
 In the Matter of the Arbitration between)
)
American Federation of Government) FMCS Case #09-02417
Employees, AFL-CIO, Local No. 4052) Contract Interpretation
) Grievant: Class Action
 and)
)
Department of Justice, Federal Bureau of)
Prisons, MDC Guaynabo, Puerto Rico)

BEFORE

: Mark I. Lurie, Arbitrator

APPEARANCES

AFGE Local 4052

: Eric Young, Esq.

Department of Justice

: Gail L. Elkins, Esq.

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement effective March 9, 1998 (the "Agreement" or the "CBA") between the Federal Bureau of Prisons (the "Agency") and the Council of Prison Locals, American Federation of Government Employees, including Local No. 4052 (the "Union").

This dispute was initially briefed by the parties and presented to the Arbitrator for the purpose of his determining whether a decision could be rendered without the conduct of a hearing. The Arbitrator rendered a decision on that question on October 5, 2009, in which he found that the evidentiary record furnished with the parties' briefs was inadequate for him to render a decision on the merits, and that an evidentiary hearing would be required. The Arbitrator also made findings of fact as to some of the matters in dispute. That decision, (hereinafter, the "PRELIMINARY DECISION") is incorporated herein by reference.

Upon due notice, the parties appeared at the prescribed arbitration hearing time and place: the U.S. Metropolitan Detention Center ("MDC"), Guaynabo, Puerto Rico at 8:00 a.m. on December 3, 2009, where they presented their respective positions and the evidence in support of those positions. The hearing was transcribed. Post-hearing briefs were to have been submitted on or before February 22, 2010.

On February 24, 2010, the Agency moved to have Warden Jorge Pastrana testify. The motion was granted, and Warden Pastrana's testimony was taken on March

4, 2010, via a telephone conference call. Post hearing briefs were timely received on March 15, 2010, as of which date the hearing was declared closed.

The issues to be resolved in this arbitration are the following:

Is the grievance inarbitrable because it was not timely filed?

Is the *2001 Settlement* a grievance settlement that is currently in effect, lawful in its purpose (contingent staffing) and enforceable according to its terms? And, if so, can its prescribed remedy be lawfully enforced by the Arbitrator and, if the remedy cannot be lawfully enforced, what should the remedy be?

The Agency also raised the threshold issue of timeliness. It argued, in its post-hearing brief, that the grievance was not timely filed, as required by Article 31, Section d of the CBA and that therefore the Arbitrator lacks the jurisdiction to rule on the merits.¹ Here is the Agency's reasoning:

The "grievable occurrence" took place on December 4, 2008, when Warden Haynes, the CEO of MDC Guaynabo, notified the Union that a Number 2 Officer would no longer be assigned to housing units that had populations exceeding 150 inmates. Union President Rivera testified that he did not attempt informal resolution of this grievance with Warden Haynes and did not seek to engage in impact and implementation ("I&I") bargaining over the Warden's decision to change working conditions.² Under Article 31.d, the latest date that President

¹ The following are the relevant sections of Article 31:

Article 31, Section b

The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

Article 31, Section d (in relevant part)

Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence...

Article 31, Section e.

If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.

² Q What is the date that you're saying the violation occurred that brings us here today?...

A. [December 14, 2008]

Q OK. Did you attempt to informally resolve?

A No.

Q OK. And why not?

Rivera could have filed this formal grievance would have been 40 days after December 4, 2008 or January 13, 2009. The stamped copy of the FORMAL GRIEVANCE FORM indicates that it was received by, and thus filed with, the Regional Director on January 20, 2009, and Regional Director Holt confirmed that he received the grievance on that date.

“Jurisdiction can be raised at any time up to the issuance of a decision.” (Quoting the Agency’s brief.) Failure to comply with the contractual filing deadline is a jurisdictional matter for which the CBA does not permit waiver, or excuse, or showing of “good cause” for the late filing. Article 32, Section h states:

“The arbitrator shall have no power to add to, subtract from, disregard, alter or modify any of the terms of: (1) this agreement; or (2) published Federal Bureau of Prisons policies and regulations.”

Accordingly, the Union’s grievance is time barred.

The Arbitrator observes that, because the Agency waived its opening statement during the arbitration hearing, and because it first advanced the timeliness argument in its post-hearing brief, the Union was not alerted to address the issue in its post-hearing brief. Nonetheless, the Arbitrator sees no reason to solicit reply briefs from the parties on the issue of timeliness prior to ruling on the Agency’s argument.

A claim of inarbitrability based upon the arbitrator's lack of jurisdiction over the subject matter (i.e., substantive inarbitrability as opposed to procedural inarbitrability) is

A Because I may attempt an informal resolution. I don't have to attempt an informal... [resolution].

Q ... Did you ask to negotiate over the change?

A No, it was already negotiated. What...was going to negotiate? It was already negotiated. It was agreed upon - one fifty. [Tr 148-149]

Q And you said you filed your grievance at the regional level because it was against Warden Haynes.

A Yes.

Q OK. Did you attempt the informal resolution with Regional Director Holt?

A No.

Q OK. Did you attempt to negotiate Warden Haynes' change with Regional Director Holt?

A No.

Q And why not?

A We considered I considered... Warden Haynes' actions as a repudiation of our agreement. It was something that was already settled...

Q. [Did you talk to Warden Haynes at all?]

A Yes.

Q What did you talk with him about?

A I asked him why he repudiated our agreement, and his answer to that was that he has a fiscal responsibility to taxpayers, and that he could not continue to pay. [Tr 164-165]

not untimely regardless of when it is raised because, if such jurisdiction does not exist under the CBA, it cannot be created by the subsequent act or omission of a single party. Specifically, an arbitrator cannot gain jurisdiction over the subject matter solely because one party has failed to timely contradict the other party's claim of the existence of such jurisdiction. However, the claim that the Agency is making here is one of procedural inarbitrability – the failure to comply with a procedural requirement of the Agreement – and such a claim must be timely raised. Arbitration is the final step in the grievance process, during which process the parties are expected to make full disclosure of all relevant facts and contentions. The purpose of arbitration is to resolve the issues raised during that process; it is not to be a forum for the presentation of new issues. The Arbitrator finds that the Agency's claim of untimeliness was, itself, untimely, and was therefore waived.

However, even if the Agency's claim of inarbitrability had been timely made, it would not prevail. Presuming, *arguendo*, that the *2001 Settlement* was a binding grievance settlement as of December 4, 2008, the Agency's continuing repudiation of and non-adherence to that *Settlement* after that date constituted a continuing violation, each occurrence of which started the clock running on a new grievable event.

ADDITIONAL FACTS

The Arbitrator finds that the following facts are self-evident, have been mutually agreed-upon, or have been established by a preponderance of the evidence.

- MDC Guaynabo is not a penitentiary but a detention facility: its inmate population consists, primarily, of persons awaiting sentencing, and not persons who have been convicted of a crime. A housing unit at the facility has seventy cells in which inmates reside. Each cell is designed to accommodate two persons, for a designed capacity of 140 inmates per housing unit. The term "overcrowding," when used by the Arbitrator in this decision, is not a qualitative conclusion by the Arbitrator but, rather, his reiteration of the parties' shorthand term for either the assignment of 3 inmates to a cell, or to the assignment of more than 150 inmates to a single housing unit.
- Overcrowding decreases inmates' access to a finite number of sinks, toilets, televisions, telephones, laundry equipment, ice, board games and athletic

equipment, and also to finite athletic, medical, hair-cutting and visitation facilities. An increased inmate population also adds to the officers' operational burdens of accounting for and interacting with the inmates, performing cell shakedowns, and monitoring inmates' conduct and their possible possession of contraband.

The Agency asserted that, when they entered into the *2001 Settlement*, Warden Pastrana and Union President Blanco intended that it would have a finite duration corresponding to the duration of arrest of protestors against the Navy's conduct of military operations on Vieques. The Agency's primary evidence for the assertion consisted of (1) the unique factors that pertained at the time (primarily the participation of celebrities whose protests and arrest drew extensive news coverage and the vehemence with which people held views on the issue) and (2) the testimony of Warden Pastrana as to what he told President Blanco at the time they entered into the *Settlement*.

The Union responded that the *2001 Settlement* contemplated no limitation of duration. The *2001 Settlement* made no mention of Vieques or its protestors; its scope was more general: increased staffing was to be a permanent solution to inmate overcrowding and, when that increased staffing was not used, those officers who should have been assigned would be paid overtime for the corresponding hours. The permanence of the arrangement was corroborated by the subsequent conduct of both parties, as described during the arbitration hearing: The wardens who succeeded Warden Pastrana – Wardens González, García, Chávez and Ledesma – all honored the terms of the *2001 Settlement*, and the Agency's recognition of the *2001 Settlement* as a contractual obligation was thereafter evidenced by a December 21, 2007 memorandum from Acting Manager Tim Kuhn to Warden Anthony Haynes, and a January 18, 2008 memorandum from Captain Seranno to "ALL CONCERNED," which reiterated the terms of the *2001 Settlement*.

The Arbitrator finds that *2001 Settlement* was a grievance settlement of a claimed Article 27 – **HEALTH AND SAFETY** – violation, and that it did not have a prescribed duration.³ This finding is based upon (1) the absence, from the

³ The Agency argued that the parties' agreement, in June 2001, that a second officer would be assigned was not a grievance settlement because "at no time were there any proposals exchanged, negotiations conducted or written documents of any settlement agreement." (Quoting the Agency's brief.) The Arbitrator disagrees. In the *2001 Settlement*, Warden Pastrana stated that he was responding to Mr.

Settlement, of language defining its duration, (2) the fact that the Agency complied with its terms from 2001 to 2008, and (3) the ambiguity of Warden Pastrana's testimony⁴ regarding his discussions with Union President Blanco that resulted in the *Settlement*. The Arbitrator finds that the *2001 Settlement* remained in effect until repudiated by Warden Haynes.

- Warden Anthony Haynes testified that the effect of the *2001 Settlement* was to create one or more permanent posts, but that such posts can be created only by the Regional Office and, sometimes, by the Central Office. The Arbitrator finds that the *2001 Settlement* did not create new posts, *prima facie*. The Warden does not need clearance from the Regional or Central Offices to assign officers, on overtime, to duties that, from time-to-time, he perceives must be performed. Such assignments do not constitute "posts."
- The Union proffered the decision of Arbitrator Craig E. Overton in an arbitration involving these same parties, FMCS 99-11423 (2000), in which Arbitrator Overton ruled that the Agency's practice of leaving posts vacant and not filling them with officers on overtime violated the Agency's promise, in the CBA, to keep work hazards to the lowest possible level. This Arbitrator finds the Overton decision to be distinguishable: it pertained to the non-filling of vacancies (i.e., posts); the instant case does not. Here are relevant excerpts from the Overton decision:

"There is no doubt that, if a Correction Officer is reassigned from his/her assigned post on the quarterly assignment roster to another post, thereby leaving his/her originally assigned post vacant, it has an adverse impact on safety... [S]ince the Agency made a valid case and received approval to

Merced's "request for informal resolution dated June 12, 2001 regarding the housing of more than 140 inmates in the housing units." (Quoting the *2001 Settlement*.)

4 Relevant excerpts from Warden Pastrana's testimony:

- Q "And how long did this situation last, Warden Pastrana?"
- A "I ...had to triple bunk some of the cells in the units, and raise the number of inmates in the housing units. That way, I would have room for what it was anticipated that was coming in... I met with... Fernando Blanco, who was the Union president back then, to advise him... it was prudent to have another officer... in the second floor."
- "So, I just wanted to make sure, while we were handling this very difficult situation, that the rest of the inmate population were not going to be planning an escape or a disturbance..."
- Q "Warden Pastrana, in [Pastrana's July 17, 2001 memorandum to Union Secy/Treas Merced], you discuss a limit of a hundred and fifty inmates per unit. Now, could you, please, tell the arbitrator what you and Mr. Blanco discussed, and what you mean by the agreement to limit the number of inmates per unit?"
- A "... I decided: 'Hey, my priority is to deal with the Vieques... inmates. I don't want nothing to deviate my attention to what I... needed to do to maintain the institution safe.' so I decided go ahead and pay for those days that that we went over." [Tr 11-15]

staff all posts on the quarterly assignment roster, it must be determined that each of those posts/positions are necessary and essential to the efficient operation at the Metropolitan Detention Center at Guaynabo. It must therefore mean that, if any of the positions are left vacant... the inherent hazards of the Corrections Officers are not lowered – they are, in fact, raised, therefore violating the language contained in Article 27.”

Arbitrator Overton recognized an exception for emergency situations. He issued a cease and desist order, but did not award the payment of overtime to those employees who might have been assigned to fill the vacated positions on overtime. The Agency appealed Arbitrator Overton’s decision and the FLRA, applying the two-pronged test in *BEP*, upheld the decision:

On the first prong, that FLRA found that keeping a vacated position vacant constituted an *arrangement* under 7106(b), and that Arbitrator Overton’s award did not abrogate a management right. Keeping a vacated post vacant was found to be an *arrangement* because it was an affirmative decision by the Agency not to fill the position, and Arbitrator Overton’s award was found not to preclude the exercise of a management right because, while it limited the Agency’s right to leave posts vacant, (1) it applied only to posts that the Agency had already identified as necessary and essential, (2) it did not preclude the Agency’s revising its determination of which posts were necessary and essential, and (3) it excepted emergency situations.

On the second prong – whether Arbitrator Overton’s award was a proper reconstruction what the Agency would have done had it not violated Article 27, the FLRA found that Overton’s was a proper reconstruction. In reaching this conclusion, the FLRA considered whether his award abrogated (i.e., precluded) the exercise of a management right, and concluded that it did not:

“In this case, the award limits the Agency’s ability to leave posts vacant. However, the limitation applies only to those posts that the Agency determined were necessary and which it requested, and received, approval for staffing. Nothing in the award prevents the Agency from changing its determination. Moreover, the award allows the Agency to leave posts vacant in emergency situations. As a result, the Arbitrator’s award **does not abrogate** the Agency’s right to assign work.” [Arbitrator’s emphasis]

In a dissenting opinion, FLRA Chairman Cabaniss observed that, while an arbitrator's decision should be given deference as to findings of fact, it should not be given deference as to conclusions of law:

“...the analysis of the arbitrator's rationale is done *de novo*, and one looks at whether the arbitrator's reasoning is consistent with the ‘applicable standard of law,’ to determine whether the award violates § 7122(a)(1), *i.e.*, whether it is contrary to law.

Chairman Cabaniss opined that he would have set aside Arbitrator Overton's award because, in his view, the arbitrator should have applied the “excessive interference” test and not the “abrogation” test, and that requiring the Agency to staff vacant posts with overtime personnel excessively interfered with the Agency's right to assign employees and work:

“I would find the Authority's “abrogation” test to be fundamentally flawed and overturn the Arbitrator's award for being in violation of the Agency's § 7106 rights to assign employees and assign work.”

In a 2003 decision, U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma, 58 FLRA 109, the FLRA adopted Chairman Cabaniss's reasoning, and abandoned the “abrogation” standard:

“...in determining whether an arbitrator's enforcement is authorized under the Statute, we will no longer apply the ‘abrogation’ standard. Rather, consistent with the Authority's practice prior to *Customs Service*, we will examine whether the contract provision, as interpreted and applied by the arbitrator, excessively interferes with the exercise of a management right.”

- The general experience of incarceration facilities is that there is a correlation between overcrowding and the incidence of assaults on officers by inmates. Where overcrowding has been a contributing factor to such assaults, paying staff to work overtime can reduce the assault rate.⁵ However, Assistant Director John

⁵ The Union proffered a letter from the Director of the Bureau of Prisons, Harley G. Lappin, to California Congressman Dennis Cardoza, in answer to the Congressman's questions about prisons in his state. The letter averred that there was a correlation between overcrowding and assaults by inmates, and that paying staff to work overtime reduced the increase in the assault rate in the California facilities. In testimony he gave to the U.S. House of Representatives on March 10, 2009, Director Lappin stated that one of the means of intervention used by his Department to prevent and suppress inmate violence was the payment of overtime to increase the number of custody staff available “to perform security duties, utilizing staff from program areas, locking down an institution after a serious incident and performing intensive interviews to identify perpetrators and causal factors, and performing comprehensive searches to eliminate weapons and other dangerous contraband.”

M. Vanyur of the Federal Bureau of Prisons issued a December 23, 2004 memorandum in which he stated, *inter alia*, that “Housing Unit Floaters (also known as #2 Officers)...are not deemed mission critical posts and should be eliminated.”⁶

- Associate Warden for Operations, Jose A. Santana, testified that compliance with the *2001 Settlement* could result in officers remaining on duty for an additional 8 hours following their assigned shifts, and that doing so would impose an unreasonable performance burden on those officers. No supporting evidence of this assertion was proffered, but the Arbitrator finds that, under the circumstances described, the conclusion is reasonable.
- Union President Jorge Rivera testified that the presence of a Second Officer reduces the inmate-to-staff ratio and, thereby, lowers the inherent hazards to the Officers within the housing unit; enhances the Primary Officer’s safety during a shakedown (since the Second Officer can stand guard during the process); and aids in the supervision of the unit, including feeding, monitoring shower lines, passing out board games, accompanying inmates who require medical attention and enhancing sanitation in the housing unit. The Arbitrator finds that these benefits, which derive from having a Second Officer present, are self-evident. However, the degree to which they have forestalled inmate-on-Officer assaults is unknown.

6 USDOJ Fedl Bureau of Prisons memorandum from John M. Vanyur, Assistant Director Correctional Programs Divisions regarding “Mission Critical Posts”:

“At the November 15-19, 2004 Executive Staff Meeting, discussions took place regarding our ongoing need to reduce overtime within Correctional Services departments system-wide due to the Bureau’s overall budget issues... Captains... were instructed to create a new quarterly roster to be reviewed and approved by their respective Warden and Regional Director... [W]e request that Captains resubmit a draft roster to include policy mandated posts previously excluded, as part of their mission critical posts.”

“The Captain... will ensure all other reasonable options have been exhausted prior to authorizing overtime to fill ‘mission critical’ posts.”

“Guidelines for Mission Critical Posts...”

HIGH Security / Detention Centers

D/W, E/W & M/W housing units should be staffed with an officer in each pod even when there are connecting pods. Floaters and/or Housing Unit #2’s are not considered ‘mission critical’ in most instances.”

“Housing Unit Floaters (also known as #2 Officers)...are not deemed mission critical posts and should be eliminated.”

- Lieutenant Josue Ortiz-Aviles testified that, while all inmates must be deemed to be unpredictable and therefore potentially dangerous, the majority of the MDC Guaynabo inmates are awaiting pretrial and, because they have more to lose by engaging in misconduct than do inmates who have already been sentenced, are less prone to cause problems. Thus, a detention center like MDC Guaynabo has a lower incidence of assaults on officers than does a penitentiary.

Lieutenant Ortiz-Aviles also testified that most of the inmate assaults-on-officers in MDC Guaynabo related not to overcrowding, but to the officer's intercession in a crime in progress (such as unlawful possession of a cell phone, drugs, weapons, or other contraband) or dealing with an inmate with mental health problems.

The Arbitrator finds that, based upon the incident data submitted into evidence (Agency Exhibit 2) and addressed at length below, both of Lt. Ortiz-Aviles' conclusions are accurate.

- Measures have been implemented to lower the inmate population.⁷ However the Arbitrator finds that, since the *2001 Settlement* pertains only when such procedures fail and the failure results in overcrowding, the existence of those measures are irrelevant to this case. Additionally, measures have been taken to cope with inmate disturbances⁸, and to reduce inmate tensions.⁹ The existence of those measures does not disprove the prudence of assigning a Second Officer when there is overcrowding.

Based upon a chart, dated November 17, 2009 (Union Exhibit 22), of 15 incarceration facilities, MDC Guaynabo had the highest ratio of inmates-to-

7 The frequency of airlifts of sentenced inmates to their designated recipient institutions was increased from once a month to twice; in INS cases, an effort was made to move inmates within 90 days following a court order to do so; Warden Haynes has made himself directly available to authorize the receipt of inmates after-hours; and an effort is made to reduce the inmate population through the use of furloughs, bail and halfway houses.

8 All staff are correctional workers who have been trained in responding to emergencies, including self-defense and disturbance control; each officer has a body alarm to which other officers will immediately respond; emergency equipment is maintained for ready deployment in the facility's stairwells; lethal and non-lethal ammunition is available within the Control Center; and there are often staff in the housing units, in addition to the assigned correctional officers: counselors, case managers, unit managers, Department heads and Executive staff.

9 Each housing unit has 5 computers with which inmates can email their families; during the holidays, the number of telephone call minutes is increased from 100 to 400; the recreation yard is open for extended hours; during the Christmas season, the commissary purchase limit is increased from \$168.00 to \$250.00.

custody staff, at 7.55 to 1. The average for the 15 facilities was 4.74 to 1. However, according to the same chart, MDC Guaynabo had the lowest percentage of inmates with histories of violence, at 1.5%. The average was 7.27%. And MDC Guaynabo had the third highest ratio of custody staff-to-inmates with histories of violence, at 9 to 1. The average for the 15 institutions was 5 to 1.¹⁰

The Agency presented a chart of inmate assaults on officers that have taken place between May 13, 2008 and October 1, 2009 (Agency Exhibit 2). Of the 17 assaults that occurred, 9 pertained to the possession or attempted disposal of contraband (primarily cell phones), 3 happened while prisoners were being moved or during emergencies, 3 related to mental health, 1 pertained to a religious meal, and 1 to an article thrown from the inmate's cell. None was primarily attributable to overcrowding. Nine of the 17 assaults occurred when the inmate population of the relevant housing unit exceeded 140 persons, but there is no evidence that overcrowding was a factor. (Eight of the 9 incidents dealt with contraband, and the ninth occurred during an inmate escort.) From the foregoing data, the Arbitrator finds that no compelling need has been shown to

10

	inmates /staff	percent violent	violent inmates /staff	staff/ violent inmate
OKL	1.08	6.50	0.07	14
HON	2.42	7.00	0.17	6
HOU	3.08	8.70	0.27	4
BRO	4.17	1.70	0.07	14
CCC	4.28	5.40	0.23	4
NYM	4.30	3.60	0.15	7
BUH	4.36	14.40	0.63	2
DEV	5.04	9.90	0.50	2
SPG	5.12	20.50	1.05	1
PHL	5.14	6.10	0.31	3
SDC	5.44	5.50	0.30	3
MIM	5.80	3.50	0.20	5
LOS	6.19	4.40	0.27	4
RCH	7.16	10.40	0.74	1
GUA	7.55	1.50	0.11	9
Average	4.74	7.27	0.34	5

have a second officer on duty in order to avoid inmate-on-officer assaults when MDC Guaynabo housing units are overcrowded.¹¹

THE UNION'S POSITION

The *2001 Settlement* was a § 7106(b)(3) “appropriate arrangement... for employees adversely affected by...” the Agency’s overcrowding of inmates in any housing unit(s). The *2001 Settlement* ensued from comprehensive discussions of the hazards inherent in supervising and controlling inmates under such conditions. In this arbitration hearing, the Agency introduced a new argument: that those hazards could never be completely eliminated and that, therefore, there is no reason to continue to abide by the *2001 Settlement*. But the Agency’s new argument is contradicted by the conclusion that Warden Pastrana drew in 2001, when dealing with persons arrested for protesting the Navy’s continued use of the island of Vieques for military practices¹² and that Management tacitly acknowledged thereafter – that overcrowding creates hazards that can best be addressed with increased staffing.

The Agency has attempted to argue that the *2001 Settlement* should no longer be deemed enforceable because circumstances have changed. But the *2001 Settlement* addresses solely those instances in which the particular hazardous circumstance recurs: i.e., when a housing unit’s population exceeds 150. The reasons for adhering to the terms of the *2001 Settlement* remain:

11 Union witnesses also averred that assigning 3 inmates to cell creates a fire hazard. No substantive evidence was proffered to support the claim, and the Arbitrator finds it to be unproven.

12 Referenced excerpts from Warden Pastrana’s testimony:

Q “And how long did this situation last, Warden Pastrana?”

A “I ...had to triple bunk some of the cells in the units, and raise the number of inmates in the housing units. That way, I would have room for what it was anticipated that was coming in... I met with... Fernando Blanco, who was the Union president back then, to advise him... it was prudent to have another officer... in the second floor.”

“So, I just wanted to make sure, while we were handling this very difficult situation, that the rest of the inmate population were not going to be planning an escape or a disturbance...”

Q “Warden Pastrana, in [Pastrana’s July 17, 2001 memorandum to Union Secy/Treas Merced], you discuss a limit of a hundred and fifty inmates per unit. Now, could you, please, tell the arbitrator what you and Mr. Blanco discussed, and what you mean by the agreement to limit the number of inmates per unit?”

A. “... I decided: ‘Hey, my priority is to deal with the Vieques... inmates. I don’t want nothing to deviate my attention to what I... needed to do to maintain the institution safe.’ so I decided go ahead and pay for those days that that we went over.” [Tr 11-15]

- President Rivera described the burden placed on staff when overcrowding causes inmate agitation; and he and former Union President Fernando Blanco testified that alternative approaches to reducing the risks of overcrowding were either too hazardous and unsanitary or too costly, and that the parties therefore agreed to additional staffing whenever the 150 base limit was exceeded. Warden Pastrana acknowledged that he and the Union mutually agreed that the best response to overcrowding was to increase the security detail, and that response was the essence of the *2001 Settlement*. The *2001 Settlement* was geared to supplement Article 27 (Health and Safety) whenever housing units reached overcapacity.
- The Agency proffered a December 23, 2004 memorandum from John M. Vanyur, Assistant Director, Correctional Programs Division, stating that Floaters and/or Housing Unit #2's were not considered "mission critical" in most cases. (The memorandum identified the need to reduce overtime costs.) The Union notes, however, that, although purportedly not "mission critical," Floaters and/or Housing Unit #2's have not been eliminated, and that the *2001 Settlement* was intended to address the dangers posed by a particular hazard: overcrowding.
- The current Warden, Anthony Haynes, testified that he has attempted to reduce overcrowding by, variously, increasing the number of airlifts from once-a-month to twice-a-month; and by instructing law enforcement agencies to personally request his permission before bringing inmates to the facility. The fact that Warden Haynes undertook these efforts is a tacit acknowledgement that problematic overcrowding persists. And, while Warden Haynes claims that these measures had effectively reduced overcrowding, they have not been entirely successful: housing unit populations continue to exceed the 150 limit.

The *2001 Settlement* did not, and does not excessively interfere with the exercise of one or more management rights. While the *Settlement* requires Management to deviate from a policy it favors, it does not preclude the accomplishment of the Agency's internal security objectives.¹³ It does not limit the Agency's capacity to relieve overcrowding.

¹³ The Union cites National Treasury Employees Union and U.S. Department of Homeland Security, 62 FLRA 267 November 20, 2007 (hereinafter "NTEU-DOHS"). In NTEU-DOHS, the FLRA enunciated the parameters of the duty to bargain. It ruled that a proposed contractual provision that modified DOHS policy would be deemed to affect the agency's right to determine its internal security practices if (1) there

Messrs. Santana, Foster and Lt. Josue Ortiz-Aviles testified that Former Warden Pastrana had lacked the authority to add positions to the Correctional Services roster, even when the positions were temporary. They each equated the staffing of a temporary overtime assignment with the creation of a post or the filling of a temporary vacancy, and testified that the authority to fill the positions resided solely in the Agency's Regional Office. However, Warden Haynes acknowledged that he had never requested Regional Office approval for the temporary overtime assignment of officers, including for extended overtime assignments, such as when guarding an inmate at a community hospital.

All four Agency witnesses testified that a lack of funds was a compelling reason to cease giving effect to the *2001 Settlement*. Budgetary constraints thus seem to have been the "change in circumstances" that motivated the Agency's repudiation of the *Settlement*. However, budgetary constraints were not a valid reason to repudiate a binding Union-Agency grievance resolution. The negotiation of the *2001 Settlement* was within the authority of Warden Pastrana, as was the enforcement of the *Settlement* by subsequent wardens, including Warden Haynes.

was a link between the agency's policy and its internal security measure, and (2) the contractual provision deviated from or modified the agency's policy. The FLRA ruled that DOHS need not bargain over internal security practices except as provided in §7106(b) of the Statute. Under §7106(b), an agency must bargain an *appropriate arrangement* for employees adversely affected by management's internal security practices. An arrangement is *appropriate* if it does not excessively interfere with the agency's internal security practices. In making this determination, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's right to determine internal security practices. In NTEU-DOHS, the FLRA found that a cba proposal that "officers will be neat, clean and professional in attire and appearance at all times while on duty" did not excessively interfere with the agency's right to determine its internal security practices or its right to determine the means of performing work.

"As we have found that Proposal 3 does not excessively interfere with the Agency's right to determine its internal security practices, it is necessary to address whether, as the Agency contends, the proposal affects management's right to determine the means of performing work. In determining whether a proposal affects the right to determine the means of performing work, the Authority **first** examines whether the proposal concerns a 'means.' In this regard, the Authority construes the term "means" to refer to 'any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work.'"

"**Second**, it must be shown that: (1) there is a direct and integral relationship between the particular methods or means the agency has chosen and the accomplishment of the agency's mission; and (2) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted."

"...the determination of whether a proposal affects management's right to determine the means of performing work depends on the degree of departure from agency policy implicit in a particular union proposal, the type of agency involved, and the agency's specific needs and requirements."

"...the appropriate inquiry is whether a union counter-proposal permits the accomplishment of the agency's mission-related purpose while modifying some particulars of its policy."

The grievance of Warden Haynes' repudiation of the *2001 Settlement* should be sustained. The remaining question is one of remedy: What remedy will comport with the standards enunciated in *BEP*? The parties' discussions during the week of June 25, 2001, that produced the *2001 Settlement*, were voluntary expressions of their mutual intent. The *2001 Settlement* was tailored to the reasonably foreseeable adverse effects of Management's decision to periodically house inmates in overcrowded conditions. Their resolution would therefore meet the FLRA's balancing test.

In AFGE Local 1345, and Department of the Army, Head Quarters, Fort Carson and 4th Infantry Division, 48 FLRA 168 August 11, 1993 (hereinafter, "AFGE-DOA"), the FLRA considered whether certain contract proposals infringed on management's right to assign work. The FLRA found, *inter alia*, that a proposal – that a second employee be assigned when work was to be performed in an enclosed area lacking mechanical or natural ventilation – was negotiable as an appropriate arrangement under section 7106(b)(3). The FLRA concluded (1) that, although the proposal would impose a burden on the Department, working in such conditions was "intrinsically dangerous" and (2) that the burden imposed on the agency was more than offset by the likelihood that the proposal could prevent an employee's injury or death.¹⁴ The Authority also deduced that such hazardous assignments occurred infrequently:

"Therefore, we conclude that the benefit afforded employees by the... [proposal] outweighs the burden it imposes on management's rights. Accordingly, we find that the [proposal] does not excessively interfere with management's rights under section 7106(a)(2)(B) and section 7106(b)(1) to assign work and determine the number of employees assigned to a work project. As the [proposal] does not excessively interfere with management's rights, it is negotiable as an appropriate arrangement under section 7106(b)(3) of the Statute."

In the instant case, because inmate services decline with overcrowding, and because inmate assaults on staff are a reasonable and foreseeable consequence of a

¹⁴ The FLRA also found, in the same case, that another proposal was not a negotiable arrangement because the union had failed to show that the affected assignment placed employees in jeopardy and thus did not justify the infringement on management rights. It ruled, in relevant part, as follows:

"[P]roposals that dictate the number of employees to be assigned to a particular job or task directly interfere with management's right under section 7106(b)(1) to determine the number of employees assigned to a work project."

"The Union does not allege, the record does not show, and it is not otherwise apparent that most, or even many, such assignments would put employees in jeopardy. Moreover, the first sentence would apply even if the assignment resulted in only temporary isolation." "We find, on balance, that the blanket prohibition on making any isolated assignments without providing for periodic surveillance imposes a burden on management that outweighs the benefit to employees afforded by periodic checks on their condition."

decline in inmate services, the burden that is imposed on the Agency – the burden of assigning a second correctional officer whenever there is an overcrowded housing – is more than offset by the likely reduction in inmate assaults on staff. Moreover, the Agency has not established that such second officer assignments will occur frequently: Management has, at its disposal, various options to control the influx of inmates to avoid the overcrowding that will result in the assignment of a second officer. Of the 15 federal correctional facilities for which statistics were proffered by the Union,¹⁵ Guaynabo had the highest ratio of inmates to custody staff, at 7.55 inmates to 1 staff member. The lowest ratio was 1.08 to 1, and the average of all of the facilities was 4.74 to 1.¹⁶

The Agency presented a document (Agency Exhibit 2) purporting to show that the incidence of assaults on staff from May 2008 to October 2009 have been unrelated to housing unit crowding, but of the 17 assaults listed, a majority took place when the housing unit inmate population equaled or exceeded 140. That experience prompted the Union to seek, during the December 2007 Labor-Management Relations meeting, a lowering of the second officer staffing criterion from 150 inmates per housing unit, to 140.

Reconstructing what the Agency would have done had it not repudiated the *2001 Settlement*, it may be presumed that it would have paid overtime to increase the number of custody staff available to perform security duties. This course of action can be deduced from testimony given by the Director of the Federal Bureau of Prisons, Harley G. Lappin, to the Congressional Subcommittee on Crime, Terrorism and Homeland Security. His testimony (which pertained to the entire federal prison system and not to a particular facility), included this statement,

“We found that both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution’s rated capacity) are important factors that affect the rate of serious inmate assaults.”¹⁷

The Agency’s stated reasoning behind its repudiation of the *2001 Settlement* dealt with the budgetary impact of overtime, but that was not sufficient reason for the Agency’s unilateral action. A *status quo ante* remedy is warranted, notwithstanding the

15 Union Exhibit 22.

16 The same exhibit presented the percentage of inmates with histories of violence. Of the 15 facilities, Guaynabo had the lowest percentage: 1.5%. The highest was 20.5%, and the average was 7.27%. The lowest ratio of custodian staff to violent inmates at a facility was approximately 1 to 1. The average of the 15 facilities was approximately 5 to 1. MDC Guaynabo had the third highest ratio of custodian staff to violent inmates: 9 to 1.

17 From testimony given on July 21, 2009.

Agency's claim that the remedy may infringe on their right to determine the budget. In AFGE v. FLRA, 785 F.2d 333 (D.C. Circuit Court of Appeals, 1986), the Court ruled that an Agency's budgetary problems are not sufficient reason to deny *status quo ante* relief.¹⁸ In addition to restoration of the *status quo ante*, the remedy should include back pay for those employees who were deprived overtime by the Agency's non-compliance with the *2001 Settlement*.

In his opening statement in the arbitration hearing, the Union advocate stated that, in its post-hearing brief, the Union would contest the timeliness, under Article 31 section g, of the Agency's response to the grievance being arbitrated. However, in its post-hearing brief, the Union did not cite Article 31 section g, and the Arbitrator deems the timeliness claim to have been abandoned. The Agency anticipated that the Union would make an Article 31 section g claim, and responded to it at length. That response is moot.

THE AGENCY'S POSITION

Whether or not the *2001 Settlement* was and remained a binding grievance settlement, this grievance should be denied because the Union failed to request impact and implementation negotiations. Article 7 of the CBA states, *inter alia*, that, in all matters relating to personnel policies, practices, and other conditions of employment, the Union will have the opportunity to negotiate procedures that Management will observe in

18 In its brief, the Union cited AFGE Local 1138 and Department of Defense, 49 FLRA 1211 (1994), a case that does not deal with *status quo ante* remedy. The Arbitrator presumes the intended reference to have been to AFGE v. FLRA, 785 F.2d 333 (1986). In AFGE v. FLRA, the Equal Employment Opportunity Commission ("EEOC") imposed a freeze on all promotions, after Congress reduced its fiscal 1984 budget. The EEOC then refused AFGE's request to negotiate the matter. AFGE filed an unfair labor practice with the FLRA. The FLRA Regional Director issued a Complaint and Notice of Hearing and proposed a settlement agreement. AFGE objected to the settlement agreement because it did not restore the *status quo ante*. The Regional Director determined that *status quo ante* relief, in the form of retroactive promotions and corresponding back pay, was not appropriate because the freeze on employee promotions had been necessitated by budget constraints. AFGE appealed. The FLRA argued that deference should be given the Regional Director's determination that that, in view of the EEOC's budget cuts, *status quo ante* relief would "result in an excessive degree of disruption in the efficiency and effectiveness of the [EEOC's] operations." (Quoting the Court.) Here is a relevant excerpt from the Court's ruling:

"...the general argument that budget cuts (coupled with a claim that some disruption will result from *status quo ante* relief) is a legitimate reason for the FLRA to exercise its discretion to deny *status quo ante* relief will not be upheld. If the Authority's overall argument were accepted, it could be stretched to preclude effective relief in any case where the employer is motivated by budgetary considerations. But economic hardship is a fact of life in employment, for the public sector as well as the private. Such monetary considerations often necessitate substantial changes. If an employer was released from its duty to bargain whenever it had suffered economic hardship, the employer's duty to bargain would practically be nonexistent in a large proportion of cases."

exercising its authority in accordance with the Federal Labor Management Relations Statute.¹⁹

Once notified of Warden Haynes' decision to no longer adhere to the 2001 Settlement, the Union had a reasonable amount of time, generally deemed to be 30 days, within which to engage in impact and implementation negotiations. It did not do so and, by filing a grievance, hopes to obtain through arbitration what it should have done through impact and implementation bargaining.

Assuming, *arguendo*, that the *2001 Settlement* was a valid and enforceable grievance settlement, it was not an appropriate arrangement because it excessively interfered with Management's right to (1) determine internal security and (2) assign work. The *2001 Settlement* would be deemed deficient under the test established by the Federal Labor Relations Authority ("FLRA") in U.S. Dep't of the Treasury, Bureau of Engraving and Printing, 53 FLRA 146 (1997) ("BEP"). Under Prong 1 of BEP, the Authority examines whether the award provides a remedy for violation of either an applicable law or a contract provision negotiated pursuant to § 7106(b). Under Prong 2, the Authority considers whether the arbitrator's remedy reflects what the agency would have done had it not violated the law or contract provision.

Article 27 constitutes an arrangement under 7106(b)(3) because it provides a benefit to employees by reducing safety hazards, and Article 18 constitutes an arrangement that is intended to allow employees the opportunity to plan days off and request shift preferences while also giving the Agency the ability to change shifts when necessary. But the *2001 Settlement*, which putatively resolved violations of Article 27, left no circumstance in which the Agency could not assign a Number 2 Officer when the inmate population in a housing unit reached 150. Per Assistant Director John Vanyur's December 23, 2004 Memorandum referenced above, Number 2 Officers are not mission critical, and an award enforcing the *Settlement* would excessively interfere with Management's right to reassign the second officer in an emergency, or when Management deems it necessary to ensure security.

¹⁹ Article 7, "Rights of the Union," section b:

"In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute, and this Agreement. This includes in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which management will observe in exercising its authority in accordance with the Federal Labor Management Relations Statute."

The Agency also argued that an arbitration awarding back pay would violate the Back Pay Act. For reasons that will be apparent, the Arbitrator will not address this claim.

DECISION

The Arbitrator has found that the *2001 Settlement* constituted a binding grievance settlement. The Arbitrator also finds that the *Settlement* was extant in December 2008, and that Warden Haynes unilaterally repudiated it. In fashioning a remedy, the Arbitrator's task is to reconstruct what Management would have done if it had not renounced the *2001 Settlement*. The criterion of what Management would have done is whether the staffing commitment made and/or the remedy agreed to (overtime payments) would have been "appropriate arrangements"²⁰ under §7106(b)(3); i.e., arrangements that would not have *excessively interfered* with the exercise of management rights. In other words, under applicable law, the Arbitrator's remedy cannot be the enforcement of the *2001 Settlement* if the effect of such enforcement would be to *excessively interfere* with the exercise of one or more Agency mission-related purposes. The question is, what would Management have done:

"Under prong II of the *BEP* framework, the... arbitrator's remedy [must reflect] a reconstruction of what management would have done if management had not violated the law or contractual provision at issue... An award that fails to satisfy either prong I or prong II will be set aside or remanded to the parties, as appropriate..."²¹

Again, in Article 27.a, Management is required to lower the inherent hazards of the correctional environment to the lowest possible level, without relinquishing its rights under 5 USC 7106. The Union has argued that the Agency's adoption of, and subsequent adherence to the *2001 Settlement* is dispositive of what Management would have done; that the *Settlement* speaks for itself. The Arbitrator finds that that other conclusions can be drawn from Management's conduct. Warden Pastrana might have agreed to the arrangement, assuming that it would be for the duration of the Vieques demonstrations, and subsequent Wardens might have gone along with the *Settlement*, regardless of their actual safety measure preferences, because they believed that the *Settlement* was valid, unrestricted as to duration, and binding upon them.

²⁰ A provision is an arrangement if it ameliorates the adverse effects flowing from the exercise of a management right.

²¹ *U. S. Dept. of Justice, Federal Bureau of Prisons, Federal Correctional Institution Sheridan, Oregon and AFGE, Local 3979* 58 FLRA 279 (2003).

The Arbitrator does not doubt that assigning a Second Officer to an overcrowded housing unit reduces the potential hazard of inmate assault. Indeed, having a Third Officer present would reduce that hazard still further. The question is not whether the presence of additional Officers reduces such hazards: it does. The question is whether the incremental advantage is worth the cost and operational restrictions it imposes. The Arbitrator finds that the answer is a matter of judgment, which may change under varying circumstances.

While the ratio of Custody Officers to inmates is unusually low in MDC Guaynabo, the ratio of Custody Officers to inmates with histories of violence is very low. The statistical evidence shows that, in this facility, inmate assaults on officers have been provoked by causes unrelated to overcrowding: most often those provocations have been engendered either by (1) the confiscation of contraband or (2) the inmates' psychological problems. There is a lack of evidence suggesting that inmate stress caused by overcrowding has produced a discernable incidence of inmate assaults on officers. It is especially telling that the Officers, themselves, have not treated the threat as if it were real and immediate. They have elected to accept overtime pay and to live with the purported threat, rather than to grieve the Agency's non-compliance with the *Settlement* in order to obtain a cease and desist order.

As noted, this case is distinguishable from that decided by Arbitrator Overton. In Overton's case, the fact that the Agency had sought and received approval, from the Regional or Central Offices, for posts was found to warrant a presumption that filling the posts had been "necessary and essential," and that leaving them vacant raised the inherent risks to Officers. The instant case does not deal with vacant posts, and so does not warrant the same presumption. And Arbitrator Overton's findings of fact aside, this Arbitrator is constrained to apply more stringent legal standard than did Arbitrator Overton: the *excessive interference* standard rather than the *abrogation* standard.

Reconstructing what Management would have done under these circumstances, the Arbitrator finds that Management would have assigned a Second Officer in only those individual circumstances where inmate overcrowding was accompanied by what Management assessed to be additional, aggravating risk elements. The Arbitrator's enforcement of the *2001 Settlement* would excessively interfere with the Agency's right to determine its internal security practices, as would the remedy of back pay.

AWARD

The grievance is sustained. The Agency unilaterally repudiated a binding grievance settlement. However, under the applicable standard of law, the *2001 Settlement* excessively interfered with the Agency's right to assign employees and work and, for that reason, cannot be enforced by the Arbitrator. Consequently, no remedy can be or is awarded.



Mark I. Lurie, Arbitrator

April 12, 2010