So, too there is no doubt that the Agency decided it had no duty to negotiate over this change despite these several contractual provisions for impact and implementation negotiations when conditions of employment were impacted. First, to be clear, the decision to make the change is not negotiable and the Union makes no such assertion here. The Agency had the right to make that decision. The Union objects to the failure of the Agency to then negotiate over the impact the decision had on working conditions and the implementing procedures. Secondly, the Union does not include in its issue any on officers who no longer worked the day shift in housing units and who still remain employed. No evidence was presented as to the impact, if any, on them.

It is evident that the contract conditions for such I&I bargaining *are conditioned on compliance with federal laws,* as seen above. Thus, for this grievance to be contractually sustained, the negotiation obligation alleged by the Union and the basis for negotiation must comply with certain U.S. Code provisions and the federal law concerning bargaining and union-employer relations. As to the latter, the Agency contends that a principle developed under cases dealing with federal unfair labor practices controls the analysis of whether there is any obligation to bargain. It cites U.S. Dept. Health and Human Services, SSA, 47 FLRA 1004 (1993), where the Federal Labor Relations Authority enunciated the "covered by" test for determining whether the matter in which bargaining is sought is covered by the CBA.[6] There, the Agency set forth a three prong test: "Expressly contained;" "Inseparably bound up with;" "Reasonably should have contemplated."

The Agency maintains that Article 18.d. of the MCBA covers any I&I issues involved in changing staffing requirement prior to the quarterly sign-up of employees on the blank roster. This section reads, inter alia:

> Quarterly rosters for the 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. The Union does not care how many managers are attending.
> 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 . . . .
> 3. the roster committee will meet and formulate the roster assignments no later than five (5) weeks prior to the effective date of the roster change.
> 4. . . .
> 5. once the competed roster is posted, all Correctional Officers will have one (1) week to submit any complaints or concerns . . . No later than the following Wednesday, Management and the Union will meet to discuss the complaints or concerns received, and make any adjustments as needed.

[6] The Union's reliance on FLRA Case 3-CA-861 (1980) does not take into account that 13 years later the Authority began using the "covered by " test to determine if bargaining was initially required. The Union does not dispute that the test now needs to be considered.

Clearly this Section does not expressly contain language that covers the Agency changing staffing needs. And while "an exact congruence of language" is not required, it cannot be concluded that "a reasonable reader would conclude that the provision settles the matter in dispute." The Agency did not articulate where the exactness lies in this section; it is obvious that there is none.

It is difficult to conclude that the decision is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." The Authority clarified this prong. It asks "whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision." Again, the Agency has not articulated how this prong would work. It could be that the joint management-union committee that makes-up the roster, and then resolves "any complaints or concerns" from employees inseparably covers this issue, but the Agency does not rely on this language at all. Thus prong 2 is not a sure thing. "Inseparably" is a strong word that suggests more certainty than appears here.[7]

Prong 3 speaks of whether "the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." If this is one of those matters that is only "tangentially" related to the provisions in the agreement and not intended to be within its scope, then the "covered by" doctrine would not apply. Again the provision for redress of concerns, without any limitation as to what those concerns may encompass, may suggest that the parties contemplated issues that would arise as a result of changes. Nonetheless, as seen above, the Agency does not rely on this provision in Article 18.d in its

[7] "*Incapable* of being separated or disjoined." *Webster's Third International Dictionary*, (2002).

argument. Thus, the notion that changes in posts "are covered by" this Article 18.d is at best tentative and would require a stretch of the imagination. It fails to reach the level of preponderance of proof needed in arbitration.

But is the Union still barred from negotiations based on other statutory provisions? Proposals that interfere with management's rights may be nonnegotiable if they hinder the Agency acting at all.[8] The MCBA provides that impact conditions of employment to be negotiated must be "required by 5 USC 7106, 7114 and 7117." Sec. 7106 establishes certain management rights, including the following:

> to determine . . . internal security practices of the agency; (Sec. 7106(a)(1)
> to assign work. . . . (Sec. 7106(a)(2)(B)

At the same time subsection (b)(3) provides that nothing in 7106(a) shall preclude any agency from "negotiating appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." As such, some interference with management rights may be allowed unless there is "excessive interference" with those rights.[9] And that was the case in U.S. Dept. Justice, Federal Bureau of Prisons and AFGE Local 506, 58 FLRA 291 (2003), where the Agency at its Coleman, Florida facility, as here, assigned only one Correctional Officer to guard two housing units for the day watch. An arbitrator, relying on another arbitrator's decision from the same facility on this issue, found that this action violated the safety provisions of Article 27. Both arbitrators concluded that

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[8] See Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. At 1290, citing Dept. of Def. v. FLRA, 828 F2d 834 (DCCA 1987).

[9] Elkouri, supra. "What constitutes negotiable appropriate arrangements has occasioned considerable litigation." The FLRA will examine the nature and extent of the impact; the circumstances of the effect and the extent of employee control; nature of the management right affected; extent of harm to the management right in relation to the benefit to employees; effect of the proposal on the efficient operation of government. See AFGE Local 513, 41 FLRA 689 (1991).

this type of assignment increased the inherent risks for correctional officers; they ordered, per a program statement, one officer in all housing units on each shift, as had previously existed.[10]

The Agency argued that the award was contrary to the various management rights in 7106. The Authority found that "the arbitrator's award directing the Agency to place Correctional Officers in all housing units on each shift affected two key management rights: to determine its internal security practices and to assign work. The award was in effect an "arrangement" within the meaning of 7106(b)(3). This created a benefit to employees and increased their safety. Using the analysis formulated in the so-called BEP case, U.S. Dept. Treasury, Bureau of Engraving and Printing, 53 FLRA 146 (1997), the Authority found that the assignment of employees by this award excessively interfered with management rights. It wrote:

> The award requires the agency to assign, without qualification or exception, additional employees to provide inmate coverage, thereby substantially affecting, without recourse, the Agency's ability to determine the particular duties to be assigned to those employees who must now occupy these correctional officer positions, as well as when such work assignments will occur. The Agency would also need to reassign employees from other areas of its facility where the Agency would otherwise have these employees perform work, thereby impacting the Agency's ability to have work accomplished in those other areas. The award does not permit the agency to decrease staffing levels for good cause, emergencies, internal security considerations or any other reason. In light of these significant restrictions, we find that the benefits afforded to employees by Article 27, as interpreted, are outweighed by significant restrictions on management's right to assign work and to determine internal security practices.

There are concerns that impact employees here and it is so found. Clearly the doubling of the inmates that housing unit officers must now guard creates inherent problems and hazards for many of the duties they perform. And while some of them are of lesser concern and may not be as troubling as others, it is sufficiently shown that others exist that adversely

[10] That statement, 5500.09, was likely replaced by 5500.12 (Oct. 2003), supra, that does not contain a numerical designation per unit.

affect employees in their carrying out duties that now include responsibilities for two units rather than one.[11]

The foremost examples at the hearing included among others: confusion as to where the officer must now be stationed when inmates return from the compound; the checking of inmates upon return when they are going in separate door for each unit; whether both units are unlocked at the same time; control of visiting inmates between units.[12] Whether the added responsibilities compromise security in these areas, as well as others, needs to be clarified in arrangements that result from negotiations. Security of the officers is clearly a condition of employment that is affected. These types of concerns are generally covered under Post Orders. Program Statement 5500.12 recognizes that while such orders are assignments (which come from management's rights), ". . . there may be post order changes that effect conditions of employment *which may warrant bargaining over procedures and appropriate arrangements.*" (emphasis added)

Clearly this type of arrangement negotiating will not make the operation less efficient. In fact it will bring order to what in some instances appears to be confusion as seen in the

[11] Several examples were given by Union witnesses that also question whether any harm resulted. Although some employees worked additional time after their shift, it is undisputed that employees knew of the procedure to receive additional compensation. As to duties becoming more time consuming, for the equipment inventory, rather than the several additional minutes claimed it would take, a witness showed the arbitrator and the parties how it could be done in 35-40 seconds. Another concern involved a requirement for five separate shakedowns during the day, with each shakedown taking twenty (20) minutes or over 1.5 hours; but that time could be substantially reduced by shaking down one, three person cell. On the other hand there is evidence that employees were confused about the locking procedures for the two units, where to position themselves when employees returned from the compound, and otherwise their responsibilities were increased with the doubling of inmates on their watch.

[12] It appears according to a Lieutenant's testimony that the officer should be stationed in the middle between units when inmates come back from the compound once an hour; the officer would then check them as they go into the open doors of each unit. However, it appears that some officers close one of the doors and station themselves at the open door and have all inmates enter one unit. The inmates from the other unit then go into a hallway and a door to their own unit. The problem is that the inside door to the other unit is supposed to be locked according to Post Orders; inmates from one unit are not allowed in the other unit, unless as visitors. There are Special Instructions for Housing Units at this facility that therefore need clarification or modification.

above example. Clarification of duties can hardly harm management's right to assign or its internal security practices, as the remedy did in the above cited case. This remedy is geared to benefit both parties.

In short, while the arbitrator will not order a status quo ante remedy as requested by the Union, as it will interfere with management rights, a negotiable impact remedy that goes to appropriate arrangements for Post Orders is proper, and it is so ordered. In fact, management solicited proposals from the Union, twice in writing, even with its position that it had no obligation to bargain.[13] This action by the Agency suggests that there is a willingness to meet and discuss remedies that otherwise meet the test of not excessively interfering with management rights. Further, it is found that this type of remedy does not create an arrangement that excessively interferes with any management right, and as such it conforms to Articles 3, 4 and 7 of the MCBA and the statutes cited therein as well as the Agency's own Program Statement 5500.12. But for the violations of these provisions such impact type negotiations would have occurred.[14]

Award

Based on the above and the entire record, the grievance is arbitrable and the threshold issues are found to have no merit. The grievance is sustained on its merits. The remedy is set forth in the final paragraph of this decision. The arbitrator shall retain jurisdiction for 90

[13] On February 22, 2005, when responding to the Union request for I&I negotiations, the Associate Warden wrote: "As always and as previously instructed, should you have any specific I & I issues that you believe are negotiable, you should submit them in writing to us." The again on April 28, 2005, responding to the April 1, 2005 grievance: "In addition, on February 22, 2005, you were advised to provide any specific impact and implementation (I&I) issues in writing for consideration." Asked at the hearing why the Agency asked for proposals when it claimed it had no duty to bargain, HR Manager Cuero testified: "We did not say that we would refuse to listen to them."

[14] To be clear the entire I&I remedy is not ordered. To order implementation bargaining after the fact would require the status quo ante remedy, which for the reasons above, is improper. Thus, the impact portion of the remedy here is allowable, as described above.

days from the date of issuance of this Decision to resolve any questions regarding the administration of the Award only.

/s/ Robert B. Hoffman

Robert B. Hoffman
Arbitrator