IN THE MATTER OF THE ARBITRATION BETWEEN	*	FMCS FILE NO.: 09-02677
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FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTE, TALLADEGA, ALABAMA	*	GRIEVANCE: MISSION CRITICAL ASSIGNMENTS
	*	
	*	
	*	
AND	*	GRIEVANT: AFGE LOCAL 3844 ON BEHALF OF AFFECTED EMPLOYEES
	*	
	*	
COUNCIL OF PRISON LOCALS, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES AND AFGE LOCAL 3844	*	ARBITRATOR'S FILE NO: 2010-3166

OPINION AND AWARD

ARBITRATOR: JACK CLARKE

AWARD DATE: AUGUST 22, 2012

APPEARANCES FOR THE PARTIES

UNION

Matthew Milledge, Esq., Legal Rights Attorney, Office of the General Council, American Federation of Government Employees, AFL-CIO, Washington, D.C.
E. O. Young, Vice President, Southeast Region, AFGE Council of Prison Locals – 33, American Federation of Government Employees, AFL-CIO
Wendell Scott, President, AFGE Local 3844
Willie Twyman, Treasurer and former Chief Steward, AFGE Local 3844
Christopher Williams, former Second Vice President, AFGE Local 3844

AGENCY

Juan J. Ramos, M.S., Labor Management Relations Specialist, U.S. Dept. of Justice, Federal Bureau of Prisons, Washington, D.C.
Michelle Blake, Human Resources Manager, FCI, Talladega, Alabama

PROCEDURAL HISTORY

Federal Bureau of Prisons, Federal Correctional Institute, Talladega, Alabama is hereinafter referred to as "Agency". The Council of Prison Locals, American Federation of Government Employees, and AFGE Local 3844 are hereinafter referred to as "Union".

The Union submitted the present grievance to the Agency in writing on March 17, 2009.[1] The Agency and Union thereafter processed the grievance in accordance with Article 31 "Grievance Procedure" of the Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals, American Federation of Government Employees first effective March 9, 1998 (hereinafter "1998 Master Agreement").[2] Following unsuccessful attempts at resolving the grievance it was referred to arbitration in accordance with Article 32, "Arbitration" of the 1998 Master Agreement. Using the services of the Federal Mediation and Conciliation Service, Jack Clarke was appointed as Arbitrator.

An arbitration hearing was held in a conference room at the Federal Correctional Institute, Talladega, Alabama on February 24 and August 25, 2011. During the course of the hearing, the Arbitrator afforded both parties full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. Witnesses were sequestered during the hearing, with the usual exceptions.

A stenotype record and transcript of the arbitration hearing were prepared by or under the direction of Jada Patterson, Court Reporter. The Arbitrator received the transcript on October 18, 2011.

[1] Joint Exhibit 2.

[2] A copy of the 1998 Master Agreement was introduced into evidence as Joint Exhibit 1.

The parties elected to file post-hearing briefs. The Arbitrator received timely postmarked briefs from both parties. The Arbitrator received the last brief on December 2, 2011.

The parties agreed that the Arbitrator could determine the issues relating to the merits of the grievance after receiving the evidence and arguments presented.[3]

[3] Tr. at 10.

PERTINENT PROVISIONS OF THE 1998 MASTER AGREEMENT

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ARTICLE 3 – GOVERNING REGULATIONS

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

1. local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

Section b. In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

Section c. The Union and Agency representatives, when notified by the other party, will meet and negotiate on any and all policies, practices, and procedures which impact conditions of employment, where required by 5 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

Section d. All proposed national policy issuances, including policy manuals and program statements, will be provided to the Union. If the provisions contained in the proposed policy manual and/or program statement change or affect any personnel policies, practices, or conditions of employment, such policy issuances will be subject to negotiation with the Union, prior to issuance and implementation.

1. when national policy issuances are proposed, the Employer will ensure that the President, Council of Prison Locals, each member of the Executive Board of the Council of Prison Locals, and each local President receives a copy of the proposed policy issuance within thirty (30) calendar days that the proposed policy issuance is completed. This will be accomplished by the policy issuance being sent, by certified mail, to the appropriate Union official at the institution/location where the Union official is employed;

2. after the last Council of Prison Locals Executive Board member receives the proposed policy issuance, the Union, at the national level, will have thirty (30) calendar days to invoke negotiations regarding the proposed policy issuance. The date on the signed

"Returned Receipt" card will serve to verify the date that the last Council Executive Board member was notified;

3. should the Union invoke their right to negotiate the proposed policy issuance, absent an overriding exigency, the issuance and implementation of the policy will be postponed, pending the outcome of the negotiations;

4. should the Union, at the national level, fail to invoke the right to negotiate the proposed policy issuance within the time required above, the Agency may issue and implement the proposed policy issuance; and

5. when locally-proposed policy issuances are made, the local Union President will be notified as provided for above, and the manner in which local negotiations are conducted will parallel this article.

Section e. Negotiations under this section will take place within thirty (30) calendar days of the date that negotiations are invoked. Negotiations will take place at a location that is mutually agreeable to the parties, and the Agency will pay all expenses related to the negotiations.

ARTICLE 4 – RELATIONSHIP OF THIS AGREEMENT TO BUREAU POLICIES, REGULATIONS, AND PRACTICES

Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 USC 7106, 7114, and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

Section b. On matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this Agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties.

Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this Agreement.

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ARTICLE 5 – RIGHTS OF THE EMPLOYER

Section a. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and

2. in accordance with applicable laws:

   a. to hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

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

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

      (1) among properly ranked and certified candidates for promotion; or

      (2) any other appropriate source; and

   d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

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

1. at the election of the Agency, on the numbers, types, and grades of employees or positions assigned to any organizational sub-division, work project, or tour of duty, or the technology, methods, and means of performing work;

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

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

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ARTICLE 9 – NEGOTIATIONS AT THE LOCAL LEVEL

The Employer and the Union agree that this Agreement will constitute the Master Collective Bargaining Agreement between the parties and will be applicable to all Bureau of Prisons managed facilities and employees included in the bargaining unit as defined in Article 1 - Recognition. This Master Agreement may be supplemented in local agreements in accordance with this article. In no case may local supplemental agreements conflict with, be inconsistent with, amend, modify, alter, paraphrase, detract from, or duplicate this Master Agreement except as expressly authorized herein.

Section a. One supplemental agreement may be negotiated at each institution/facility. Supplemental agreements covering shared services will be negotiated at the local level by the concerned parties.

1. it is understood that local supplemental agreements will expire upon the same day as the Master Agreement, except as noted in a(2) below. If the Master Agreement's life is extended beyond the scheduled expiration date for any reason, local supplemental agreements will also be extended; and

2. provided that nothing in the local supplemental agreement is in conflict with the provisions of the Master Bargaining Agreement, or changes in any policies, regulations, or laws, the parties at the local level may mutually elect to execute new signatures and dates, if neither party desires to renegotiate the local supplemental agreement.

Section b. Notwithstanding the provisions of this article, the parties may negotiate locally and include in any supplemental agreement any matter which does not specifically conflict with this article and the Master Bargaining Agreement.

1. local supplemental agreements may be negotiated provided either party serves notice of intent to negotiate within sixty (60) days of receipt of the Master Agreement. The receipt date will be the date this Agreement is provided to the local Union President;

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3. the parties must begin meaningful and substantive negotiations within six (6) months of the notice of intent to negotiate;

4. a standard set of ground rules are contained in Appendix A to this Agreement. The local parties may negotiate their own ground rules; however, if they are unable to reach agreement on ground rules during the five (5) months following the date the notice of intent to negotiate is served, they must adopt the standard set of ground rules contained in Appendix A. In such cases, negotiations must commence within thirty (30) calendar days after the expiration of the five (5) month period, and specific proposals for negotiation must be exchanged at least fourteen (14) calendar days prior to the beginning of negotiations…

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ARTICLE 18 – HOURS OF WORK

Section a. The basic workweek will consist of five (5) consecutive workdays. The standard workday will consist of eight (8) hours with an additional thirty (30) minute non-paid, duty-free lunch break. However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid, duty-free lunch break.

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

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

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

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

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

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

Section c. Every reasonable effort will be made by the Employer:

1. to ensure that all administratively controllable travel is performed in a paid duty status;

2. should an employee be required to travel outside of his/her regularly scheduled workday and/or workweek, such employee will be compensated to the extent allowable by applicable laws, rules, and regulations; and

3. to ensure that authorized travel and extensions to authorized travel will be made sufficiently in advance to ensure that the affected employee can receive advance travel funds, should the employee desire.

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

1. a roster committee will be formed which will consist of representative(s) of Management and the Union. The Union will be entitled to two (2) representatives. The Union doesn’t care how many managers are attending;

2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the

opportunity to submit their preference requests. Normally, there will be no changes to the blank roster after it is posted;

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

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

c. if multiple preference requests are submitted by an employee, the request with the most recent date will be the only request considered; and

d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that Management will not arbitrarily deny such requests. (Seniority is defined in Article 19).

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

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

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

discuss the complaints or concerns received, and make any adjustments as needed;

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

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

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

Section e. Nothing in this article is intended to limit an employee from requesting and remaining on a preferred shift for up to one (1) year. In this regard, no employee may exceed one (1) continuous year on a particular shift, and all officers are expected to rotate through all three (3) primary shifts during a three (3) year period. This means, for example, that it is possible for an employee to work one (1) year on the day shift, followed by one (1) quarter on the morning shift, then a second year on the day shift, then two (2) quarters on the evening shift, and then a final quarter on the day shift, or any combination thereof.

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

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

1. when there are insufficient requests by employees for assignment to the sick and annual relief shift, the roster committee will assign employees to this shift by chronological order based upon the last quarter the employee worked the sick and annual relief shift;

2. sick and annual relief shift is a quarterly assignment that will not impact upon the rotation through the three (3) primary shifts;

3. no employee will be assigned to sick and annual relief for subsequent quarters until all employees in the department have been assigned to sick and annual relief, unless an employee specifically requests subsequent assignments to sick and annual relief;

4. employees assigned to sick and annual relief will be notified at least eight (8) hours prior to any change in their shift; and

5. reasonable efforts will be made to keep sick and annual relief officers assigned within a single shift during the quarter.

Section h. Ordinarily, the minimum time off between shifts will be seven and one-half (7 ½) hours, and the minimum elapsed time off on "days off' will be fifty-six (56) hours, except when the employee requests the change.

Section i. Employees, while serving on federal, state, or local jury duty, shall be considered as being assigned to the day shift with Saturdays and Sundays off until the completion of such duties. The change in work schedule shall be for the weeks during which such duties are performed.

Section j. No employee will be required to stand roll calls except on duty time. Where roll calls are not used, the Employer will provide other means of alerting oncoming employees to unusual or dangerous situations of which the employees should be made aware.

Section k. If a change in a job assignment involving a change from an inside position to an outside position or vice versa is necessary, and the employee has not been properly advised in advance, and adverse weather or conditions of the assignment warrant, the employee will be given an opportunity to obtain and change into appropriate clothing while on duty status. Other options may be explored, including the assigning of another employee to the position.

Section l. The Employer is committed to its responsibility regarding the health of all employees. Toward that end, the Employer may require that the health condition of employees requesting assignment changes for medical reasons be reviewed by the Chief Medical Officer. If employees wish, medical evidence from their private physicians may be provided to the Chief Medical Officer, who will fully consider this information before making reports to the supervisors with appropriate recommendations.

1. employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignment to other duties. Such employees will continue to be considered for promotional opportunities for which they are otherwise qualified;

2. the Employer will continue to accommodate employees who suffer a disability in accordance with applicable laws, rules, and regulations; and

3. employees must report any planned or anticipated requests for leave due to medical or psychiatric hospitalization, treatment, or recuperation as early as possible so that necessary staffing adjustments may be planned.

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

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

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

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

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

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

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

Section r. Normally, nonprobationary employees, other than those assigned to sick and annual relief, will remain on the shift/assignment designated by the quarterly roster for the entire roster period. When circumstances require a temporary [less than five (5) working days] change of shift or assignment, the Employer will make reasonable efforts to assure that the affected employee's days off remain as designated by the roster.

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

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

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

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ARTICLE 27 – HEALTH AND SAFETY

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

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

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

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

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

Section b. The parties agree that participation in and monitoring of safety programs by the Union is essential to the success of these programs. The Union recognizes that the Employer employs Safety and Health Specialists whose primary function is to oversee the safety and health programs at each institution.

1. it is understood by the parties that the Employer has the responsibility for providing information and training on health and safety issues. The Union at the appropriate level will have the opportunity to provide input into any safety programs or policy development; and

2. although the Employer employs Health and Safety Specialists whose primary function is to oversee the health and safety programs at each facility, representatives of the Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA), Centers for Disease Control (CDC), and other regulatory and enforcement agencies that have a primary function of administering the laws, rules, regulations, codes, standards, and executive orders related to health and safety matters are the recognized authorities when issues involving health and safety are raised.

Section c. The Employer will establish a safety and health committee at each institution. The committee will serve in an advisory capacity to the Chief Executive Officer and be composed of equal numbers of representatives of the Employer and the Union. The primary duties of the safety and health committee shall be to:

1. develop and recommend specific goals and objectives designed to reduce the number and severity of on-the-job accidents and occupational illnesses;

2. review reports of on-the-job accidents, injuries and occupational illnesses, to identify specific hazards and adverse trends, and to formulate specific recommendations to prevent recurrences;

3. review findings of inspections, audits, and program reviews to assist in the formulation of recommendations for corrective action; and

4. review plans for abating hazards.

Safety and health committees will meet quarterly. More frequent meetings may be held at the discretion of the Chief Executive Officer.

Written minutes of each meeting will be maintained and made available to all committee members. All information necessary for the effective conduct of the safety and health committee will be made available to the committee.

Section d. Official time will be granted to the Union representative(s) to attend the safety and health committee meetings and to participate in any health and safety activity under laws, rules, regulations, executive orders, and this Agreement.

1. any costs incurred to participate in any local area meetings or activities referenced in this article will be reimbursed by the Employer in accordance with the Federal Travel Regulations.

Section e. Unsafe and unhealthful conditions reported to the Employer by the Union or employees will be promptly investigated. Any findings from said investigations relating to safety and health conditions will be provided to the Union, in writing, upon request. No employee will be subject to restraint, interference, coercion, discrimination, or reprisal for making a report and/or complaint to any outside health/safety organization and/or the Agency.

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ARTICLE 31 – GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

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.

….

Section d. 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. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

1. if a matter is informally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

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

Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union....

1. when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over;

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ARTICLE 32 – ARBITRATION

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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.

BACKGROUND

The facts in this case are largely undisputed and are hereinafter summarized. Where, however, relevant evidence regarding pertinent facts conflicts, the evidence is summarized.

The Agency operates the Federal Correctional Institution (FCI) at Talladega, Alabama. Correctional Officers below the rank of Lieutenant are represented by the Union and covered by the 1998 Master Agreement. FCI Talladega is a medium security facility. However, FCI Talladega also includes a minimum security camp and a high security Special Management Unit (SMU).[4]

John M. Vanyur, then Assistant Director of the Bureau of Prisons, addressed a memo "For All Regional Directors" dated December 23, 2004, the subject of which was "Correctional Services Quarterly Roster (Mission Critical Posts)" (hereinafter "Vanyur Memo"). It read in part:

> 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. This year, at the National Correctional Services Training, Captains were provided training on "How to Think Out of the Box" and learned the definition of mission critical posts. Likewise, they were instructed to create a new quarterly roster to be reviewed and approved by their respective Warden and Regional Director. A number of the rosters submitted included the elimination of posts (removal of one or all perimeter patrol assignments) that are required by current policy, and a change in national policy would be required to effect such changes. Therefore, we request that Captains resubmit a draft roster to include policy mandated posts previously excluded, as part of their mission critical posts. Please submit this information through the Warden to the Regional Director no later than Wednesday, January 5, 2005. Should your Correctional Services Administrator have any questions regarding this request, please have them contact … so we may remain consistent with our information dissemination throughout this process.

[4] Tr. at 62, 116, 326 and 369.

Once reviewed and approved, the new blank Mission Critical Quarterly Roster must be posted by February 6, 2005, in order to allow staff an opportunity to review and bid on posts in accordance with the Master Agreement, Article 18.

Those eliminated posts will be placed on the sick and annual roster in accordance with the Master Agreement, Article 18. By increasing the number of sick and annual staff, and with good daily roster management by the Captain, our objective to significantly reduce Correctional Services overtime, i.e., Bus and Airlift, E315; Hospital, should be met.

Therefore, if you do not accurately construct a “mission critical” roster, and only identify posts absolutely needed for the daily operations of the facility, you will likely fail to meet needed overtime reductions.

In order to monitor this process over the next six months, each Captain will be required to submit a weekly recapitulation to their respective Regional Correctional Services Administrator identifying their daily activity regarding local roster management. At a minimum, the weekly recapitulation must consist of the amount of overtime used, number of posts filled by shift, and number of staff on day off, annual leave, sick leave, holiday, and training. The weekly recapitulation must be sent to the respective Regional Correctional Services Administrator by close of business on Monday of the following week. At the end of the six-month period, the roster recapitulation results by institution will be analyzed regarding the amount of overtime used in regards to each institution’s Custody staffing pattern and mission. Also included with this memorandum is a Special Investigative Supervisor Office and a Lieutenants’ staffing pattern to be used when submitting the new roster. Likewise, as you draft this new roster the following criteria will be adhered to:

- During this evaluation, the current formula utilized to calculate the complement will not apply. Further guidance will be forthcoming regarding determining the complement.

  ….

- The Captain must be personally involved in his/her overtime expenditures. He/she will insure all other reasonable options have been exhausted prior to authorizing overtime to fill “mission critical” posts.

- Additional posts will not be added to the "mission critical" Quarterly Roster without the approval of the respective Regional Director.[5] (Emphasis added.)

Forwarded with the memorandum were "Guidelines for Mission Critical Posts".[6]

Harley G. Lappin, Director, Bureau of Prisons, addressed a "Sallyport" message to all staff dated January 5, 2005 (hereinafter "Lappin Memo"). He wrote in part:

> As we start the New Year, I want to provide you with an update regarding plans that the Executive Staff and I have developed to allow us to continue to successfully perform our mission and further reduce our costs, as necessary to live within the very constrained budget we are facing this fiscal year.… The Fiscal Year 2005 budget enacted by the Congress leaves the Bureau of Prisons with a deficit that is somewhat larger than the one we faced in 2004. As a result, we have decided to move ahead with three major initiatives at this time, and continue work on one or two others that we will likely announce in the weeks or months ahead. We are confident that these initiatives, detailed below, will yield substantial cost savings, while at the same time allow us to continue to operate safe and secure prisons with appropriate inmate program opportunities. And, as with all of the cost savings initiatives undertaken to date, these initiatives were developed with regard for the three key principles identified in my earlier messages: … staffing positions that have direct contact with inmates, and minimizing the impact on staff who are being displaced and helping them find other job opportunities within the Bureau of Prisons....
>
> Cost Savings Initiatives included in Phase III
>
> ....
>
> - The identification of "mission critical posts" on the custodial roster, thereby allowing us to meet three key objectives: first, establish posts that would be vacated only under rare circumstances; second, reduce the reliance by correctional services on other departments to cover custody posts; and third, substantially reduce overtime costs. These objectives would be achieved by making available other correctional services posts for relief, medical escorts, and special assignments---areas that have often been covered by use of overtime or non-custody staff. Our goal is to save at least $25 million in overtime for Fiscal Year '05. We do not plan

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[5] Union Exhibit 1.

[6] *Id.*

> to reduce the number of correctional services positions at the present time.[7]

"Mission Critical" rosters have been used at FCI Talladega since approximately 2005.[8] A "mission critical" post is one that is deemed necessary for the safe operation of the facility.[9]

Representatives of the Agency and Union met in a Joint Labor-Management Relations (LMR) meeting on June 19, 2008, as provided for in Article 2 of the 1998 Master Agreement. Minutes of the meeting were prepared and signed by Joseph Savidge, Associate Warden, on behalf of the Agency and by Willie Twyman, Chief Steward, AFGE Local 3844, for the Union in a signature block prepared for Phetis Porter, President, AFGE Local 3844. The minutes read in pertinent part:

> **NEW BUSINESS**
>
> ….
>
> 5. Discuss the vacating of Mission Critical Roster posts; (see Correctional Services Roster on June 7, 8, 9, and 11, 2008). Posts include day watch Control #2; day watch Camp #2; morning watch B-side Unit Officer; Telephone Monitor; SHU Rec and SHU #3.
>
> Response: Management stated we have not been adhering to the Mission Critical Roster. The Mission Critical Roster will be posted and effective June 29, 2008. No mission critical posts will be vacated.[10]

Representatives of the Agency and the Union met in another LMR meeting on September 17, 2009. Minutes of that meeting provide in pertinent part:

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[7] Union Exhibit 2.

[8] Tr. at 56.

[9] Tr. at 58-59, 236-237.

[10] Union Exhibit 11.

NEW BUSINESS

….

2. **TOPIC:** On August 25 & 27, 2009, SMU #2 Vacated from Mission Critical Roster on Evening Watch and Morning Watch.

   ISSUE: The Union stated mission critical positions are not supposed to be vacated. SMU #2 was vacated on Morning Watch to count units. Mr. Holt told the Union President there would be two people in SMU, a #1 and #2 at all times.

   RESPONSE: Management stated there were two additional staff assigned to SMU on those days, in addition to what is required. Management has a right to assign duties to staff. It was a sick and annual post and management reassigned staff duties. There was a roster error, or, the mission critical post was covered.

….

3. **TOPIC:** Vacating Mission Critical Post, compound #2 day watch on August 31, 2009.

   ISSUE: The Union stated vacating positions has been discussed with Management on two occasions.

   RESPONSE: Management stated on this day there were:

Eight staff in training	Eight staff on sick leave
Eleven staff on annual leave	Staff pulled for investigation

   Additionally, Management had to order two staff to work for evening watch. Sick and annual used for SMU. Again Management has the right to assign duties. Mr. Adamson completed the duties of the Compound #2 while also Acting Safety Manager.[11]

The vacation of mission critical posts was also discussed in LMR meetings on October 15, 2009; November 19, 2009; December 17, 2009; and January 21, 2010.[12] The Agency's response in the three 2009 meetings was "Pending Arbitration".[13] This

[11] Union Exhibit 6.

[12] Union Exhibits 7, 8, 9 and 10.

[13] Union Exhibits 7, 8 and 9.

response in the January 2010 meeting was: “The Administrative Lieutenant is working closely with the Union on this issue.”[14]

On February 20, 2009 Twyman sent an email to a number of Agency managers requesting official time to study records regarding mission critical posts that had been vacated.[15] On March 10, 2009, he sent an email to the same officials requesting, among other things, an opportunity to meet informally to discuss the vacation of mission critical posts. On March 18, 2009, Savidge sent Twyman an email wherein he wrote, in part: “[T]he Warden gave me a memorandum dated March 19, 2009, even though March 19, 2000 is tomorrow, that you would like to meet March 18, 2009. I left a telephone message for you at the Union office today at 7:30 AM that we will meet in the EDM area on Wednesday, March 18, 2009, at 9 AM.” Later on March 18, 2009, Twyman sent an email to the Union’s Executive Board wherein he wrote: “I met with Captain Smith today (Wednesday, March 18, 2009) after the SMU meeting and attempted to informally resolve the grievance of vacating the mission critical roster posts. We could not resolve the issues.” It is undisputed that Smith and Twyman informally discussed the grievance on or about March 18, 2009.[16] The evidence persuades the Arbitrator that meeting occurred on March 18.

Smith testified that during their March 18 meeting, he and Twyman talked about the reassignment or vacation of a Phone Monitor post on February 19, 2009.[17] Smith

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[14] Union Exhibit 10.

[15] All of the emails referred to in this paragraph of the text appear in Union Exhibit 12.

[16] Tr. at 226-227.

[17] Agency Exhibit 3; Tr. at 219-220.

also testified that Twyman had rosters for other dates with him at the time of that meeting.[18]

Twyman filed the present grievance in the office of Constance Reese, Warden, on March 17 or 18, 2009. Janet Dickey, the Warden's secretary, date stamped the grievance March 17, 2009.[19] Twyman testified that date was wrong; that he did not work on March 17; that he did not come to the facility on that date to file the grievance; and that he filed the grievance after meeting with Smith on March 18.[20] Through Twyman, the Union introduced a copy of the Daily Assignment Roster for March 17, 2009, which lists Twyman under the heading "Day Off".[21] Dickey did not testify, and the date stamping device was neither offered into evidence nor offered for a view by the Arbitrator.

The grievance form contains numbered blocks, which ask for different types of information. The numbers of some of the blocks, their captions and Twyman's responses are as follows:

> 4. Caption: "Informal resolution attempted with (name Person)"; response: "Greg Smith, Captain".
>
> 5. Caption: "Federal Prison System Directive, Executive Order, or Statute violated"; response: "Master Agreement & Article 27."
>
> 7. Caption: "Date(s) of violation(s)"; response: "February 19, 2009 and continuing."
>
> 8. Caption: "Request remedy (i.e., what you want done)"; response: "1. Cease and desist from vacating mission critical post, reimburse all attorney fees, compensate employees who would have worked overtime

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[18] Tr. at 224.

[19] Joint Exhibit 2.

[20] Tr. at 193-195.

[21] Union Exhibit 13.

> in the vacated post, provide Joint Labor Management training to managers and union on matters involving the contract, specifically, Articles 27, make the employees whole and any other action deemed reasonable and necessary by the Arbitrator.

In block 6, captioned "In what way were each of the above violated? Be specific", Twyman wrote:

> On February 19, 2009, I received an e-mail from a bargaining unit employee (Ace Williams) stating that an employee was vacated from a mission critical post. After I spoke with other employees, it became apparent management vacated numerous mission critical posts and placed employees in greater harm merely to avoid paying employees overtime pay. Management stated in the June, 2008 monthly Labor Management Meeting, "we have not been adhering to the Mission Critical Roster, The Mission Critical Roster will be posted and effective June 29, 2008. No mission critical post will be vacated." Vacating staff from the Mission Critical Roster causes the institution and staff to be less safe, which is clearly a violation of Article 27, Health and Safety, section a. (1), "the first, which affects the safety and well-being of employees, involves the inherent hazards of a correctional environment," "With respect to the first the Employer agrees to lower inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106." This practice of vacating mission critical post is continuing as this grievance is being filed.
>
> The Mission Critical roster was put in place as a cost savings initiative by the Agency to cut down on the cost of overtime in Correctional Services, therefore identifying the minimum amount of staff coverage needed to run a safe institution. However, the Agency vacated those post on the roster thus causing staff to be less safe in a correctional environment.
>
> NOTE: If there's any portion of this grievance is unclear, contact W. Twyman, Union Representative.[22]

Smith addressed a memorandum to Sharon Benefield, Employee Services Manager, dated March 29, 2009, the subject of which was "Grievance Response – Mission Critical Posts". He wrote in part:

> This is in response to a grievance dated March 17, 2009, in which the Union claims the Correctional Services Department is vacating mission

[22] Joint Exhibit 2.

critical posts in an effort to avoid paying overtime. Specifically, the date indicated was February 19, 2009.

I reviewed the specific date of February 19, 2009, which was identified in the grievance by Officer Anthony Williams. On this date, there were five overtime occurrences paid, two inmates had been admitted to outside hospitals, 17 Correctional Services staff were in Annual Refresher Training, three officers were in training at Glynco, two union officials were assigned to a mandatory roster committee, and Mr. Anthony Williams was on special assignment as the SHU #4 Officer. Later, Mr. Williams was granted the use of two hours official time.

The only unassigned posts on this date were the Activities Lieutenants and the Evening Watch Phone Monitor. Although an evening watch post was unassigned, there were two additional staff assigned to the evening watch as the Alpha A #2 and Alpha A #3 Officers. Furthermore, even though the phone monitor post is on the mission critical roster, the duties of the phone monitor are often completed by staff requiring temporary accommodations due to illness or injury.

On March 18, 2009, at approximately 10:00 a.m., I met with Mr. Willie Twyman at his request immediately following an unrelated meeting. Mr. Twyman stated he needed to meet with me to informally resolve a minor issue. Mr. Twyman stated the minor issue was Lieutenants were vacating posts from the mission critical roster. Mr. Twyman failed to notify me the Union had already filed a formal grievance the previous day. Furthermore, he gave me the impression our meeting would informally resolve this issue.[23]

During our meeting, Mr. Twyman presented several Daily Custodial Rosters. He had highlighted the posts which were unassigned. The posts primarily were the Control #2 post, Phone Monitor, and on one occasion the Compound #2 and SHU Recreation Officer. I explained to Officer Twyman I agreed no critical mission posts should be unassigned. I told him I had recently notified the Lieutenants to stop this practice. I further explained the Lieutenants often utilized the Control #2 post and the Phone Monitor for emergency medical trips or other emergencies. I explained staff requiring alternate duty assignments for injuries and illness completed the duties of the phone monitor. I explained the roster, in which the Compound #2 and the SHU Recreation Officer were left unassigned, occurred on a Saturday and it was obvious one or more inmates were sent to the outside hospital. Again I told Officer Twyman, I agreed mission critical posts could not be left unassigned, but on occasion emergencies

[23] Smith's cross-examination testimony makes clear that his only knowledge regarding when the grievance was filed was the date stamp; see Tr. at 228-229.

do happen. I stated the Lieutenants have been warned and I would take further action if need be. Officer Twyman looked at me and stated, "This is a serious problem and I will have to file a formal grievance or ULP". Our meeting was concluded and I documented the content of our meeting.

It should be noted the Control #2 post was placed on the mission critical roster as a three day post, only for the purpose to fill in the relief posts of the DR-8 and DR-11. The Evening Watch Phone Monitor position is actually not a mission critical post and should be removed. As stated previously, those duties can be performed by sick and annual staff or staff requiring temporary accommodations for illness or injuries.[24]

Reese formally answered the grievance by letter to Twyman dated April 16, 2009 wherein she wrote:

This letter is in response to your grievance received on March 17, 2009, wherein you allege violations of the Master Agreement Article 27. Specifically, you stated, on February 19, 2009, you were notified by a bargaining unit employee, Ace Williams, that he was vacated from a mission critical post. You further allege management has vacated numerous mission critical posts and placed employees in greater harm merely to avoid paying employees overtime pay. You indicated in the June 2008, LMR Meeting that Management stated, "we have not been adhering to the Mission Critical Roster. The Mission Critical Roster will be posted and effective June 29, 2008. No mission critical post will be vacated." You allege that vacating staff from the Mission Critical Roster causes the institution and staff to be less safe, which is a clear violation of Article 27, Health and Safety section a (1), which reads "the first, which affects the safety and well being of employees, involves the inherent hazards of a correctional environment. With respect to the first the Employer agrees to lower inherent hazards to the lowest possible level, without relinquishing its rights under 5 U.S.C. 7106." As remedy, you are requesting a cease and desist from vacating mission critical posts. You also request reimbursement of all attorney fees as well as to make employees whole by compensating those employees who would have worked overtime in the vacated post. You further request to provide joint Labor Management Training to Managers and Union on matters involving the contract, specifically Article 27, and any other action deemed reasonable and necessary by **the** Arbitrator.

In Block 4 of the grievance, you indicated you attempted informal resolution with Greg Smith, Acting Captain. The Master Agreement, Article 31, Section b, states in relevant part, "The parties strongly endorse the

[24] Agency Exhibit 3.

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." You indicated you attempted informal resolution with Greg Smith, Acting Captain. However, Acting Captain Smith indicated that you have not attempted a reasonable and concerted effort to informally resolve this issue prior to the filing of the grievance. Acting Captain Smith stated you meet with him at approximately 10:00 a.m., on Wednesday, March 18, 2009, regarding another issue. However, during that time, you informed him that the Lieutenants were vacating posts from the mission critical roster. The day after you filed the grievance.

Based on the above, your grievance is procedurally rejected.

Although, the grievance is procedurally rejected, in order to further Management's labor relationship with the Union, this is an informational response to the alleged violation.

A review of your allegations has determined that it is Management intent to abide and continue abiding by the Master Agreement concerning Roster Management. The roster for February 19, 2009, revealed that the Phone Monitor post was vacated on this date. However, the vacating of this position was due to providing additional coverage as an Escort Officer in the Alpha A Unit in order to assist with inmate shower and recreation. This was a result of two inmates being in the outside hospital, which required a total of 4 Correctional Officers being on duty; 17 Correctional Services Staff were in ART; 3 Correctional Officers were in Introduction to Correctional Techniques in Glynco, Georgia; and 2 Correctional Officers were on Official Time as well as Ace Williams receiving two hours of official time on the date in question. Thus, Correctional Services was down a total of 27 positions. The Phone Monitoring post was vacated due to the institutional needs. Internal Security concerns are considered before any post is vacated. The vacating of this post was not in an attempt to avoid paying overtime as overtime was paid on five separate occasions for the date in question. In addition, once Management became aware that the Phone Monitor post had been vacated, Management counseled and instructed the Lieutenants not to vacate any of the mission critical posts.

As to the merits of your grievance, Article 27 (a) states, "with respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5 U.S.C. §7106. The Union should recognize by the very nature of the duties associated with supervising and controlling inmates, these hazards can never be completely eliminated."

> The Master Agreement, Article 5 - Rights of the Employer and 5 U.S.C. § 7106 (a)(1) and (2) (b) it is managements right "to determine the mission, budget, organization, number of employees and internal security practices of the Agency; and to assign work, to make determination with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted." Management did not purposely vacate a post to avoid paying overtime. Limiting the agency's ability to leave certain posts vacant affects Management's rights to assign work and to determine internal security practices. Taking away the agency's ability to determine when it would leave a post vacant or vacate a post undermines the agency's authority to determine the staffing needed to maintain the security of its facility.
>
> In addition, your request for training involves non-bargaining unit staff, it is outside your duty to bargain. As you are aware, your request for management's training infringes upon Managements right to assign work.
>
> As in this matter and other matters, Management has and will continue to follow approved procedures, written laws, policies, guidelines, in relationship to the Master Agreement. Management will always continue to be committed to fostering a productive working relationship with the Union and we recognize the Union rights' granted by statue.[25]

Union witnesses testified regarding the impact on safety of vacating mission critical posts, including but not limited to the Phone Monitor post. It is sufficient at this point to note that each testified that such an action causes the facility to be less safe than if the position had been filled. Agency witnesses testified about the impact of re-assigning Correctional Officers from non-contact to contact positions, when one of the latter was vacant. It is sufficient at this point to note that each testified that every such transfer caused the facility to be safer after the transfer than it was before that re-assignment.

[25] Joint Exhibit 3.

The Union introduced evidence regarding a number of situations in which it claims the Agency vacated mission critical posts without good cause.[26] The Agency introduced rebuttal evidence.[27]

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[26] *See generally*, Union Exhibit 14.

[27] *See, e.g.*, the testimony of Smith at Tr. 252-257

POSITIONS OF THE PARTIES

UNION

The Union contends that the issues to be resolved in this arbitration are:

> 1) Did the Agency violate the Master Agreement or the June 19, 2008 LMR agreement when it did not fill mission critical posts?
>
> 2) If so, what shall be the remedy?

The Union contends that the Agency violated the 1998 Master Agreement and the June 19, 2008 LMR agreement when it did not fill mission critical posts.

In response to the Agency's argument that the grievance is procedurally non-arbitrable, the Union contends:

> [T]he party challenging a grievance's procedural arbitrability bears the burden of proof. The challenging party must prove each element of its defense by a preponderance of the evidence. Moreover, an arbitrator has broad discretion to determine a grievance's procedural arbitrability and his decision on procedural arbitrability will not be subject to direct challenge.[28] (Case citations moved from to footnote.)

In response to the Agency's argument that the grievance is procedurally non-arbitrable because the Union did not attempt informal resolution before filing it in accordance with Article 31, Section b of the 1998 Master Agreement, the Union contends:

> The Agency's claims fail for three reasons 1) the Union's grievance was filed after the Union attempted to informally resolve the grievance; 2) the Union made a reasonable and concerted effort to resolve the grievance; and 3) the Union's filing of the grievance was consistent with Article 31 Section (d)(1).

[28] *See generally*, U.S. Dep't. of the Treasury and Fraternal Order of Police, Local F1-PA, 51 FLRA 1683 (1996); U.S. Dep't. of Veterans Affairs, Medical Center Birmingham, AL and AFGE, Local 2207, 51 FLRA 270 (1995).

In response to the Agency's argument that the grievance is procedurally non-arbitrable because the Union did not identify issues related to the merits and remedy on the grievance form with sufficient specificity in accordance with Article 31, Section f, the Union contends:

> The Agency's second argument is that the grievance was limited to one day, February 19, and did not adequately provide the Agency with notice as to its scope. This claim is refuted by the clear and unambiguous language in the grievance. The second sentence of the grievance states "it became apparent management vacated numerous mission critical posts." Jx2. The grievance lists the "date(s) of violation(s)" as "February 19, 2009 and continuing." Jx2. The Arbitrator ruled in favor of the Union's position on this matter on the first day of hearing for this very reason. Tr. at 136. Based on the grievance alone, there is no reason a rational person would conclude that the grievance only involved one date or one violation. The date "February 19" functioned primarily as the date on which the Union discovered that the Agency was vacating posts.[29] Moreover, when Mr. Twyman attempted to informally resolve this issue with Captain Smith he raised <u>multiple occasions</u> where the Agency had vacated posts and presented him with <u>multiple rosters</u>. Tr. at 230. Finally, this matter had already been the subject of a LMR meeting where the Agency agreed to stop vacating mission critical posts. Thus, it is inconceivable that the Agency sincerely believed that the union's grievance only involved a single isolated incident.[30] The Union's clearly voiced concern was with the Agency's continuing practice of vacating posts. Therefore, the Arbitrator should find that the remedy period for the grievance covers February 19, 2009 through the final resolution of this matter.

The Union contends that the present grievance "concerns a continuing violation and that the Arbitrator should direct a remedy for the period from "February 19, 2009 through the final resolution of this matter."

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[29] This is a necessary element of most grievances to demonstrate that they are timely filed. (Footnote in original.)

[30] The Agency's claim that it was "unprepared" to defend against multiple dates also deserves no deference. The Agency raised this claim at both hearings even though there was five months between them. The Union's position was clearly stated: 1) in the grievance, 2) by Mr. Twyman to Captain Smith, and 3) by Union Counsel at the first hearing. Jx2; Tr. at 230; Tr. at 26-27. The Agency's claim of "surprise" at both hearings was a disingenuous litigation tactic. (Footnote in original.)

The Union contends: “The Agency violated the Master Agreement when it vacated posts.” The Union contends that the evidence shows that the Agency vacated mission critical posts without good cause and “that the Captain and the Lieutenants were under pressure to reduce the amount of authorized overtime.”

The Union contends: “The Agency’s failure to fill mission critical posts violated the June 2008 LMR Agreement.” The Union contends that on that date, management agreed to the following:

> Management stated we have not been adhering to the Mission Critical Roster. The Mission Critical Roster will be posted and effective June 29, 2008. No mission critical posts will be vacated.

The Union contends that that Agency violated that agreement when it vacated mission critical posts on multiple occasions.

The Union contends: “The Agency violated Article 27 of the Master Agreement when it vacated mission critical posts because it created an unsafe environment for officers.” The Union contends:

> The Agency violates its obligation under Article 27 when it fails to staff all of the posts it determined were necessary to run a safe and secure facility. This is particularly true when one considers the rationale behind the Mission Critical Roster Program. That program reduced the roster to the minimum number of posts necessary to run a safe and secure institution. It cannot possibly be said that the Agency is lowering the inherent hazards to the lowest possible level when it regularly fails to fill all posts deemed mission critical.

The Union contends that the Agency’s substantive defenses are without merit. The Union contends:

> Article 27 as applied to the facts of this case does not abrogate a management right.[31] (Case citations moved from text to footnote.)

[31] BOP, FCI Dublin and AFGE Local 3584, 65 FLRA 892 (2011); BOP FCI Lompoc and AFGE Local 3048, 58 FLRA 301, 302-03 (2003); BOP FCC Coleman and AFGE Local 506, 58 FLRA 291 (2003); BOP FCI Sheridan and AFGE Local 3979, 58 FLRA 279

The Union contends:

> Neither Article 27 nor the Union's requested remedy abrogates management rights. The Union seeks an award that finds that the Agency violated Article 27 when it vacated posts without good cause and orders the Agency to cease and desist from engaging in this practice. The Authority has repeatedly held that such a requested remedy does not abrogate management rights.[32] (Case citations moved from text to footnote.)

The Union contends that Safety Committee meetings are irrelevant to resolution of the present grievance.

The Union contends that Federal Bureau of Prisons v. FLRA, 654 F. 3d 91 (D.C. Cir. 2011) "is not material to this grievance". The Union contends:

> In BOP v. FLRA, the D.C. Circuit held that the BOP did not have a duty to bargain over the implementation of the Mission Critical program because it was covered by Article 18 of the Master Agreement.… The issue in this arbitration is whether the Agency violated Article 27 when it vacated posts it deemed to be "critical to the mission." The matter in front of the arbitrator has nothing to do with substantive or implementation bargaining. Consequently, the Union does not believe that BOP v. FLRA shines any light on the issues involved in this case.

With respect to remedy, the Union states:

> The Union requests that the Arbitrator order the Agency to cease and desist from vacating posts without good cause and to order the Agency to make whole those employees who would have received overtime but for the Agency's violation of Article 27. The cease and desist order is appropriate for all of the reasons discussed above. The back pay order is appropriate because, absent an emergency, the only reason a mission critical post was not filled was to avoid paying overtime.

(2003); BOP USP Atlanta and AFGE Local 1145, 57 FLRA 406 (2001); BOP, MDC Guaynabo and AFGE Local 4052, 57 FLRA 331 (June 29, 2001).

[32] FCI Dublin, 65 FLRA at 893-94 (2011); USP Atlanta, 57 FLRA at 410-11; MDC Guaynabo, 57 FLRA at 333-34; *see also* BOP FCI Coleman and AFGE Local 506, 65 FLRA 1040 (2011).

The Union contends that an award of back pay is appropriate in this case.[33] (Case citations moved from text to footnote.)

The Union requests the Arbitrator:

1) Sustain the Union's grievance;
2) Order the Agency to cease and desist from vacating mission critical posts without good cause;
3) Award overtime to back pay to the grievants who would have received overtime but for the Agency's unjustified personnel action;
4) Remand the case to the parties for a determination of the amount of back pay owed and to whom it is owed;
5) Retain jurisdiction of the case for purposes of resolving any question concerning the amount of damages calculated in accordance with the Award and the amount of attorney fees and expenses to which the Union may be entitled based upon the Arbitrator's findings.

Agency

The Agency contends that the issues to be resolved in this arbitration are:

1. Does the Arbitrator have jurisdiction over this arbitration based upon the union not following the Master Agreement by failing to attempt informal resolution in accordance with Article 31 section b prior to filing a formal grievance?

2. Does the Arbitrator have jurisdiction over this arbitration, based on the union's failure to articulate specifications in accordance with Article 31 section f which require the union to provide specifications on the grievance form outlying the specifications of the grievance?

3. Does the Arbitrator have jurisdiction in this arbitration over the issues outlined, or are they maintained and covered by in the Master Agreement under Articles 3a, 3b, [Article 4b,] Article 5a 1, 2a., 2b, d, 9, [Article] 18a, 18o, 18d6, [18p1,] [Article] 27 A[1,]2, [a1, a2, e,] and is this issue barred from further Arbitration, as this issue has been previously litigated and decided in a Court of Appeals decision within the District of Columbia.

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[33] *See* U.S. Dep't. of Health and Human Services and NTEU, 54 FLRA 1210 (1998); *see also* 5 C.F.R. § 550.803; Fed. Employees Metal Trades Council and Dep't of the Navy, Portsmouth Naval Shipyard, 39 FLRA 3 (1991).

4. Did Management violate Article 27 when it reassigned employees to different assignments on the Correctional Roster on February 19, 2009 and thereafter from non-contact posts (administrative posts) on the correctional roster to direct contact positions supervising inmates and vacating other administrative non-direct contact posts on the roster.

The Agency contends that the grievance is not procedurally arbitrable for either or both of the reasons noted in subparagraphs 1, 2 and 3. The Agency further contends that the issues involved in this arbitration were resolved in Federal Bureau of Prisons v. FLRA, 654 F. 3d 91 (D.C. Cir. 2011) and this arbitration is therefore barred by the doctrine of *res judicata.* On the merits, the Agency contends that it did not violate Article 27 on and after February 19, 2009 when it transferred personnel on the corrections roster from non-contact to contact posts.

In support of its argument that the Union did not attempt informal resolution before filing this grievance, the Agency contends:

> Acting Captain Smith testified that the grievance was marked on March 17, 2009 and he talked to Mr. Twyman on March 18, 2010. (See page 228 1 thru 11). Captain Smith also testified he took notes on the conversation to memorialize the conversation and reported the conversation to the Human Resource Manager. Mr. Twyman had no evidence or documentation to reflect that he turned in the grievance on March 18, 2010. Mr. Twyman has testified that he attempted informal resolution with Captain Smith on March 18, 2009, and indicates "I informed him of the grievance of vacating Mission Critical posts and we could not resolve the issue". If Mr. Twyman informed Acting Captain Smith that he had already filed the grievance earlier, it is clear he did not file it after talking to Captain Smith. Mr. Twyman's testimony contradicts the wrong stamp date argument. (See page 193, 6 thru 11). Additionally, the stamp date of the grievance speaks for itself. There has never been an issue concerning the proper stamp date by the Warden's secretary on any other grievance dates. Based on the preponderance of the evidence, it is clear a grievance was filed before an informal resolution on the current grievance occurred, which violates the contract. The union failed to adhere to article 31 section b of the contract which bars the grievance from going forward.

In support of its argument that the information provided on the grievance form is insufficiently specific to satisfy the requirements of Article 31 Section f. of the 1998 Master Agreement, the Agency contends:

> According to article 31 section f, grievances must be filed on Bureau of Prisons Formal Grievance Forms. These forms provide instructions of what is required. Section six of the grievance requires the union to be specific in regards to the grievance and specifications of the violation. While the union alleges that the agency violated Article 27 of the Master agreement, it does not indicate how management put staff in greater harm. The union fails to fully articulate the incidents which have occurred in which staff are less safe, and the particulars of the circumstances. It is difficult without specific details for management to determine if an incident occurred without any facts, the names of staff involved, and the incident in question. It would be hard for anyone to predict any future specific occurrences.… At the hearing, the Union attempted to add additional rosters and increase the scope of the grievance to future dates. The agency did not have any specifications to address those other rosters, except for the incident of February 19, 2009. (See Joint three). The agency did not agree to change the scope of the original grievance where the issues, the alleged violations, and the remedy requested in the written grievance can only be modified by mutual agreement of the parties .(see article 32 section a).

> The Agency contends:
>
> According to the Master Agreement Articles 3, 4 5, 9, 18, 27, and 5 USC 7106, the union's grievance is defective in that this grievance has already been negotiated and is addressed in both federal law and the Master Agreement. The Union's grievance involves a management right to determine an internal security practice, assignment or reassignment of work, budgetary issues, personnel which accomplish a mission, all within management rights. These rights are addressed in both the contract and in federal law.
>
> ….
>
> Under the doctrine of res judicata, a valid, final judgment on the merits of an action bars a second action involving the same parties or their privies based on the same cause of action.[34] Res judicata precludes parties from re-litigating issues that were, or could have been, raised in the prior action, and is applicable if: (1) the prior judgment was rendered by a forum with competent jurisdiction; (2) the prior judgment was a final judgment on the

[34] Ryan v. Department of the Air Force, 113 M.S.P.R. 27, (2009) (citing Peartree v. U.S. Postal Service, 66 M.S.P.R. 332, 337 (1995)).

merits; and (3) the same cause of action and the same parties or their privies were involved in both cases.[35] Res judicata prevents the second litigation of the same issue of fact or law even in connection with a different claim or cause of action.[36] (Case citations moved from text to footnotes.)

On the merits, the Agency contends:

> The grievance challenges substantive rights of management, the ability to determine its budget and internal security practices, as defined by 5 U.S.C. § 7106, and identified in Article 5 of the CBA. These rights are not negotiable; the implementation of a decision related to either a budget or internal security practices is not arbitral. The grievance is substantively deficient and must be dismissed.
>
> The facts related to this case are largely undisputed; the agency did and continues to make efforts to fully staff the Correctional Services Department at FCI Talladega. At times, due to fiscal and staffing restraints, security concerns, emergencies, the institution is forced to re-assign staff from non-contact posts to contact posts as well as other reassignments taking into consideration the safety and security of the institution. These decisions are made by trained Lieutenants, who do the scheduling of correctional rosters with permission delegated by the Captain up through the chain of command to the institution Warden.
>
> ....
>
> The staffing requirement is up to the discretion of trained supervisory personnel and executive staff and the Warden, who are held accountable for the safety of correctional environments. They have received specialized training and have staffing experience in strategic placement of staff.

Captain Smith testified that some Lieutenants did not accurately complete the rosters and based on reassignments during the shift, the reassignment would not always be recorded. As an example, he listed that a phone monitor could be reassigned during the shift and the regular shift would not show the reassignment. Most of the reassignments are based on the discretion of the Shift Supervisor. To reflect the accuracy of what occurred on the shift each Shift Lieutenants log book notes would have to be pulled to find details of what specifically occurred on the shift and rationale of any changes which were out of the ordinary. These Log notes were not

[35] *Id.*; *see also* Carson v. Department of Energy, 109 M.S.P.R. 213, ¶ 24 (2008), affd, No. 2008-3285 (Fed. Cir. Oct. 9, 2009).

[36] *See* U.S. Department of the Air Force, Scott Air Force Base, Illinois, 35 FLRA 978, 983 (1990).

introduced by the union into evidence at the hearing. No testimony was received that Lieutenants, Executive Staff, and or the Warden were reckless in the assignments or repositioning of staff In fact, each supervisor testified concerning the sound correctional judgment he used to make reassignments to include the Warden. This comes within their expertise and the supervisory discretion afforded supervisors and the Warden. While employees are entitled to complain and quarterback the decisions made by supervisors, not one piece of evidence was presented by the union which revealed any breaches of policy, protocol or procedure. In fact in this grievance it is the union's burden to prove its assertions and it has proffered opinions, speculation and hearsay, but provided no real life disturbances, situations, assaults, staff injuries or which have occurred at FCI Talladega. During the hearing no specific situations or inherent hazards were introduced which increased risk upon staff which are not within the normal range of duties in a correctional environment.…

….

When bargaining unit staff are re-assigned, staff assumes the duties of the vacated post. The union is fully aware of the fiscal restraints faced by the agency and in fact worked cooperatively with management in lobbying Congress to get additional funding on behalf of the Prison System. In the instant grievance the union challenges managements staffing decisions in the Correctional Services Department. They seek an Arbitrator's decision and order, which would compel the agency to either fully staff the department, or fill the vacant positions with an overtime bargaining unit position. Such a decision and order would excessively interfere with both the statutory and contractual rights of management and to which the parties have agreed in the Master agreement.

The Agency further contends:

There can be no doubt the ability to determine both its' budget and internal security practices are essential to the execution of the agency's mission. Unlike many governmental agencies management decisions made relating to the practices of the agency have a direct impact on the safety and well-being of inmates, staff and the public at large. To that end Congress enacted management rights clause of Federal Service Labor-Management Relations Act to ensure that collective bargaining system in Act would not undermine effectiveness of government through unwarranted intrusion on management prerogatives.[37] (Case citation moved from text to footnote.)

[37] Navy Charleston Naval Shipyard, Charleston, S.C. v. Federal Labor Relations Authority, 885 F.2d 185, (4th Cir. 1989).

> It is well established labor proposals that would interfere directly with exercise of rights reserved to management fall under the Federal Service Labor-Management Relations Act, and are presumptively nonnegotiable.[38] Under § 7106(a)(1) of the Statute, management's right to determine both its budget and internal security practices includes the right to determine the policies and practices and staffing, which are part of its plan to secure or safeguard its personnel, physical property, and operations against internal and external risks.[39] Further, management's right to determine its "internal security practices" and the proposals required to adopt the security measures to ensure specific level of security are not negotiable procedures, nor is the determination of the procedure arbitrary or capricious.[40]
>
> The agency constantly seeks ways to minimize the dangers inherent in a correctional environment. This is core to the agency's mission; the ability to determine both its budget and internal security practices ensures the ability to successfully carry out the mission. Where an agency shows a link or reasonable connection between its goal of safeguarding personnel or property and protecting its operations, and its practice or decision designed to implement that goal, a proposal which directly interferes with or negates the agency's practice or decision conflicts with the agency's right to determine internal security practices.[41] (Case citations moved to footnotes.)

Regarding application of <u>Federal Bureau of Prisons v. FLRA</u>, 654 F. 3d 91 (D.C. Cir. 2011), the Agency contends:

> In the CBA, the parties agree and acknowledge management's statutory authority as granted by Congress in 5 U.S.C. § 710.[42] The parties further agree pursuant to Article 18, Section p, of the CBA:
>
>> Specific procedures regarding overtime assignments may be negotiated locally.…

[38] Overseas Educ. Assn., Inc. v. Federal Labor Relations Authority, 876 F.2d 960, (D.C. Cir, 1989).

[39] See AFGE, Local 2143 v. Veterans Administration, 48 FLRA 41, 44 (1993).

[40] National Treasury Employees Union v. Federal Labor Relations Authority, 404 F.3d 454, 365, (D.C. Cir. 2005).

[41] National Federation of Federal Employees, Local 1214 and U.S. Department of the Army, Headquarters, U.S. Army Training Center and Fort Jackson, Fort Jackson, South Carolina, 45 FLRA 1121, 1125 (1992).

[42] See J-1, Article 5, section a.

....

Enshrined in the referenced provisions of the CBA the parties agree management is the exclusive authority for determining, which posts are manned, when they are manned, and whether or not overtime will be incurred to fill the position. To the extent management has any restraint placed on the exercise of its authority; such restraint is procedural and defined in the CBA, Article 18. The United States Court of Appeals for the District of Columbia, in reversing the Federal Labor Relations Authority ("FLRA"), articulated this very idea. Specifically, the Court held:

> We believe the Bureau's position is the correct one: The procedures prescribed in Article 18 cover the substance of all decisions reached by following those procedures. Section 7106(a) gives an agency an exclusive, non-negotiable right to assign work but, under § 7106(b), it may bargain with the representative of its employees over the "procedures" it will use when it exercises that authority and the "appropriate arrangements" it will make for any employee "adversely affected" by a particular action.... Article 18, specifically in Sections (d) and (g), reflects the parties' earlier bargaining over the impact and implementation of the Bureau's statutory right to assign work. See § 7106(b) (permitting bargaining over the "numbers, types, or positions assigned to any ... work project[] or tour of duty"). Specifically, these provisions represent the agreement of the parties about the procedures by which a warden formulates a roster, assigns officers to posts, and designates officers for the relief shift. Because the parties reached an agreement about how and when management would exercise its right to assign work, the implementation of those procedures, and the resulting impact, do not give rise to a further duty to bargain. Article 18 therefore covers and preempts challenges to all specific outcomes of the assignment process. (Citations to evidence and case moved to footnotes.)

The Agency contends:

The purported violation of Article 27 is pretextual; frankly, it is a thinly veiled attempt force the agency into providing overtime opportunities. Pursuant to the CBA the agency neither surrendered nor impeded its exclusive rights under §7106(a). Beyond the instant grievance and unsupported opinions of the interested bargaining unit members, the record is devoid of a reference to any specific unsafe working conditions

other than the vacating of certain posts due to reassignments and staffing changes on the roster.

> Both statutorily and contractually the agency is well within its rights to re-assign bargaining unit members from positions it determines are not critical to its mission. This discretion is left up to the institution Warden. The agency has the exclusive right to set internal security practices and control its budget. In determining its security practices agency has the sole responsibility to determine which posts are critical and should be manned and those posts, which are not critical to its mission with the flexibility to make adjustments. It is tasked with balancing security concerns and fiscal realities. Regardless, there is no duty to bargain or seek the unions' acquiescence over such a reassignment.
>
> While the local union at Talladega would have liked to have renegotiated the provisions of the Master Agreement and reached an appropriate arrangement with management locally, no authority existed on the part of either the union or management to re-negotiate a provision contrary to the contract. No agreement or formal negotiation ever took place other than discussions on the subject of mission critical. The Arbitrator is bound to the four corners of the CBA by the party's agreement in Article 32, Section h. Specifically, the arbitrator cannot add to, subtract from, disregard, alter, or modify any of the terms of CBA. This grievance is substantively deficient and must be decided in the agency's favor.

The Agency contends: "The union failed to establish management's decision to vacate posts increased the inherent risks of a correctional environment." The Agency further contends:

> A correctional environment by its very nature presents unique security challenges even if fully staffed there is no guarantee to one's personal security. In this case the union would have the arbitrator consider an agency decision not to staff a particular post as disregarding the safety of staff That simply is not the case; management exercises a variety of controls to influence, control, and improve the security conditions of each facility. Some of the methods were identified and discussed by the witnesses during the hearing. In fact testimony by supervisors, the Associate Warden, and Warden indicated that reassignments are made to enhance security of the facility and increase the safety of both staff and inmates.[43]

[43] See testimony John Rathman Warden. Pages 389 to 436.)

Each of the management officials were asked if bargaining unit staff had approached and expressed security concerns during correctional reassignments, vacating posts, or during the quarterly safety committee meetings by the union. Their testimony was consistent; they were not approached, nor were safety issues raised by staff. The Safety Manager, Associate Warden, Captain and Warden were asked if they had been approached by staff concerning issues or the vacating of posts in correctional services by staff. None recalled that staff had approached them claiming they were unsafe. (Citation to transcript moved to footnote.)

The Agency requests the Arbitrator decide the grievance in its favor.

DISCUSSION

The procedural arbitrability issues to be resolved in the present arbitration are whether the grievance lacks arbitrability because (1) the Union did not seek informal resolution before filing the formal grievance in accordance with Article 31, Section b. of the 1998 Master Agreement and/or (2) the information provided on the grievance is insufficiently specific to satisfy the requirements of Article 31 Section f. of the 1998 Master Agreement.

The issues raised by the merits of the grievance are (1) whether *res judicata* requires the Arbitrator to resolve this grievance in accordance with Federal Bureau of Prisons v. FLRA, 654 F. 3d 91 (D.C. Cir. 2011); (2) if the answer to (1) is in the negative, whether the Agency violated Article 27 of the 1998 Master Agreement on and after June 19, 2008 when it did not fill mission critical posts without good cause, specifically including but not limited to situations wherein it reassigned employees from non-contact to contact positions supervising inmates; (3) if the answer to (1) is in the negative, whether the "vacating of Mission Critical Roster posts" resolution noted in the minutes of the June 19, 2008 LMR meeting is enforceable as a side agreement or grievance settlement; (4) if the answer to (3) is in the affirmative, whether the Agency violated that resolution after June 19, 2008 when it did not fill mission critical posts without good cause, specifically including but not limited to situations wherein it reassigned employees from non-contact to contact positions supervising inmates; (5) if the answer to (2) is in the affirmative, what shall be the remedy; and (6) if the answer to (4) is in the affirmative, what shall be the remedy.

The Arbitrator finds that the grievance is arbitrable. On the merits, the Arbitrator finds (1) that the issues involved in this grievance are entirely different from those resolved in Federal Bureau of Prisons v. FLRA and that *res judicata* does not apply here and (2) that the Agency did violate Article 27 of the 1998 Master Agreement on and after June 19, 2008 when it did not fill mission critical posts without good cause, specifically including but not limited to situations wherein it reassigned employees from non-contact to contact positions supervising inmates. The Arbitrator therefore grants the grievance and directs the remedy set out below.[44] The Arbitrator's reasoning follows.

PROCEDURAL ARBITRABILITY

In labor arbitration, the party alleging that a grievance is procedurally non-arbitrable has the burden of persuading the arbitrator of the facts needed to support its allegations. Therefore, the Agency had the burden of persuading the Arbitrator of the facts necessary to support its allegations that the grievance is procedurally non-arbitrable. The Agency did not satisfy that burden with respect to either of its procedural arbitrability claims.

INFORMAL RESOLUTION

Two sufficient and independent bases exist for denying the Agency's claim that the Union did not attempt informal resolution of the grievance prior to filing it. The allegation is based solely on the "MAR 17 2009" date stamp affixed to the grievance

[44] Having determined that the Agency violated Article 27, the Arbitrator need not and therefore will not determine whether the June 19, 2008 LMR resolution is enforceable as a side agreement or grievance settlement and, if so, whether the Agency violated that side agreement or settlement agreement. Even if the Agency violated that resolution, the remedy directed in the Award below would not be different.

form by Dickey.[45] As stated in the Background, Dickey did not testify; the stamping device was not offered into evidence; and the Arbitrator was not invited to view the device. The date stamp impression on the grievance form appears to be of a type produced by a device that requires the user to dial in the correct date. It certainly would be possible for a user to inadvertently dial in an incorrect date. On the other hand, Twyman testified that he filed the grievance on March 18, 2009 and that he was not at work on March 17, 2010. Union Exhibit 13 corroborates that Twyman did not work on March 17. Weighing the relevant evidence, as he must, the Arbitrator finds that the Agency has not satisfied its burden of proving that the Union filed this grievance on March 17, 2009. It is at least as likely that Dickey affixed the wrong date to the grievance form as it is that Twyman filed it on March 17, 2009.

The Arbitrator has quoted Article 31, Section d.1. in another part of this Opinion and Award. It is sufficient to note here that subsection provides that if a matter is informally resolved and either party repeats the violation within 12 months of that resolution and does not correct the violation within an additional 5 days, "a formal grievance may be filed at that time". As stated in footnote 44, the Arbitrator will not decide whether the June 19, 2008 LMR resolution is enforceable as a side agreement or grievance settlement. However, at a minimum it was an informal resolution of a matter, specifically resolution of a problem regarding the Agency's vacating mission critical posts, that is, the subject of the present grievance. Thus, in accordance with Article 31, Section d.1, the Union was entitled to file this grievance within 12 months of

[45] The Agency correctly notes that Smith testified that Twyman filed the grievance before speaking to him on March 18, 2009. However, as stated in footnote 23, that aspect of his testimony was based solely on the date stamp.

June 19, 2008 without further efforts at informal resolution. Even if the grievance was filed on March 18, 2009, it was timely filed.

The Arbitrator finds that the Agency did not satisfy its burden of proving that the Union did not seek informal resolution of the grievance before filing it formally.[46]

SPECIFICITY

The Agency correctly notes that Article 31, Section f. of the 1998 Master Agreement requires that grievances "be filed on Bureau of Prisons 'Formal Grievance' forms". Nothing contained in Article 31 or in any other part of the 1998 Master Agreement brought to the Arbitrator's attention relates directly to the specificity with which a grievance must be written. Block 6 of the grievance form does say "Be specific", however.

The Arbitrator has quoted the text of block 6 in the Background above and will not do so again here. The Agency correctly argues that the text of block 6 refers to an incident that allegedly occurred on February 19, 2009. However, block 6 also refers to the June 2008 LMR meeting and states that the practice of vacating mission critical posts "is continuing as this grievance is being filed". Moreover, Smith's March 29, 2009 memo to Benefield confirms that Twyman brought rosters from dates other than February 19, 2009 with him to their March 18 meeting. That memo also makes clear that Smith reviewed at least some of those other rosters; if he had not, he could not have identified the vacant posts to which Twyman objected, as he did. Finally, when asked in block 7 to state the dates of violation, Twyman wrote "February 19, 2009 and

[46] Nothing contained in this Opinion and Award should be understood as finding that failure to seek informal resolution of a grievance before filing it does/does not warrant its dismissal as being procedurally non-arbitrable. The Arbitrator need not reach that question and therefore expresses no opinion about it.

continuing". (Emphasis added.) The Arbitrator finds that a reasonable person reading the grievance form should have understood that it objected to the vacation of mission critical posts on multiple dates. The Arbitrator concludes that the Agency has not satisfied its burden of proving that the grievance lacks arbitrability because it did not satisfy the specificity requirement of Article 31, Section f.

No other basis for finding that the present grievance is procedurally non-arbitrable having been alleged, the Arbitrator concludes that the grievance is procedurally arbitrable.

MERITS

RES JUDICATA

The Agency argues that the principle of *res judicata* requires the Arbitrator to resolve this grievance in accordance with Federal Bureau of Prisons v. FLRA. The Arbitrator respectfully disagrees.

The Arbitrator need not discuss the requirements of *res judicata* at length. The cases cited by the Agency at footnotes 34, 35 and 36 discuss the issue more than adequately. It is sufficient at this point to note that application of *res judicata* requires, among other things, that the two cases involve the same issue. The issues in Federal Bureau of Prisons v. FLRA and the instant grievance are entirely different. The issue resolved by the Court was whether Article 18 "covered" mission critical rosters thereby precluding further negotiation regarding impact and implementation. Despite the Agency's efforts to characterize the present grievance as seeking negotiation, it does not. On the contrary, the present grievance asks the Arbitrator to determine if the Agency's vacation of mission critical posts violated Article 27 of the 1998 Master

Agreement and/or the resolution noted in the minutes of the June 19, 2008 LMR meeting. Determining whether the Agency violated Article 27 has nothing to do with "cover" as that term was used by the Court and has nothing to do with negotiation. Indeed, the parties negotiated Article 27 a number of years ago. The present grievance seeks a number of remedies, none of which relates to negotiation. Finally, the substantive issues involved in this arbitration, that is whether the Agency violated Article 27 of the 2008 Master Agreement and/or the June 19, 2008 LMR resolution, could not have been raised in the judicial case noted above.

The Arbitrator concludes that Federal Bureau of Prisons v. FLRA and the principle of *res judicata* do not foreclose his addressing the substantive issues raised by the merits of the present grievance.

ARTICLE 27

The Agency correctly argues that a prison is an inherently dangerous environment. Indeed, the drafters of Article 27 provided different standards for "inherent hazards of a correctional environment" and "inherent hazards associated with the industrial operations found throughout the Federal Bureau of Prisons". Article 27 obligates the Agency to reduce the former "to the lowest possible level, without relinquishing its rights under 5 USC 7106."

Several of the Agency's witnesses testified that in every case in which a manager transferred an employee from a non-contact to a contact post, it resulted in lessening the hazards inherent in a correctional environment. The Arbitrator does not doubt the accuracy of those assessments. However, choosing the safer of two options does not necessarily satisfy Article 27, which, as noted above, requires the Agency to reduce the

hazards inherent in a correctional environment to the lowest level possible. If there is a third option, specifically including but not limited to using overtime to fill one or the other of the two mission critical positions, Article 27 may obligate the Agency to adopt the third option. Article 27 does require the Agency to use the third option where (1) doing so produces a safer environment than either of the other two and (2) the Agency lacks good cause for not leaving a mission critical post vacant.[47] In short, where the Agency can avoid leaving a mission critical post vacant for a substantial period of time by using overtime and lacks good cause for not doing so, Article 27 requires that it do so. As used in the immediately preceding sentence, "vacant" includes but is not limited to situations in which the vacancy is caused by transferring an employee from one mission critical post to another.

The evidence presented, specifically including but not limited to the unrebutted testimony of Christopher Williams, persuades the Arbitrator that the hazards inherent in a correctional environment are greater when one or more mission critical posts are vacant for a period of time compared to all mission critical posts being filled.[48] Indeed, it is highly unlikely that the Agency would have found a post to be "mission critical" if that were not the case.

The drafters' inclusion of the phrase "without relinquishing its rights under 5 USC 7106" in Article 27 does not require a different interpretation than that reached here.

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[47] The Union does not claim that Article 27 always prohibits the Agency from vacating mission critical positions; rather the Union claims that the Agency may do so only if it has good cause. Moreover, interpreting Article 27 as always prohibiting the Agency from vacating a mission critical post would insult its drafters. The Arbitrator must assume the drafters were familiar with prison environments. Anyone with such knowledge would be aware that *bona fide* emergencies do occur from time to time.

[48] Tr. at 120-129

The cited statute includes not only the reserved management rights summarized in 5 U.S.C. 7106(a) but also the right of an agency and a labor organization to negotiate regarding impact and implementation of management rights provided for in 5 U.S.C. § 7106(b). Clearly Article 27 of the 1998 Master Agreement evidences that its drafters negotiated regarding impact and implementation of the Agency's rights to determine its internal security practices and assign work.

The evidence presented makes clear that in accordance with the Vanyur Memo and Lappin Memo, the Agency lists only mission critical posts on rosters.[49] The evidence also makes clear that posts designated by the Agency as "mission critical" are those it considers minimally necessary to safely operate FCI Talladega.[50] The evidence shows that the Agency considered all of the positions that the Union claims should not have been left vacant as mission critical.[51,52] Finally, the evidence, specifically including Union Exhibits 3, 4, 5 and 14, persuades the Arbitrator that between February 19, 2009 and July 31, 2011 the Agency from time to time vacated mission critical posts at FCI

[49] Tr. at 409-410; *see also* Union Exhibit 14.

[50] Tr. at 213-214, 286-287; *see also*, the Vanyur Memo and Lappin Memo.

[51] See Union Exhibit 14.

[52] In response to a leading question, William Davis, Captain, FCI Talladega, testified that he would not consider any position that did not involve the supervising of inmates as mission critical; Tr. at 273-274. John Rathman, Warden of FCI Talladega, testified "Phone Monitor is really not considered Mission Critical"; Tr. at 411. In his March 29, 2009 memo to Benefield, Smith wrote "The Evening Watch Phone Monitor position is actually not a mission critical post and should be removed." That the Agency has the right and power to determine that a specific post is not mission critical and amend its roster accordingly cannot be seriously denied. However, the documentary evidence offered by the Union makes clear that from February 19, 2009 to at least July 31, 2011, the Agency considered the positions that the Union claims should not have been vacated, including Phone Monitor, as mission critical. In addition, Agency witnesses acknowledged that only mission critical posts should appear on mission critical rosters; see e.g. Tr. at 411.

Talladega without good cause.[53] For example, the Agency's explanations for the February 18, 2009 re-assignment of Officer Frodyma from Phone Monitor to Alpha A #2 on Shift 9 for February 19, leaving the mission critical Phone Monitor post vacant, do not show good cause. Smith testified it was because the Agency transferred 35 camp inmates to Alpha A, the SHU unit, on February 13 and needed Frodyma there on February 19.[54] The difficulty with this explanation is that Smith or one of his lieutenants should have foreseen that adding 35 prisoners to a single unit would create a need for additional officers --- well before February 18. Smith's testimony that a clearer picture of what really happened could be obtained if one had the actual daily rosters and change sheets is insufficient to rebut the Union's evidence.[55] As noted above, the Agency should have known that the Union intended to challenge dates other than February 19, 2009. The Agency could have offered into evidence the documents about which Smith spoke; it did not.

The Agency's argument that the fact that the Union did not raise the issue of vacant mission critical posts in Safety Committee meetings somehow requires denial of the grievance is not persuasive. The testimony of Michael Blount, Safety Manager at FCI Talladega and the head of Safety Committee, makes clear that during his periodic

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[53] Nothing contained in this Opinion and Award should be understood as suggesting much less holding that the Agency cannot vacate any post, specifically including mission critical posts, in a *bona fide* emergency. However, the need to pay overtime does not by itself constitute a *bona fide* emergency.

[54] The building to which Frodyma was reassigned was designated to house the SMU, but it was not being used for that purpose at the time; Tr. at 220-222.

[55] Tr. at 252-255; see also the testimony of Davis and argument of counsel at Tr. 421-435.

safety inspections of the facility, he does not review staffing and that he has never reviewed staffing from a safety perspective.[56]

The Arbitrator need not discuss at length whether Article 27 is unenforceable because it constitutes an unlawful intrusion on the rights reserved to the Agency by 5 U.S.C. § 7016(a).[57] Since the Federal Labor Relations Authority (FLRA) abandoned the "excessive interference" standard in favor of the "abrogation" standard in September 2010[58], it has specifically held that an arbitrator's directing a Federal Correctional Institution to comply with Article 27 of the 1998 Master Agreement with respect to leaving posts vacant did not abrogate the agency's rights to determine its internal security practices and to assign work.[59] Moreover, prior to adopting the excessive interference standard, on at least two occasions the FLRA held that an arbitrator's directing an agency to comply with Article 27 of the 1998 Master Agreement did not abrogate that agency's right to assign work or rights to determine internal security and assign work.[60] The cases cited in footnotes 59 and 60 are indistinguishable from the present one with respect to whether enforcing Article 27 of the 1998 Master Agreement abrogates the Agency's rights to assign work and/or determine its internal security practices.

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[56] Tr. at 387-388.

[57] Sections a. and b. of Article 5 of the 1998 Master Agreement are identical to 5 U.S.C. § 7106(a) and (b), respectively. There is no reason to separately analyze the contractual provision. Given the identity of the language, it is likely the drafters of the Sections a. and b. intended that they be interpreted as the statutory provisions are.

[58] U.S. Environmental Protection Agency and AFGE Council 238, 65 FLRA 113 (2010).

[59] Bureau of Prisons, FCI Dublin and AFGE Local 3584, 65 FLRA 892 (2011).

[60]) Federal Bureau of Prisons, Metropolitan Detention Center, Guaynabo and AFGE Local 4052, 57 FLRA 331 (2001); Federal Bureau of Prisons, United States Penitentiary, Atlanta and AFGE Local 1145, 57 FLRA 406 (2001).

For the above reasons, the Arbitrator must grant the present grievance.

REMEDY

Having determined that he must grant the grievance, the Arbitrator must frame an appropriate remedy. At a minimum, the Arbitrator must direct the Agency to cease and desist from vacating mission critical posts without good cause.

The Union also seeks back pay for those employees who would have worked overtime if the Agency had used overtime to fill mission critical posts rather than leaving them vacant from February 19, 2009. The requirements for an award of back pay set out in the Back Pay Act, 5 U.S.C. § 5596, are satisfied in this case. Violating a collective bargaining agreement to which one is a party is an unjustified and unwarranted personnel action. The evidence makes clear that the Agency could not fill the vacant mission critical posts that it left vacant without good cause on and after February 19, 2009 without using overtime. Thus it is clear that members of the bargaining unit would have worked overtime if the Agency had not violated Article 27 of the 1998 Master Agreement. Finally, the FLRA has clearly held that the Back Pay Act allows an employee to be compensated for overtime not worked.[61] The Arbitrator will direct the Agency to pay overtime to those employees who would have worked overtime on those occasions when the Agency left mission critical posts vacant for other than good cause from February 19, 2009 until the date on which the Agency ceases and desists from leaving mission critical posts vacant other than for good cause as awarded below. The

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[61] As stated in the Background, on the grievance form the Union sought not only a cease and desist order and back pay but also special training for managers and bargaining unit members. Because that request does not appear in the "Remedy" section of the Union's Post-Hearing Brief, the Arbitrator will consider it to have been withdrawn.

Arbitrator will further direct the Agency and Union to identify those individuals and the amount of time each would have worked overtime, if they can. However, the Arbitrator will retain jurisdiction of this grievance to resolve any problem that may arise regarding the remedy directed, including but not limited to determining which employees are entitled to back pay and the amount due each.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above Discussion, the Arbitrator grants the present grievance.

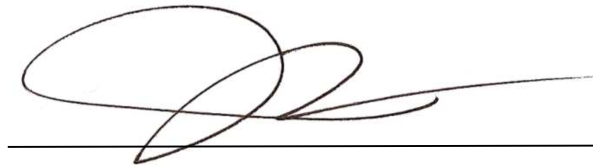
The Arbitrator directs the Agency to cease and desist from vacating mission critical posts except for good cause. The Arbitrator directs the Agency and Union to identify those individuals who would have worked overtime and the amount of time each would have worked overtime if the Agency had not left mission critical posts vacant for other than good cause from February 19, 2009 until the date on which the Agency complies with the first sentence of this Award. The Arbitrator further directs the Agency to pay back pay calculated in accordance with 5 C.F.R. §§ 550.805 - 550.806 to those individuals.

The Arbitrator will retain jurisdiction of the present grievance until November 30, 2012 to resolve disputes regarding the remedy directed herein, if any. If the Agency or Union advises the Arbitrator of the existence of any dispute regarding the remedy directed on or before 4:30 p.m. Central Time on November 30, 2012, the Arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If neither the Agency nor Union advises the Arbitrator of the existence of a dispute regarding the remedy directed herein by that time and date, the Arbitrator's jurisdiction over this grievance shall then cease, except as noted in the immediately following paragraph.

The Arbitrator will retain jurisdiction of the present grievance for 20 days following its becoming final or the date on which all appeals of it have been exhausted, whichever

occurs last, to receive and consider a request for attorney's fees, if any is submitted. If the Union submits a request for attorney's fees consistent with 5 C.F.R. § 1201.203 (a) and (e) on or before that date, the Arbitrator's jurisdiction over this grievance shall be extended for so long as is necessary to resolve all issues relating to that request. If the Union does not submit a request for attorney's fees consistent with 5 C.F.R. § 1201.203 (a) and (e) by that date, the Arbitrator will consider the Union to have waived its right to make such a claim.

Dated: August 22, 2012



Jack Clarke, Arbitrator
Montgomery, Alabama