In the Matter of Arbitration Between

American Federation of Government Employees, Local 501, Federal Detention Center, Miami, Florida

Union,

and

U. S. Department of Justice, Federal Bureau of Prisons, Federal Detention Center, Miami, Florida

Agency.

_____/

FMCS NO. 210512-06662

OPINION AND AWARD

Appearances:
For the Union:
Mark J. Berkowitz, Esq.
Mark J. Berkowitz, P. A.
110 SE 6th Street, Suite 1700
Fort Lauderdale, FL. 33301-5047

For the Agency:
Kevin D. Watson
Labor Relations Specialist
U. S. Department of Justice
Bureau of Prisons
Washington, D. C. 20534

The hearing in this matter was held in Miami, Florida via Zoom on December 16-17, 2021. The parties called witnesses and presented documentary and other evidence. The Union called four witnesses, the Employer five, and the parties introduced a total of 21 exhibits. A transcript of the proceedings was made and the parties opted to submit post-hearing briefs in lieu of oral closing arguments. This Opinion and Award follows.

BACKGROUND FACTS

The grievance was filed on March 5, 2021, claiming the following violations:

> On March 1, 2021 the union became aware that management at FDC Miami is failed [sic] to follow Master Agreement Articles 27, Section a.1. Which states there is two distinct areas of concern regarding the safety and health of employee in the Federal Bureau of Prison. First, which affects the safety and wellbeing of employees involve the inherent hazard of correctional environment. On March 1, 2021 management roster adjusted several staff who were attending Annual Refresher Training to work at different positions throughout the building without their protective equipment(Stab resist vest , duty belt, and safety boots). Union local 501 finds management actions is an attempt to avoid the use of overtime procedures, and a disregard for the safety of their employees.

For relief, the grievance requests:

> Ask management to follow Master Agreement article 27. To cease and desist present and future practices to roster adjust staff attending annual refresher training. Order the agency to abide by applicable laws and rules and regulations in regards to overtime procedures. Make employee whole in accordance with Back Pay Act.

The essence of the grievance is that certain bargaining unit members who had been assigned to, and were attending training, were "roster adjusted" out of training to other assignments. These assignments, according to the Union, were either for the purpose of, or had the effect of, denying overtime compensation to certain other employees, and also caused these employees to go to the adjusted assignments without all appropriate protective gear, such as safety boots, stab vests, safety gloves, and duty belts. The Union alleges these violations occurred on March 1, 2, and 3, 2021. JX3.[1]

---

[1] The Exhibits will be referred to as: JX for Joint Exhibits; UX for Union Exhibits; and AX for Agency Exhibits. The Court reporter did not continuously paginate the two days of the hearing transcript. Each day's transcript starts at page 1. All of the Union's witnesses are in the first volume and all of the Agency's witnesses are in the second volume.

THE TESTIMONY

The Union's Witnesses:

The Union's first witness was Eric Spiers, the President of the local union. He has been a senior correctional officer for 11 years and is currently stationed at the Miami Federal Detention Center (FDC). He described the duties and responsibilities of a correctional officer and those of his Union position. Tr. 15-16. He described the Memorandum of Understanding (MOU) as an agreement applicable at the FDC which "designates and declares how overtime is to be distributed equally and equitably and fairly." Tr. 18. He said correctional officers are stationed usually mostly in housing units where the inmates reside and in the control center, special housing unit, and solitary confinement. Tr. 19. He described the voluntary and mandatory overtime procedures. Tr. 19-21.

Mr. Spiers described and demonstrated some of the safety equipment used by correctional officers at the FDC, including stab vests, safety shoes, safety gloves, and duty belts. Mr. Spiers described the Annual Refresher Training (ART). Tr. 32. He said correctional officers usually attend ART in business casual attire (polo shirt or shirt and jeans or pants and sneakers). Tr. 33. He said he has never worn personal protective equipment (PPE) at training sessions and to his knowledge never was instructed to do so. Tr. 34. Mr. Spiers described UX3-5 as the daily assignment sheets for March 1, 2, and 3, 2021 for ART. Tr. 35. When asked if UX3 shows that "employees were taken out of training and put back into the operational part of the facility," Mr. Spiers said "I believe so." Tr. 37. Mr. Spiers could not describe how UX3 and the MOU impacted overtime assignments. Tr. 38-9.

Mr. Spiers said the assignments out of ART was a violation of the MOU because other officers that had signed up for day shift overtime on this particular day (March 2, 2021) "would

have been" skipped for that post because the Agency did not follow proper overtime procedures. Tr. 40-41. Regarding UX5 (the daily assignment sheet for March 3, 2021), Mr. Spiers said employees were taken out of annual training and sent to the hospital. Tr. 42. He said, however, "I might be wrong" but it appears officers in annual training were sent to the hospital to cover overtime at that post instead of being in annual training. Tr. 43. He said those officers were "supposed to, you know, have safety shoes on and other safety equipment out there." Tr. 44. He said those employees were placed in danger by being transferred to (I believe he meant out of) training, or the court reporter took it down incorrectly. He said there were 18 employees in annual training on March 3, 2021. *Id.* Mr. Spiers then reviewed UX4 and 5 to the same effect.

On cross-examination, Mr. Spiers was asked some questions about the date of the MOU and the CBA. Tr. 49-50. He described the voluntary and mandatory overtime process. Tr. 52. Mr. Spiers was unable to identify the areas in FDC that are foot hazard areas. Tr. 54-5. He stated all of the housing units, the response posts, and "most areas" because of a requirement to respond to emergencies. Tr. 55. He said a duty belt and protective gloves are not required for all correctional officers. Tr. 57-8. Mr. Spiers said if a correctional officer forgets a vest or duty belt they are supposed to get one from the lock shop, although he noted the lock shop is only available on the day watch. Tr. 58. He said the ART takes place outside the secure environs of FDC. He agreed management has the right to reassign staff. Tr. 59.

Regarding his testimony that Officer Page had been moved from ART to 10 West, he stated he "may have misspoke." Tr. 60. He said on the three dates identified in the grievance (March 1-3, 2021) there was no annual training. "That's why we did the grievance." Tr. 64. He did not know if safety boots were required at the hospital but would be needed taking an inmate to and

from the hospital. Tr. 66. Referring UX5, page 2, he said it appears all staff on assignment at the hospital were on overtime. Tr. 67.

On re-direct examination, Mr. Spiers was asked about his personal knowledge of the re-assignments on March 1-3, and he said he was told by numerous employees they did shakedowns for two days. Tr. 70. As to whether in those shakedowns the employees were wearing their personal protective equipment, he said "I believe they were not." Tr. 70-71. Mr. Spiers said he did not have personal knowledge whether safety equipment was available for officers on those days. Tr. 73.

The Union's next witness was Augusto Ortega, a senior officer specialist at FDC for 26 years. He is also vice president of communications for the Union. Tr. 75-76. There was some discussion about why an informal grievance was filed. Mr. Ortega said his knowledge of the facts supporting the grievance comes from the documents in evidence-the daily overtime rosters. Tr. 81-82. He said those exhibits (UX3-5) tell where all the staff were working that day and the area they worked. Tr. 82. He said those documents show the officers that were in training and were transferred to different areas. Tr. 83.

Mr. Ortega said UX7 (a daily roster) shows who logged in on the overtime roster and the second page is the people that were skipped for overtime on those specific dates. The third page shows the officers that were skipped and those that were assigned overtime. Tr. 85. Mr. Ortega did not come up with an amount owing for overtime but calculated "roughly $5,000.00." Tr. 87. He said all of the people transferred required personal protective equipment. Tr. 89.

On cross-examination, Mr. Ortega agreed that management has the authority to reassign correctional staff from annual refresher training to a custody post, but they have to "follow policy" by going through the chain of command. Tr. 92-3. Mr. Ortega identified several officers who

were assigned overtime. Mr. Ortega said bulletproof vests are issued on a daily as needed basis whereas stab vests are provided to officers. Tr. 100.

On re-direct examination, Mr. Ortega, said he believes Officer Orr was assigned to 10 East and for that he needed safety equipment.

The Union's next witness was Daniel King, a custody officer. Tr. 105. He is a Union shop steward. Tr. 106. He had knowledge of correctional officers being pulled out of ART. He said volunteers were requested first and since no one volunteered they started randomly selecting officers to units. Tr. 107. They did not have their personal protective equipment with them. He said the lock shop has vests, duty belts and such. Tr. 108. Mr. King was not reassigned on March 1-3, but named some of the officers he recalled who were removed from ART. Tr. 109-111. He said a shakedown did not occur on March 1-3. Tr. 112. Regarding the Union's calculation of damages, he said they tried to use the average officer. Tr. 112-113.

On cross-examination, Mr. King said staff do not have their PPE with them ART. Tr. 118. He said boots are required beyond the second floor. Tr. 119. He said the officers taken from ART told the supervisors they did not have their PPE with them. Tr. 121. He named specifically Officers Flanagan and Joseph. Tr. 122.

The Union's last witness was Brendan Flanagan, a correctional officer at FDC. Mr. Flanagan was not called out of ART on March 1-3. Tr. 125. He said he knows people were called out of ART on March 1 but did not know who specifically. He said officers do not typically bring their PPE to training. Tr. 126. He said every day of the ART several officers were called out.

The Agency's Witnesses:

The Agency's first witness was Eugene Carlton, who is the Warden of FDC. His duties are to oversee the overall administrative and operational functions of FDC. Tr. 14. He had been

Warden at FDC for approximately 21 months when this grievance arose. He stated his understanding of the grievance is the Union believes management did not have authority to move staff out of ART and those staff were not provided protective equipment. Tr. 15. Since the events of March 1-3 he has not had any discussions with the Union about this grievance nor did any of the correctional officers come to him about being reassigned. Tr. 16. He said the Agency has the authority to determine the mission, the budget, internal security practices. Tr. 17. He said section 7106 and page 8 of the CBA state the same thing. Tr. 20. Mr. Carlton said he was aware of the declaration of a national emergency on March 13, 2020, and that it is still in effect. Tr. 21.

Mr. Carlton said it is management that makes the determination when it is necessary to pay overtime. Tr. 23. That the Agency has to make the best decisions based on the available staff, internal security concerns, and available resources. *Id.*

On cross-examination, Mr. Carlton said under the CBA an employee must first go to the lowest level of management to make any type of complaint and that would be the lieutenant or captain level. He did not know if any had done so regarding this grievance. Tr. 24. He said management rights are spelled out in the CBA and he did not believe management rights would be curtailed by other provisions of the CBA, but management cannot exercise rights in violation of the law. Tr. 26. Mr. Carlton said under emergency circumstances management has the right to implement policies and procedures. Tr. 27. He said after management determines overtime is necessary, that is when the MOU comes into play. Tr. 31. He said the MOU is not a restriction on the right of management to order the payment of overtime. Tr. 33. Regarding Article 27 of the CBA, it is not overridden by the emergency. Tr. 34.[2]

---

[2] Article 27 says participation of the union is essential to the success of safety programs.

He said if staff forgets emergency equipment, the FDC has an ample supply to provide them. Tr. 36. He said "it may have happened" that an employee from training went into the housing unit without proper boots and this would not be a violation of the CBA. Tr. 37-39. Mr. Carlton said employees are made fully aware they may be called into the institution while they are in training. Tr. 38. He said an employee that goes into the housing unit "without a specifically tailor-made stab vest" would be subject to a danger or possible liability because there is inherent danger going into the institution. Tr. 40. He is not aware of any provision allowing an employee to decline to go into the facility without the proper PPE. Tr. 41.

On re-direct examination, Mr. Carlton said it is the employee's responsibility to advise their supervisor they do not have their equipment. Tr. 43. He said employees are measured for their initial vest. Tr. 44.

The Agency's next witness was Alexis Brown, the Human Resources Manager at FDC. Tr. 46. Her chain of command is the associate warden and the executive staff are the warden, the associate wardens, the executive assistant, and the captain. Tr. 48. She said there are signs posted stating "vest required beyond this point" but no signs that state boots required beyond this point. Tr. 49. Ms. Brown referenced and read from certain duties and responsibilities from position descriptions.

On cross-examination, Ms. Brown said she did not write any of those position descriptions and without referring to them would not know the type of PPE required for those positions and safety boots are not considered part of the uniform according to the program statement. Tr. 58-59.

The Agency's next witness was Bobby Mays, the Employment Development Manager at FDC for 13 years. Part of his duties include coordinating and implementing training for correctional officers. Mr. Mays was in charge of ART during fiscal year 2021. Tr. 63-64. He

identified AX6 as the annual training agenda for fiscal year 2021 and stated it was not canceled on March 1-3, 2021. Tr. 65. He said he has personal knowledge that ART participants being told they would possibly be going into the FDC during the week and everyone needed to have their protective equipment with them. Tr. 65-66. However, Mr. Mays did not describe the basis of his "personal knowledge." Regarding AX7, Mr. Mays described it as the list of classes for the ART and it shows the names of the participants who participated in and completed class during those three days. Tr. 67.

On cross-examination, Mr. Mays could not say if there was a formal written B.O.P. policy to the effect that officers in training are informed to bring all their personal protective equipment or anything specifically directed to this training. Tr. 68-9. He could not say if any of the individuals on AX7 had their PPE with them at the ART. Tr. 72.

In answering the arbitrator's questions, Mr. Mays said he knew for a fact that the officers who attended ART March 1-3 were advised to bring their PPE with them (Tr. 73), but when asked how he knew this, Mr. Mays was only able to say ART is done every year and "staff are required to have their PPE with them at all times because at any given time – this is a correctional setting where they would have to respond inside." Tr. 74. In answer to a further cross-examination question, Mr. Mays was not able to say who gave that notification. Tr. 75.

The Agency's next witness was Jeffrey Weirich, a captain at FDC since 2018. He is chief of security and head of the department for correctional services. Tr. 77. He reports to the associate warden and lieutenants and correctional officers report to him. Tr. 79. He said correctional officers are required to have their PPE "on them and readily available when assigned to ART." *Id.* However, on the next page, Mr. Weirich said the "should" have their equipment with them any time they come to work." Tr. 80. He said he "did instruct the class to make sure they had their

equipment because we would be doing some shakedowns on the back-to-basics day." Tr. 81. He discussed the signs in AX8 (vest required beyond this point), said certain footwear is not required beyond this point, vests and gloves are but not duty belts which are optional. Tr. 82. He said AX9 tracks all staff vests as to whom they are issued and expiration dates and that FDC ordered all new vests in 2019. Tr. 83. He said loaner vests are available if an officer does not have his/her vest and that they were available from the lock shop even if not on the day shift. Tr. 84.[3]

On cross-examination, Mr. Weirich could not say if he was present at ART on March 1-3, 2021. Tr. 88. He said the lock shop does not issue boots. He said safety boots (steel tipped) are not required in the housing units. Tr. 90. Correctional officers are required to wear boots as part of their uniform. Tr. 92. Mr. Weirich did not have personal knowledge where the ART officers were assigned on March 1-3, 2021. Tr. 94. There were a number of questions about which parts of the FDC boots are required, and the witness said boots are part of the uniform.

On re-direct examination, Mr. Weirich said a non-uniform BOP staff member may be assigned to a custody post even if they did not have a uniform. Tr. 98.

On its rebuttal case, the Union recalled Mr. Spiers who reiterated his previous testimony regarding uniforms and ordering them and said boots are part of the uniform. Tr. 103.

On cross-examination, Mr. Spiers said he believed on a "dress-down" day, a correctional officer can come to work without boots and assume a post. Tr. 103.

THE ISSUES

Unless parties agree on the issues in a given case, the issues are defined by the written grievance and management's response. Here, there was no specific agreement on the issues

---

[3] AX9 was subsequently withdrawn by the Agency.

between counsel at the hearing. Accordingly, based on the written grievance (JX2-3) and management's response (JX4), I determine the issues to be the following:

1. Whether the Agency violated Article 27 (Health and Safety) section a.1. when it assigned several staff attending ART to work at different positions in the FDC without their protective equipment, including stab vest, duty belt, and safety boots).
2. Whether the Agency violated Article 18 (Hours of Work) and the Negotiated Agreement, also called the MOU, by avoiding overtime payments to certain correctional officers.
3. In response to the grievance, the Agency raised several procedural arguments, including that the grievance was filed with the wrong management official, the grievance form was not properly completed, and the grievance did not specify how the grieved articles were violated. JX4.

THE PARTIES ARGUMENTS[4]

The Union's Arguments:

The Union argues Article 18 of the Master Agreement requires application of the Fair Labor Standards Act regarding the assignment of overtime hours to bargaining unit employees; that Article 27 requires the parties to work cooperatively, not unilaterally, in the implementation of safety procedures; and that Article 28 requires adequate safety equipment and supplies be available in operations areas of the facility. UB1.[5]

The Union argues the Agency's position, that the pandemic-related declared national emergency gives it authority to ignore the provisions of the Master Agreement and the Memorandum of Understanding (MOU), is without legal justification. UB2. The Union asserts

---

[4] This Section is intended to describe the parties' arguments for context but not to set them out in detail. The arbitrator has considered all of the arguments though they may not be described here.

[5] The Union's Brief will be referred to as UB and the Agency's Brief as AB.

the Agency failed to introduce any evidence or demonstrate how the pandemic affected Agency's operations that would allow it to ignore the collective bargaining process. Id.

The Union argues the Warden admitted in his testimony that the Agency committed contractual violations when the Warden testified employees "may have" gone from training into housing without proper boots. UB3. That the Warden also agreed ensuring safety is to be a joint effort between the Union and the Agency. The Union states no Agency witness credibly testified from first-hand knowledge that employees arrived at their training sessions with their own personal protective equipment and that the overwhelming evidence was that they arrived in business casual attire without their personal protective equipment. UB4-5. The Union states bargaining unit members do not possess their safety equipment during training nor are they ordered to do so and that boots need to be specifically ordered and vests are specifically tailored for individual employees. UB5.

The Union states its testimony describes the overtime assignment procedures being a voluntary component and an assignment component depending on the circumstances at the time. UN6. The Union argues the three applicable daily rosters (UX3-5) show various bargaining unit employees were taken out of training and moved into the operational areas of the facility resulting in other employees being improperly skipped for overtime assignments in violation of the MOU. UB7. The Union states its economic analysis is that bargaining unit employees who were removed from training sessions and bypassed for overtime lost a total of five thousand dollars. UB8.

The Union argues because employees were ordered into dangerous areas of the facility without their personal protective equipment there was a violation of the General Duty Clause of the Occupational Safety and Health Act of 1970 which requires all employers to provide a work environment "free from recognized hazards that are causing or likely to cause death or serious

physical harm." UB9. The Union argues the Agency's "directive" is void as against public policy and, therefore, unenforceable. UB9.[6]

The Union states the NLRB's decision in *Port Printing & Specialities,* 351 NLRB 1269 (2007) limits the exigency exception to the duty to bargain before implementing unilateral changes to exigencies "having a major economic effect requiring management to take immediate action and requiring a "compelling business justification." UB9-10. In this case, the Union argues, the Agency merely cited the coronavirus national emergency but did not provide any "real justification" for its unilateral action or how the emergency had an impact on its operations or the efficiency of those operations. UB10.

The Union argues that arbitral authority also supports its position. It cites How Arbitration Works, by Elkouri and Elkouri for the definition of "emergency" as an unforeseen combination of circumstances that calls for immediate supervisory action. UB10. Accord, *Virginia-Carolina Chem. Co.,* 42 Labor Arbitration Reports (LA), 237, 240 (Kesselman 1964), and cases supporting the proposition that the issue is not whether management's actions were reasonable or non-arbitrary, but whether management's actions were actually tied to the emergency. The Union cites *Canadian Porcelain Co.,* 41 LA 417,418 (Hanrahan 1963) that the limits on management's authority to act in the face of an emergency include: management must not be directly responsible for the emergency; the emergency must materially threaten to impair business operations; it must be of limited time and duration; and the suspension of contractual provisors must be unavoidable and limited to the duration of the emergency.

When making assignments during an emergency, the Union argues management's actions must be in good faith and reasonable in scope and there must be "some minimal rational basis" for

---

[6] Citing *Katz v. Frank Weinberg & Black, P.L.*, 268 So. 3d 773 (Fla. 4th DCA 2019), and *Dillin v. Constr. & Turnaround Servs, LLC,* (D.C. NJ 2015).

management's actions, citing several arbitration awards. UB11. The Union argues the Agency acted unilaterally and without justification and that its position, that it has absolute authority to make the assignments at issue, based on the pandemic national emergency is contrary to the essence of the collective bargaining process.

The Union argues it is entitled to an award of reasonable attorney's fees pursuant to 5 U.SC. 5596(A)(ii) and 5 U.S.C. 7701(g). UB14.

The Agency's Arguments:

The Agency describes its core values and states the President declared a national emergency on March 13, 2020, concerning the coronavirus disease pandemic. The national emergency was continued on February 24, 2021, by President Biden. AB2. As a result, the Agency states, it had not returned to "normal operations" during the applicable period of this grievance. The Agency references 5 U.S.C. §7106 – Management Rights, and Articles 5 and 18 of the Master Agreement.

The Agency argues the chain of command is critical when it comes to federal law enforcement and the Agency has 122 institutions, 6 regional offices, and one 1 central office. The Agency employs 36,000 employees, supervises 153,000 federal prisoners in 37 states and Puerto Rico. AB7.

The Agency states non-custody staff are all qualified to replace or substitute any custody staff when required by circumstances. These non-custody staff are identified by NC on UX 3-5. The Agency argues the Union presented no evidence showing it did not have authority to "reassign" staff on March 1-3, 2021, and 5 U.S.C. §7106(a)(2)(d) gives the Agency authority to take whatever actions may be necessary to carry out the Agency's mission during emergencies. AB9. That section7106(a) allows management to determine internal security practices as well as

assign employees and assign work. These rights, the Agency says, are reiterated in Article 5, Sections a(1) and (2) of the CBA. AB10.

The Agency argues the reassignments that are the subject of this grievance were in the best interest of staff and inmates. AB11. That management has the authority and responsibility to allocate staff resources effectively to ensure the efficiency of the service and to take whatever actions may be necessary to carry out the Agency's mission during emergencies.

The Agency states that AX7 and UX3-5 show only two staff members were reassigned from training: Angel Santos, Jr., and Ebony Orr, and that Mr. Garcia and Mr. Page were not in training on March 3, 2021 as they were using eight hours of sick leave. AB12. That Mr. Santos was reassigned to 8-East for the 6am to 2pm shift and Mr. Orr was reassigned to 13 West for that same shift. *Id.* The Agency states these two correctional officers "were needed by the agency in order to determine the personnel by which Agency operations were conducted (Per MA Article 5 b)." *Id.*

The Agency states AX7 and UX3-5 show only two correctional officers were reassigned during the three day period March 1-3, 2021 and that there were 56 overtime occurrences for March 1, 59 overtime occurrences for March 2, and 49 overtime occurrences for March 3. AB13.

The Agency argues it has to make the best decisions based on the available staff and internal security concerns to the best extent possible based on available resources. In this regard, the Agency argues Article 27 of the CBA deals with the safety and health of employees. That safety and well-being involves the inherent hazards of a correction environment and safety and health involve lowering inherent hazards to the lowest possible level. AB14. The Agency states at no time did it require an employee to work a post, specifically a correctional officer, to work a custody post without the proper equipment. That the Union failed to prove it did so. That merely

reassigning a correctional officer from training to a correctional post does not meet the contractual standard necessary to establish the Agency failed to reduce the inherent risks of prison work to the lowest possible level. AB 15.

The Agency notes the position description for correctional officers states in the Major Duties and Responsibilities section that during institution emergencies or periods of heavy workload or limited staff, correctional officers may be required to work long and irregular hours, unusual shifts, etc. AB16, citing AX4. The Agency states temporary vests are available for staff and that they are located in the "lock shop" which was available during the day watch shifts. *Id.*

The Agency argues the National Protective Vest Procedures section of UX10 states staff are required to wear the vest while participating in applicable training sessions relating to self defense and that the Agency's witnesses testified the training class was informed on the first day they were to have all their PPE in case they were called to go inside the institution. As to protective gloves, UX11 addresses how management will provide temporary gloves if needed. AB17.

DISCUSSION

Procedural Issues:

The Agency properly and timely raised several procedural issues in its response to the grievance regarding the manner of filing the grievance, but not the timeliness of the grievance, and identified arbitrability as an issue in its brief (AB1) but made no argument in the brief on these issues. Even had the procedural issues been pursued more vigorously, I would have been inclined to rule on the merits of the grievance inasmuch there was no identifiable prejudice to the Agency's understanding of the grievance and no prejudice to the Agency's ability to fully prepare its defenses. Further, no penalty is specified in the CBA for a failure to strictly adhere to these

grievance procedures. Striking the grievance where there is no discernible prejudice to the Agency would unfairly promote form over substance.

The Merits:

There are two aspects to this grievance: First, the Union challenges the Agency's action reassigning correctional officers from ART to other parts of the facility when the officers did not have all of their protective gear; and second, the Union challenges the Agency's authority to reassign correctional officers from ART to correctional duties in other parts of the facility when doing so allegedly violates the provisions of the negotiated agreement (MOU) dealing with overtime in that the assignments caused some officers to lose overtime opportunities.

The Allegations There Were Assignments From ART Without Protective Equipment

Article 27 of the CBA (Health And Safety) deals with workplace safety and health. Section a.1 deals with those aspects of the safety and well-being of employees that "involves the inherent hazards of a correctional environment and section a.2 deals with those aspects of the safety and well-being that "involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons." The Union's argument is that the correctional officers who attended ART March 1-3, 2021, were removed from ART and reassigned to duty in other parts of the FDC without proper safety equipment.

The record is clear and there is no dispute between the parties that some number of correctional officers were removed from ART and assigned to duty in other parts of the FDC. Although the Union's witnesses had difficulty identifying which specific employees were removed from ART, Mr. Flanagan's testimony was that each day, i. e, March 1, 2, and 3, 2021, "several officers were called out." Tr. 126-27. I credit that testimony and the Agency did not deny a number of correctional officers were removed from ART and reassigned to other parts of the FDC.

The next question is whether the Union was able to prove by a preponderance of the reliable, probative, evidence that the Agency violated Article 27 requirements that it "lower those hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106" and "furnish 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."

I credit the Union's testimony that officers who attended ART during March 1-3, 2021, came to the training in business casual clothing or some other form of casual attire and did not bring with them their personal protective equipment. No Agency witness was able to testify credibly that those correctional officers were advised they needed to bring their personal protective equipment with them to the ART. For example, Mr. Mays (the facility's Employment Development Manager) testified he had "personal knowledge" that ART participants were told they would possibly be going into the FDC during the week and needed to have their personal protective equipment with them. Tr. 65-6. However, Mr. Mays could not describe the basis of his "personal knowledge" and therefore, I cannot credit his testimony to that effect as reliable. It was not only hearsay, but the source of the hearsay was not identified.

Similarly, Mr. Weirich testified that correctional officers are required to have their personal protective equipment "on them and readily available when assigned to ART" (Tr. 79), but on the next page of the transcript said only they "should" have their equipment with them anytime they come to work. Tr. 80. Due to this inconsistency in Mr. Weirich's testimony and the lack of a supporting document, I do not credit the Agency's argument that the correctional officers who attended ART during March 1-3, 2021, were either advised or required to have their personal

protective equipment with them during that ART. Nor could Mr. Weirich recall if he was personally at the ART on any day during the March 1-3, 2021, period. Tr. 88.

Having determined there was no requirement or advice that the correctional officers attending ART on March 1-3, 2021, have their personal protective equipment with them and that some of them were assigned out of ART to other parts of the facility, the next issue is whether those assignments violated Article 27 (Safety And Health) and/or Article 28 (Uniform Clothing). Article 28 b requires the Agency to "ensure that adequate supplies of security and safety equipment are available for issue to and/or use by employees during the routine performance of their duties." Subsection g provides that "safety-toed footwear . . . will be shoes or boots at the discretion of the individual employee" and that "safety shoes will be worn by all employees who work in areas designated as foot hazard areas by the institution supplement." The "institution supplement" is in evidence as UX13 and requires the mandatory wearing of safety shoes for all staff and inmates in "designated foot hazard areas" which are listed as basement computer storage room, facilities, food service/warehouse, ISM/mailroom, lockshop/armory, rear gate, safety warehouse, commissary, foot card detail, fourth floor, mechanical rooms, recreation, tool room and warehouse.

Because the Union did not call a witness who was actually assigned a duty post from ART, no Union witness testified that any of the officers removed from ART worked in one of the designated "foot hazard areas." Although "lockshop/armory" is one of the designated foot hazard areas, there is an exception for "those who are in the hazardous area for temporary business only." That would include officers going to the lockshop to get loaner equipment. However, Mr. Weirich testified that boots are part of the uniform and if an officer is in uniform, he needs to be wearing boots. Mr. Weirich also said boots are not required PPE. Tr. 96. It does not make sense to me to say to an officer, if you are in uniform you need to be wearing boots, but if you are reassigned

from ART and are not in uniform, you do not need to be wearing your boots. After all, boots are safety equipment and if needed at all, should be worn whether in uniform or not. Since the Agency did not prove it advised the March 1-3 ART attendees in advance to bring their protective equipment to class, requiring one or more of them to work without protective boots is a violation of Article 28 g1 "safety shoes will be worn by all employees who work in areas designated as foot hazard areas by the institution supplement."

The evidence is clear that none of the officers attending ART March 1-3, 2021, had their protective boots in ART and the lock shop does not provide protective boots. The testimony was unclear as to whether officers were assigned to parts of the facility that required protective boots and Agency witnesses testified that protective boots are not required in all parts of the facility. Agency Exhibit 8 is sign that vests are required "beyond this point," but Ms. Brown (HR Manager) testified without rebuttal there is no sign saying boots are required beyond a certain point. Tr. 49.

The facility maintains what the parties referred to as a "lock shop" at which employees can borrow or be loaned pieces of protective equipment they do not have with them. With the exception of boots, no Union witness testified that any correctional officer attending ART who was assigned to another part of the facility went there without having obtained required protective equipment. No Union witness who was assigned duty at another part of the facility on March 1-3 was called as a witness. Without such first-hand testimony, the Union could not, and did not, prove any correctional officer did not have required protective equipment (other than boots) when on duty March 1-3, 2021, after having been moved from ART to another part of the facility.

There was credible testimony that during the period of March 1-3, 2021, there were shakedowns conducted which were described as sending officers into the housing units to look for contraband inside the inmates' cells and common areas. Tr. 69-70. Officer Ortega also testified

credibly that officers were assigned from ART to the facility during this period. TR. 87-89. "Facility" is listed as one of the foot hazard areas in Article 28. Mr. King testified that safety shoes are required above the second floor. Tr. 123.

There was no evidence at all that any of the ART attendees came with their protective equipment and it seems logical that if they were advised in advance to do so, at least some of them would have complied. Had the Agency called a witness who testified from personal knowledge that the ART attendees were advised to have their protective equipment with them at the training sessions, the result would be different. Thus, the state of the record is that the ART attendees were not advised in advance to have their protective equipment with them, and some were assigned to "foot hazard areas" without safety boots.

The Agency defended its assignments from ART arguing, *inter alia,* that the Covid-19 emergency declaration gave it the right to make whatever assignments it deemed appropriate. The Agency did not put the emergency declaration or proclamation itself into evidence, but merely introduced a Notice dated February 24, 2021, that President Biden continued the National Emergency signed by President Trump on March 13, 2020, by Proclamation 9994. Proclamation 9994 is attached to the end of this Opinion And Award.[7] It does not give executive agencies any super powers or authority to disregard collective bargaining agreements. Section 1 of the Proclamation, entitled "Emergency Authority" states:

> The Secretary of HHS may exercise the authority under section 1135 of the SSA to temporarily waive or modify certain requirements of the Medicare, Medicaid, and State Children's Health Insurance programs and of the Health duration of the public health emergency declared in response to the COVID-19 outbreak.[8]

Section 3, entitled "General Provisions" states:

---

[7] I have taken judicial notice of Proclamation 9994.
[8] This provision has no bearing on the instant case.

> (a) Nothing in this proclamation shall be construed to impair or otherwise affect: (i) the authority granted by law to an executive department of agency, or the head thereof.

Nor does 5 U.S.C. §7106 (Management Rights) give any such broad powers to disregard the provisions of a CBA. After the listing of management rights, subsection (a)(1)(D), allows an agency to "take whatever actions may be necessary to carry out the agency mission during emergencies." Emphasis added. Further, section (b) states "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 section." In this regard, the parties negotiated Article 5 (Rights of the Employer) of the CBA, which includes the language quoted above from 5 U.S.C. §7106 that the agency may "take whatever actions may be necessary to carry out the Agency mission during emergencies." Emphasis added. Neither the COVID-19 emergency declaration, Proclamation 9994, 5 U.S.C. §7106, nor Article 5 of the CBA give the Agency the unbridled authority asserted without justifying its necessity. The Agency made no showing that the actions it took regarding the assignment of officers from ART to other posts without safety boots were "necessary" to carry out the Agency's mission.

The Agency unquestionably had the authority to assign the officers attending ART to other posts in the facility and I would not second guess the decision to do so in the circumstances of this case. Several Union witnesses agreed the Agency had such authority. However, if the assignment results in the violation of other provisions of the CBA, the Agency must be held accountable for any such violations. Accordingly, I find the Union established a violation of Articles 27 and 28, and the Institution Supplement by assigning officers to "foot hazard areas" without their protective footwear. Nothing in the COVID-19 emergency declaration and/or proclamation gives the Agency authority to violate the CBA in this regard.

The Allegations That Assignments From ART Resulted in Lost Overtime Opportunities

The Union alleges management attempted to or did avoid the overtime procedures set forth in the Negotiated Agreement (MOU), dated August 25, 2011 (JX5). In pertinent part, the MOU states "Management will not skip any bargaining unit employee . . .". UX2 is the ART Schedule for several weeks, including the week of March 1-5, 2021, and shows the names of the officers assigned to ART for that week.

Officer Ortega testified that UX7 is a daily roster showing who logged in on the overtime roster and that the second and third pages show officers who were skipped for overtime on those dates. The primary difficulty with the Union's position is the evidence does not establish that the officers who were skipped for overtime, if any, lost that overtime as a result of an officer from ART being assigned to a post in the facility. No witness testified that officer X lost his/her overtime preference because officer Y was assigned to a certain post from ART.

The second problem with the Union's evidence is, even assuming arguendo, that certain officers lost overtime as a result of reassigning ART attendees to other posts in the facility, there is no credible evidence as to damages. The Union's estimate of $5,000.00 is totally inadequate and speculative as there was no testimony how this amount was determined, other than that it was a guesstimate based on an alleged "average" officer. Further, Mr. Spiers testified all officers assigned to the hospital were paid overtime. Tr. 67. Agency Exhibit 7 shows there were numerous overtime occurrences during the March 1-3, 2021 period (56 on March 1; 59 on March 2; and 49 on March 3). The Union did not challenge this Exhibit or the Agency's assertion of the amount of overtime assignments.

AWARD

With specific reference to the issues noted on page 11 above, the grievance is granted in part and denied in part, as follows:

1. The Agency violated Articles 27 (Health and Safety) and 28 (Uniform Clothing) when it assigned officers from ART to work at posts in the FDC without their protective boots. The remedies sought by the Union for this violation are (10 an order to "cease and desist present and future practices to roster adjust staff attending annual refresher training" and (2) "Ask management to follow Master Agreement article 27. To cease and desist present and future practices to roster adjust staff attending annual refresher training." Since a number of Union witnesses agreed the Agency has the authority to assign ART attendees to posts in other parts of the FDC, this grievance is granted to the extent such assignments conflict with other provisions of the CBA, such as Articles 27 and 28, which must be dealt with on a case-by-case basis.
2. The Agency did not violate Article 18 (Hours of Work) and/or the Negotiated Agreement (MOU) in that there was no credible evidence (1) that the Agency assigned ART attendees to other posts in the FDC which resulted in the avoidance or denial of overtime to any officers; and (2) that any officer suffered financially by reason of the Agency's actions.
3. The procedural/arbitrability issues raised by the Agency in its response to the grievance are not sufficient to dismiss the grievance.
4. Counsel for the Union requests reasonable attorney's fees pursuant to 5 U.S.C. §5596 which provides for, *inter alia*, back pay and attorney's fees. I make no determination in this Opinion And Award as to attorney's fees but will permit Union Counsel to file a

detailed request for attorney's fees justifying the request. The Agency has the right to respond to any such request. The request for attorney's fees shall be submitted within 15 calendar days of the date of this Opinion and Award and the Agency shall have 15 calendar days from receipt of the request to respond. The parties may extend or shorten these time periods by agreement.

Stuart A. Goldstein, Arbitrator

Dated: April 25, 2022