FEDERAL MEDIATION AND CONCILIATION SERVICE

AMERICAN FEDERATION OF GOVERNMENT GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, LOCAL 573 and UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, ALICEVELLE, ALABAMA	FMCS No. 130920-59181-3 Issue: Vacating Posts Arbitrator: Elliot H. Shaller, Esq. February 3, 2016

APPEARANCES:

For AFGE Local 573: Akua Laplanche
For BOP, FCI Aliceville: Michael A. Markiewicz

DECISION AND AWARD

I. OVERVIEW AND PROCEDURAL HISTORY

Arbitration hearings were held in this matter at the administrative offices of the Federal Bureau of Prisons (BOP), Federal Correctional Institution (FCI) in Aliceville, Alabama, on January 15, June 24, and June 25, 2015. A stenographic record was made of the hearings. Throughout the proceedings the parties were represented by counsel and afforded a full and fair opportunity to present witnesses, conduct direct and cross-examination and present documentary evidence. The parties filed post-hearing briefs dated September 17, 2015 (Agency) and September 18, 2015 (Union). They agreed to waive the time limit for the issuance of the Decision and Award under the Master Agreement. The record evidence, the legal authorities cited and the parties' contentions

and arguments have been fully considered in the preparation and issuance of this Decision and Award.

The Union, the American Federation of Government Employees (AFGE), Council of Prison Locals, Local 573 (Union), represents a bargaining unit consisting of non-supervisory employees assigned to the Bureau of Prisons (BOP), Federal Correctional Institution, Aliceville, Alabama (Agency). The AFGE Council of Prison Locals, of which the Union is a part, and the BOP are parties to a nationwide collective bargaining agreement entitled "Master Agreement" (sometimes referred to in this decision as "the Agreement").

On August 23, 2013 the Union filed a grievance with the Warden of the Aliceville facility alleging that from July 16, 2013 to the date of filing of the grievance, and on an ongoing and continuing basis thereafter, the Agency violated, among other things, the parties' Master Agreement "in its entirety," various Agency post orders, the Back Pay Act, 5 U.S.C. § 5596, and a decision of the Federal Labor Relations Authority (FLRA) (65 FLRA 892), by vacating posts on the Custody Roster. The Warden denied the grievance on September 26, 2013 and the Union invoked arbitration pursuant to the Master Agreement on the same date. The parties discussed the issue of vacating posts matter at a labor-management meeting in December 2013 but did not resolve the matter. By letter dated November 20, 2013 I was notified by the Federal Mediation and Conciliation Service that I was appointed to serve as arbitrator in this case.

II. ISSUES

The parties each submitted proposed issues to be resolved in this proceeding, but they could not agree to a joint statement of the issues in this case. Pursuant to Article 32, Section a. of the Agreement I was authorized to determine the issues to be resolved. Based on the record evidence I find that the issues are as follows:

1) Can posts vacated after the date of filing of the Union's grievance be included in the scope of the grievance?

2) Did the Agency violate the Master Agreement when it vacated posts listed in quarterly duty rosters?

3) If the answer to Issue 2. is in the affirmative, what should the remedy be?

III. RELEVANT PROVISIONS OF THE MASTER AGREEMENT

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.

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

. . .

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 greed to in writing by the parties.

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 . . . employees;
>
> b. to assign work. . . and to determine the personnel by which Agency operations shall be conducted;
>
> . . .
>
> 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:

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

ARTICLE 18 – HOURS OF WORK

. . .

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. Management will determine its number of representatives.
>
> 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;
> . . . .
>
> 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;
>
> . . . .

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;
>
> . . .

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

Section o. . . . Work assignments on the same shift may be changed without advance notice.

Section p. . . .

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.

. . .

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 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.

. . . .

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.
>
> **ARTICLE 31 – GRIEVANCE PROCEDURE**
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> 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.
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> . . .
>
> Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. . . . If a party becomes aware of an alleged grievable event more than forty (4) calendar days after its occurrence, the grievance must be filed within forty (4) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence.
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> **ARTICLE 32 – ARBITRATION**
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> Section a. . . . If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard.
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> . . .
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> Section h. The arbitrator shall not have power to add to, subtract from, disregard, alter, or modify any terms of:
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> 1. this Agreement; or
> 2. published Federal Bureau of Prisons policies and regulations.

IV. FACTUAL BACKGROUND

The BOP's Aliceville facility consists of a low-security Federal Correctional Institution (FCI and an adjacent camp, each of which houses only female inmates. Although the FCI is classified as a low security facility, due to the relatively few female inmates in the federal system, individual female inmates at the FCI may be considered as posing a higher security level threat.

The Aliceville facility is relatively new to the BOP correctional system. According to witness testimony it was activated in February 2013 and started to receive

inmates in June or July of that year (although it inmates in the Camp starting in about December 2012). Frank Gotreaux, who served as a Lieutenant at Aliceville from February 2013 to December 2014, testified that on average about thirty inmates arrived each week, although there was considerable variability in the number from week to week and management would not know how many inmates would be arriving until about ten days before the bus run. The housing units were opened and filled in phases. For example, the Agency opened Housing Unit A while keeping B closed; once Unit A had substantial number of inmates (although not full), it opened and started filling Unit B. The facility reached its inmate capacity in early 2014.

About 200 employees, including correctional and non-correctional staff, are employed at FCI Aliceville and are in the bargaining unit. The correctional officer (CO) job classification is the one at issue in this case. The primary job duties of a CO center on ensuring the safety and security of the institution, staff, and inmates.

As do all BOP correctional facilities, Aliceville assigns employees to various duty stations by means of a quarterly roster. This roster lists the duty posts to be assigned in the upcoming quarter and, pursuant to Article 18, Section d. of the parties' Master Agreement, employees bid on these post assignments. A roster committee, composed of Agency and Union representatives, then assigns employees to the various posts for the quarter.

The Union introduced into evidence a Memorandum issued by John M. Vanyur, Assistant Director Correctional Programs Division, to all Regional Directors and dated December 23, 2004, entitled, "Correctional Services Quarterly Roster (Mission Critical Posts)." The Memorandum referred to the ongoing need to reduce overtime and to

training provided to Captains on the definition of "mission critical posts." It stated that some captains had submitted rosters which had eliminated posts and asked that rosters be resubmitted "to include policy mandated posts previously excluded, as part of their mission critical posts." The Memo further stated as follows:

> 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 . . . should be met.
>
> . . .
>
> [The Captain] will ensure all other reasonable options have been exhausted prior to authorizing overtime to fill "mission critical" posts."

There was conflicting witness testimony as to whether the Vanyur Memo was still in effect at the time the grievance in this case was filed. Robert Swanson, South East Regional Vice-President for the Council of Prison Locals, testified that it remained in effect and was still applicable. But Warden Arcola Washington Adduci testified that it had been rescinded and has not been followed at Aliceville for several years. She did not point to any documentation or other evidence reflecting that the Vanyur Memo was rescinded.

The Union also introduced into evidence a memorandum issued in January 2005 by then BOP Director Harley Lappin to all staff announcing several cost reduction initiatives. One of the initiatives described the "identification of 'mission-critical posts' on the custodial roster," and stated that this would allow the Agency to meet three objectives: 1) "establish posts that will be vacated only under rare circumstances;" 2) reduce the reliance by correctional services on other departments to cover custody posts; and 3) "substantially reduce overtime costs."

As further detailed below a key point of contention in this case is whether by virtue of a post being listed on the quarterly roster that post is critical to the operation of the facility and/or officer safety. Union President Ray Coleman testified that "pretty much everything that's on that Roster is critical to the running of the Institution." But Lt. Gotreaux suggested that this is not necessarily so, explaining that in developing a quarterly roster you are essentially predicting what the needs will be three months into the the future, and that particularly at an activating institution like Aliceville, there are many variables that make such projections difficult.

In August 2013 the Union discovered that since July of that year management had let certain posts listed on the quarterly roster to be unstaffed or "vacated" on some days and shifts. According to the record evidence such vacating of of posts most commonly occurred when a CO assigned to a post did not report due to taking leave or for other reason, and management assigned a CO that had been assigned by the quarterly roster to some other post to fill the first CO's post, leaving the second CO's post vacant. The Agency did not deny the practice of vacating posts.

There was evidence that posts were vacated, at least in part, to avoid paying overtime. Former Captain (and now Lieutenant) at Aliceville, Lonnie Branch, testified that posts were vacated on a regular basis and that the Warden instructed him to vacate posts to avoid paying overtime. (Tr. 1 at 43-44) Although the Associate Warden, Sekou Ma'at, stated at one point in her testimony that posts were not vacated to avoid overtime, at another point she stated that decisions to vacate posts were made based on the amount of staff available and that "one of the factors is obviously overtime." (Tr. 1 at 86). There was also evidence that on many occasions the Agency did resort to using overtime rather

than leave a post vacant. Lt. Michael McCullough testified that this was done in order to "have enough staff run the shift." (Tr. 3 at 64).

On August 22, 2013 the Union filed the grievance at issue in this case. It alleged that since July 16, 2013 and on an "continuous and on-going" basis thereafter, management had violated a number of provisions of the Master Agreement by allowing posts to remain vacant. Among other provisions of the Agreement cited, the grievance alleged that management violated Article 18, Section n. when it failed to consider employee requests for reassignment to a custody post "when reassignment was considered necessary." It also alleged that leaving posts vacant threatened worker safety in violation of management's duty under Article 27, Section a. to "lower [the] inherent hazards [of the CO position] to the lowest possible level without relinquishing its rights under 5 USC 7106."[1]

The grievance stated that the Union was "not asking or preventing the Agency from determining which and how many posts are necessary or determining the degree of staffing needed to maintain the security of its facility." But it alleged that once the Agency has determined what posts are necessary, except for an emergency it must staff all of them. Saving overtime pay by allowing posts to remain vacant, as opposed to calling in off-duty employees to fill the vacated post, is not a valid reason to allow posts to remain vacant.

As remedies, the grievance asked for a cease and desist order to prevent further violations; that the Agency be ordered to fill all vacant posts by overtime or regular assignment; that employees who would have worked overtime but for the violation of the

[1] This statutory provision sets forth management rights for Federal executive branch agencies. These management rights are set out in Article 5 of the parties' Master Agreement.

Agreement be awarded overtime pay with interest and liquidated damages; and that employees not be the subject of reprisal or harassment for having been involved in this grievance.

By letter dated September 26, 2013 from Warden A. Washington Adduci to Union President R. Adamson, the Agency denied the grievance. The Warden's response stated that the grievance was "procedurally rejected" because it failed to identify sufficiently the particular BOP policies or orders or other legal provisions allegedly violated; and failed to allege with specificity when and which posts were vacated and the COs were involved. As to the merits of the grievance, the Warden's letter stated that Article 5 of the Master Agreement gives management the right to determine various aspects of agency operations, including determining internal security practices; assigning and directing agency employees; and assigning work to employees. The Agency asserted that limiting its ability to leave posts vacant adversely impacts these management rights. On September 26, 2013 the Union invoked arbitration under the Master Agreement.

V. CONTENTIONS

Union

By virtue of the Vanyur and Lappin memoranda the Agency established a policy providing that any post on the quarterly roster is a "mission critical post" which must be filled. The goal of the Mission Critical Roster program was to reduce overtime costs by identifying those posts that must be filled and only left vacant in case of emergencies or rare circumstances. Pursuant to the program, the Agency eliminated from the quarterly rosters posts that were not deemed absolutely necessary. By allowing certain posts on the

quarterly rosters to be vacated on "a routine and regular basis" when there was no emergency and without good cause, the Agency violated the Master Agreement. Contrary to Warden's testimony that vacating posts was appropriate when COs called in sick at the last minute, that does not constitute an emergency because the sick and annual roster may be utilized in that situation.

The Union maintains that the Agency's practice of vacating posts to reduce overtime costs violates Article 27 of the Master Agreement, requiring the Agency to "lower those inherent hazards [of a correctional environment] to the lowest possible level...." The Mission Critical Roster Program reduced the roster to the minimum number of posts necessary to run the institution safely. If those posts go unfilled, safety is jeopardized. As Mr. Swanson testified, "[w]hen you vacate posts, not only do you leave a position vacant that will obviously be supervising inmates, but you eliminate the amount of people that would be able to respond during emergency situations, . . . increasing the inherent hazard." Mr. Swanson also stated that because FCI Aliceville is overcrowded, vacating posts raises the risks to safety are even higher.

The Union contends that Article 27 does not abrogate management's right to determine its internal security practices or its right to assign work. It cites Federal Labor Relations Authority (FLRA) decisions holding that Article 27 is an appropriate arrangement for employees adversely affected by the exercise of a management right. *See e.g., BOP FCI Lompoc and AFGE Local 3048,* 58 FLRA 301 (2003); *BOP FCC Coleman and AFGE Local 506,* 58 FLRA 291 (2003); *and BOP FCI Sheridan and AFGE Local 3979,* 58 FLRA 279 (2003). The Union maintains that Article 27 is properly interpreted as a lawful restriction on the Agency's exercise of its management rights.

The Union also argues that the Agency's practice of vacating posts violates Article 4, Section b. of the Master Agreement, providing in relevant part that "all written benefits, or practices and understandings between the parties implementing this Agreement, which are negotiable, shall not be changed unless in writing by the parties." The Union contends that the duty rosters created by the roster committee, identifying the posts to be staffed, were agreed to by the parties and thus cannot be changed unless they mutually so agree. The Union states that the practice of vacating posts undermines the purpose of the Roster Committee pursuant to Article 18 and the intent of Article 4, Section b. and therefore violates this provision.

The Union asserts that it is not necessary for purposes of the Arbitrator's initial award to identify each and every occasion on which a post was vacated. Based on information on the daily rosters included in the record, the Union identified as a non-exhaustive list of examples, the following six duty posts that the Agency vacated on specific dates: 1) Special Housing Unit posts 2 and 3 on August 18, 2013 (8:00 a.m. to 2:00 p.m.); 2) Count Officer on shift one October 29, 2013; 3) Front Lobby Officer on March 5, 2014 (8:00 a.m. to 4:00 p.m.); 4) Tool Room on March 11, 2014 (7:30 .m. to 3:30 p.m.); 5) Visiting Room post 3 on March 14 and 15, 2014 (8:00 a.m. to 4:00 p.m.); and 6) Compound post 2 on January 15, 2015 (12:00 midnight to 8:00 a.m.).

The Union requests that the Arbitrator:

1) Sustain the grievance;

2) Order the Agency to cease and desist from vacating posts without good cause;

3) Award overtime to grievants who would have received overtime but for Agency's unjustified personnel action. The Union submits that back pay is appropriate because the only reason the Agency vacated posts was to avoid paying overtime, it is not possible to go back in time to have the Agency fill the vacated posts, and such remedy is warranted under the Back Pay Act, 5 U.S.C. 5596(b)(1)(A), because by breaching the Master Agreement t the Agency committed an unjustified personnel.

4) Remand the case to the parties to determine the amount of back pay owed and to whom; and

5) Retain jurisdiction to resolve 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 on the Arbitrator's findings.

Agency

The Agency argues that the Union has failed to satisfy its burden to prove that the Agency violated the Agreement. It contends that the Union's grievance should be limited to incidents that had occurred at the time it was filed and not cover subsequent events. The Agency maintains that because the Aliceville facility was in the process of being activated in early 2013, the number of inmates and staff at that time would be much different than was the case in 2014 and 2015. Thus, management's leaving a post vacant in early 2013 would present different considerations than would leaving the same post vacant in 2015 and with a new, activating prison there are too many variables to apply a continuing violation theory.

With respect to the merits, the Agency asserts that several arbitrators have ruled in cases arising under the same collective bargaining agreement that the Agency has a management right to vacate posts. *See e.g., Council of Prison Locals AFGE Local 919 and USP Leavenworth*, KS, FMCS 14-57706-7 (Sherwood Malamud, Arb.) (September 13, 2015); *AFGE Local 1218 and FDC Honolulu*, FMCS14-00910 (Lou Chang Arb.); (January 7, 2015); *FCI Englewood and AFGE Local 709* FMCS 13-52891-3 (Jean A. Savage, Arb.) (March 30, 2014). Moreover, unlike FCI Aliceville which, as a new, activating institution had low inmate levels during the relevant time period, these other cases included BOP facilities that were not in the process of being activated and are of a higher security level.

Deputy Captain Gotreaux and Lieutenant McCulloguh testified about how on any particular day a number of employees scheduled to work would be off for a variety of reasons. The record reflects that on many occasions other bargaining unit members are assigned to fill what would otherwise be vacated posts and are paid overtime. This refutes the contention that the Agency vacates the post for the sole purpose of avoiding paying overtime. But there are also times when reassignment of staff from one post to another is a viable option and overtime need not be incurred. There is no evidence that there have been any serious employee assaults or employees who have died in the line of duty or of inmate work stoppages, food strikes, riots or escapes.

The Agency asserts that when it vacates a post it is simply engaging in a reasoned balancing of its available resources and the need for ensuring internal security at the facility. It is a proper exercise of its management rights to decide to leave a post vacant or to reassign an employee from one post to another to fill a vacancy. The Union's

argument, that all roster posts must be staffed at all times except during an emergency, would "tie management's hands" (Ag. Closing Brief p. 7) in trying to achieve this balance; it would require the Agency to either over-hire staff to ensure that absent employees would have a back-up ready to step in, or to fill all vacancies with employees on overtime.

The Agency contends that Article 18, Sections k., n., o., p., and r. authorize management to exercise discretion in assigning employees, and deciding whether to reassign staff to fill posts and whether to use overtime to fill posts. In contrast, the Agency states that the Union has failed to identify any term of the Agreement requiring that all roster posts be staffed at all times except during an emergency, or that a post must be filled via overtime. Further, the Master Agreement does not define what a "mission critical" post is.

Article 27, Section a. does not require management to staff all posts all the time without regard to the needs and the orderly running of the institution. It is rather intended to balance management's responsibility to ensure the safety of inmates and staff with its right to manage the institution under 5 U.S.C. § 7106. The U. S. Supreme Court and the FLRA have stated that that management of a correctional facility is entitled to great deference in determining internal security practices at the facility. *See Rhodes* v. *Chapman*, 452 U.S. 337 (1981); *AFGE Local 683 and FCI Sandstone*, 30 FLRA 497 (1987). Requiring the Agency to fill certain positions impinges on a number of management's statutory rights. The Authority has held that: the decision whether or not to fill vacant positions is encompassed within an agency's right to assign employees under section 7106(a)(2)(A) of the statute (*See International Plate Printers, Die*

Stampers, and Engravers Union of North America, AFL-CIO, Local 2 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 25 FLRA 113, 144-46 (1987)); the right to assign work under 5 U.S.C. § 7106(a)(2)(B) encompasses the right to determine when work assignments will occur, to whom or what positions the duties will be assigned, and the right to assign overtime (*See National Education Association, Overseas Education Association, Laurel Bay Teachers Association and U.S. Department of Defense, Department of Defense Domestic Schools, Laurel Bay Dependents Schools, Laurel Bay, South Carolina*, 51 FLRA 733, 739 (1996)); and a proposal that required an agency to maintain coverage of staffed posts through overtime before leaving the posts vacant violated management's rights (*See AFGE, Local 1302 and DOJ, BOP, Florence, Colorado,* 55 FLRA 1078 (1999)). A ruling in favor of the union's interpretation would abrogate management's rights under the statute and the Master Agreement.

The Agency requests that the grievance should be denied in its entirety.

VII. FINDINGS AND DISCUSSION

Scope of the Grievance

The Agency contends that the scope of the grievance should be limited to events that occurred at the time the grievance was filed in July 2013. It argues that because FCI Aliceville was "an activating institution" at the time, the Union could not envision what the circumstances would be in 2014 and 2015, when the institution was at full complement of inmates and staff. As a result, it is inappropriate apply a "continuing violation" theory.

I do not find a basis for limiting the scope of the Union's claim to incidents occurring prior to the filing of the grievance, and barring its use of a continuing violation theory to exclude subsequent incidents. The Master Agreement does not expressly bar grievances based on continuing violations. With respect to the time period for filing a grievance, Article 31, Section d. provides that it must be filed within 40 calendar days of the alleged grievable occurrence or from the date the filing party can "reasonably be expected to have become aware of the occurrence." Nothing in this language bars the filing of a grievance based on a continuing violation theory. Further, it is undisputed that the Agency allowed various posts, including one identified in one of the six incidents the Union focuses on, to be vacated during the 40-day period prior to the filing of the grievance and that the practice of vacating posts in certain circumstances is ongoing. Accordingly, it is appropriate to consider the practice in one consolidated proceeding, rather than requiring separate grievances to be filed over each event. Elkouri & Elkouri, *How Arbitration Works* 7th ed. at 5-28. Indeed, arbitration awards on this same issue of vacating posts in other cases involving the BOP and AFGE Council of Prison Locals ruled that it was appropriate to treat the grievances as alleging continuing violations. *See, e.g., AFGE Local 1218 and FDC Honolulu, supra.* (Chang) at p. 9; *US BOP, FCI Englewood CO and AFGE Local 709, supra*, (Savage) at pp. 10-11.

I am not persuaded by the Agency's argument that it is inappropriate to consider the grievance in this case as alleging a continuing violation because Aliceville was in the "activation" process when it was filed. Article 27, Section a. of the Master Agreement, concerning health and safety, does not distinguish between institutions based on whether they are in the process of being activated. Rather, the Agency's responsibility to lower

the "inherent hazards" of CO work to "the lowest possible level," consistent with the exercise of management rights, is ongoing. As detailed below, whether this contractual requirement has been violated depends on the particular facts surrounding any given instance of a post being vacated. While the inmate and staffing levels of the institution at any given time may impact the assessment of whether the Agency has met its contractual obligation, I find that it does not preclude consideration of the grievance as alleging a continuing violation.

Whether the Agency Violated the Master Agreement

The FLRA has established in a series of cases the legal framework under which grievances involving management's vacating posts under the Master Agreement should be resolved. In *USP Atlanta, GA. and AFGE Local 1145*, 57 FLRA 406 (2001), an arbitrator ordered management not to vacate posts unless such posts did not contribute to safety, or when management had "good reason" to vacate the post. The award was based on Article 27, Section a. and Article 18, Section u. of the Master Agreement. The FLRA held that the award did affect management's rights to assign work and determine its internal security practices under 5 U.S.C. § 7106(a). However, it held that the award did not prevent management from determining how many posts must be staffed and from leaving posts vacant when there was good reason to do so. The FLRA further held that Article 27 of the Agreement does not preclude management from determining the degree of staffing needed to maintain the security of its facility nor prevent it from reassigning employees from one post to another to increase security. Accordingly, the FLRA ruled that Article 27 is an appropriate arrangement because it ameliorates the adverse effects

(i.e., threats to safety) of the exercise of management rights (i.e., vacating posts). The arbitrator's award thus did not abrogate management's rights, and management's exceptions to the award were denied.

By its express terms the provision of Article 27, Section a. stating that that the Agency must "lower inherent hazards to the lowest possible level" is not absolute or unqualified; the Agency's obligation in this regard is "without relinquishing its rights under 5 USC 7106." Based on the language of Article 27, Section a. and the FLRA precedent cited above, I find that in determining the merits of the grievance a balance must be struck between: management's ability to exercise its rights under 5 U.S.C. § 7106(a) to, among other things, assign work, determine internal security, and direct employees; and the Union's ability to promote the safety of bargaining unit employees through implementation of agreement provisions such as Article 27, Section a. More specifically, I do not find, as the Agency seems to argue, that its management rights allow it to vacate any post at any time for any reason. The FLRA has made clear that Article 27, Section a. can under certain circumstances serve as a basis for limiting the exercise of those management rights.

Similarly, and contrary to the gist of the Union's argument, I do not find that Article 27, Section a. mandates a conclusion that, except in case of an emergency, any time the Agency vacates a post listed on the quarterly roster it has necessarily violated the Agreement. The Union relies heavily on the Vanyur memo (Un. Exh. 1), which gave rise to the concept of the "mission critical roster" that all BOP facilities were supposed to implement. The Union maintains that pursuant to that memo and accompanying guidelines, any post identified on the quarterly roster is *per se* "mission critical," so that

vacating any such post threatens employee safety thereby violating Article 27, Section a. requiring the Agency to lower the "inherent hazards" of CO work "to the lowest possible level."

The parties dispute whether the Vanyur memo, issued in 2004, was still in effect at the time relevant in this case. For present purposes it is not necessary to resolve that dispute. Even assuming *arguendo* that it still applies, I do not find that it supports the Union's argument on this point. The memo at no point discusses employee safety as a key reason for its issuance. Rather, the focus of the memo is on "significantly reduc[ing] . . . overtime" by including on duty rosters only those posts "absolutely needed for the daily operations of the facility." From this fact I draw the conclusion that the memo refers to "mission critical" posts in the context of operational efficiency, not employee safety. Thus, a post listed on a roster is "critical" for the efficient and effective operation of the facility, but that does not necessarily mean that it is "critical" for employee safety. While presumably employee safety is a component of the Agency's mission and more staff on duty provides greater institutional safety than less staff, this fact alone does not support a holding that each instance of vacating a post on the quarterly roster is a violation of the Master Agreement.

Rather than either of the somewhat absolutist arguments advanced by the parties, I find that the proper approach for resolving the grievance entails a more fact-specific and situational analysis. I find Arbitrator Savage's approach in a similar case involving vacating posts under the Master Agreement to be the most reasonable one. In *FCI Englewood, Col. and AFGE Local 709*, *supra,* the grievance alleged that management violated Article 27, Section a. of the Master Agreement when it vacated Special

Investigative Services (SIS) technician positions, as these employees are responsible for detecting contraband smuggled into the institution. Arbitrator Savage ruled that management did not violate the Agreement when it filled a vacant Count CO position with an SIS technician for part of a shift, as management had done all it could reasonably be expected to do to minimize threats to employee safety. Arbitrator Savage used a "good cause" standard for determining whether the Agency violated Article 27, Section a. The decision states:

> [G]ood cause is a reasonable standard to evaluate the evidence. Put differently, the question is whether it was reasonable for management to leave posts vacant and in doing so still meet Article 27's requirement.

FCI Englewood, Col., Analysis and Award at p. 17.[2]

In applying this standard, I believe it appropriate to weigh the nature and extent of the threat to safety from leaving a post vacant against the Agency's reason for doing so. Put another way, the greater the threat to safety, the more pressing need to leave the post vacant must be. I do not agree with the Union's contention that if a post is vacated to avoid overtime "good cause" is necessarily lacking and/or Article 27, Section a. is necessarily violated. It is not in my province to pass judgment on whether the Agency can properly exercise its management rights to effectuate one policy (e.g., security and safety of the institution) but not another (e.g., managing its budget). My only concern is whether the Agency exercised what would otherwise be its management rights in this

[2] This "good cause" standard has a basis in the Master Agreement. Section r. states that "normally," employees will remain on the assignment specified for them on the quarterly roster, but when "circumstances require a temporary [less than five (5) working days] change of shift or assignment," the Agency will "make reasonable efforts to assure that the affected employee's days off remain as designated by the roster." "Reasonable efforts" are defined in Section u. as a "presumption . . . for the procedure stated and shall not be implemented *otherwise without good reason*." [Underscore supplied.] *See USP, Atlanta, Ga.*, 57 FLRA at 410.

case to vacate posts in a manner consistent with its contractual obligations under Article 27, Section a. and other applicable provisions of the Agreement.

Using the "good cause" standard I will now address the six specific incidents of vacating posts that the Union has specified in its post-hearing brief as constituting violations of Article 27, Section a.

SHU Posts 2 and 3, August 18, 2013, 8:00 a.m. to 2:00 p.m. – The SHU is a segregated housing unit designed to contain inmates that may "get in trouble" if allowed to remain in the general population. Inmates in SHU remain in their cells in the unit at all times except for five hours a week when they may engage in exercise outside their cells. There are typically five CO positions assigned to the SHU: SHU 1, 2, and 3, and SHU property (who maintains inmate property) and SHU recreation. The SHU 1 CO is in charge of the unit and this post is staffed for 24 hours a day, 7 days a week.

It is undisputed that on August 18, 2013 the SHU 2 and 3 posts were left vacated from 8:00 a.m. to 2:00 p.m. (Un. Exhs. 8 and 10.) It is unclear from the record whether one of the two vacated SHU posts was filled by the SHU property or recreation CO, or perhaps by a CO from another part of the institution. In any event it appears uncontroverted that there were two COs (SHU 1 and one other CO) who were assigned to the SHU during that time. (Tr. 1 at 191-192.) The question presented is whether management had good cause to leave the two SHU posts vacant on the date and shift in question without violating its obligation under Article 27, Section a. to lower inherent hazards to the COs to the lowest possible level without relinquishing its management rights under the statute and the Agreement.

The Union's Local President, Ray Coleman, testified that vacating SHU 2 and 3 poses a threat to safety because SHU inmates must be checked on every 30 minutes (Tr. 1 at 119-120) and the SHU 1 CO can not accomplish this task if the SHU 2 and 3 COs are not on duty. But I am not persuaded that the Union has shown by preponderant evidence that the way in which Agency staffed the SHU on this day and shift posed a threat to the COs' safety in violation of Article 27, Section a. Mr. Coleman's testimony was premised on there having been only one CO on duty. If that were the case, and considering the evidence that the CO occupying the SHU 1 post is not supposed to go down range, it would appear that the requirement that inmates be checked on every 30 minutes could not have been met. Moreover, Deputy Captain Frank Gotreaux testified that if there are any inmates in the SHU two COs "at a bare minimum" are sufficient to staff the unit. (Tr. 2 at 19.) If the Agency left all of the SHU posts vacant except for the SHU 1 post, there would be strong basis for finding that that the Agency violated Article 27, Section a.

However, later in his testimony President Coleman acknowledged that there were two COs on duty on the date and time at issue. Further, although record evidence does not reflect how many inmates were in the SHU on August 18, 2013 between the hours of 8:00 a.m. to 2:00 p.m. specifically, the record reflects that in general during this time period the SHU population was relatively low. The institution was still in the process of being activated and had not reached its full complement of inmates. As for the SHU population Deputy Captain Gotreaux testified that from the middle to the end of 2013 it did not reach its maximum capacity of about 94 inmates and that the unit typically had one or two inmates and, "at the high end," there may have been about 20 inmates for a short period of time. It does not appear from this evidence that there was a dangerous

ratio of inmates to SHU staff when the two posts were vacated. There were no assaults on COs or particular incidents that endangered them during the time at issue, although this fact alone is by no means dispositive. Although an emergency situation, like an inmate fight, could occur without advance notice at any time, this possibility in itself is not enough for me to find that the Agency violated Article 27, Section a. There is no evidence in the record to suggest that if there was an emergency the Agency would not have been able to respond by reassigning staff to address the situation.

For these reasons I find that the Agency had good reason to leave the SHU 2 and 3 posts vacant on August 18, 2013 from 8:00 a.m. to 2:00 p.m. and did not violate its obligation under Article 27, Section a. to lower inherent hazards to the lowest possible level without relinquishing its management rights.

Count Officer, October 29, 2013, 12:00 midnight to 8:00 a.m. – The Count Officer assists residential unit COs with inmate counts. These counts must take place at 4:00 and 10:00 p.m., and 12:01, 3:00 and 5:00 a.m. (Tr. 1 at 125.) Inmates are confined to their cells from 8:30 p.m. to 6:00 a.m. (Tr. 2 at 119-120.) The Count Officer is only assigned to the morning watch (12:00 midnight to 8:00 a.m.) because there is only one CO assigned to each housing unit on this watch (as compared to two COs for the day and evening watches). (Tr. 3 at 130-132.)

It appears undisputed that the Count Officer position was left vacant on the morning watch on October 29th when the CO originally assigned to the post was authorized to use compensatory time off on that date. (Un. Exhs. 8 and 12.) However, I find that the Union did not establish by a preponderance of the record evidence that

leaving the post vacant on this occasion constituted a breach of the Agency's safety obligations under the Agreement.

As a Union witness pointed out (Tr. 1 at 154-155) taking accurate inmate counts is a critical feature of effectively operating a correctional institution. An escaped prisoner is a threat to staff and the institution, not to mention the surrounding community. The assistance the Count CO provides to the housing unit CO in conducting the counts is no doubt desirable. However, according to the record evidence inmates are confined to their cells when counts are taken. Further, there was a lack of evidence that at the time the post was vacated the residential unit COs were stretched thin by their other job duties; indeed, the post was vacated four or five months before the institution reached full capacity. Any threat to safety due to the absence of the Count Officer to assist with the count on the date the post was vacated appears minimal. No particular incidents endangering CO safety occurred during this time period, although this fact alone is not by any means dispositive. If this post was vacated with great frequency, there might be a greater threat to safety and a different result, but I do not find this to be the case here. Further, the fact that the Agency had two days' advanced notice that the Count Officer would be on leave does not detract from the finding that the Agency's had good reason to leave the post vacant.

For these reasons I find that it has not been shown by a preponderance of the evidence that the Agency breached its obligations with regard to lowering the risks to COs' safety under Article 27, Section a. by leaving the Count Officer post vacant on October 29, 2013 from 12:00 midnight to 8:00 a.m.

Front Lobby Officer, March 5, 2014, 8:00 a.m. to 4:00 p.m. – The Front Lobby Officer is responsible for screening staff and visitors entering the institution. This includes having staff and visitors pass through metal detectors, screening for explosive devises and for drug paraphernalia, and also screening phone calls coming into the facility. (Tr. 1 at 165, 175.) It was described as the "first line of defense against any kind of threat" to the institution. (Tr. 1 at 175.) Union President Coleman testified that "[y]ou have to have a Front Lobby Officer. If there is none "I assume people just walk in. . . It's one of those days you just pray nothing bad happens." The Agency did not refute this testimony. The post is normally staffed from 8:00 a.m. to 4:00 p.m.

It appears undisputed that this post was left vacant for the entire shift on March 5, 2014. (Un. Exhs. 8 and 14.) While there was some testimony that COs assigned to other posts, such as the Compound or the Visiting Room, could assist in screening incoming visitors (Tr. 1 at 129) there was no evidence that some other post was vacated, or that other arrangements were made, to provide coverage of the Front Lobby on the date and time at issue.

As indicated above, the purpose of the post is to screen visitors and staff to ensure that contraband or dangerous items such as weapons or explosives are not brought into the facility. Without a CO to perform the necessary screening, for example, it appears that a visitor might enter the facility without such items being detected. Although there was no evidence that any banned items in fact entered the facility or that there were any particular incidents endangering CO safety that occurred due to the post being vacant, this is not sufficient to rebut the conclusion that vacating the posed a safety risk. I therefore find that the Agency lacked good cause to vacate the Front Lobby post on

March 5, 2014 from 8:00 a.m. to 4:00 p.m. in violation of its obligation under Article 27, Section a. to lower threats to safety to the lowest possible level consistent with its management rights.

Tool Room, March 11, 2014 (7:30 a.m. to 3:30 p.m.) – The Tool Room CO is responsible for accounting for the tools that are used for work at the facility. Lieutenant Michal McCullough testified that the Tool Room CO issues tools to the general foreman and "lower level" tools to inmates for work at the facility. The Tool Room CO checks each tool in and out of the room and all tools have to be accounted for by 4:00 p.m. every day. A missing tool or other item from the Tool Room poses an obvious danger to CO safety. When a tool or item is unaccounted for the Compound must be shut down and a search undertaken to find it. (Tr. 1 at 127-128; Tr. 3 at 57-58.)

The record establishes that this post was left vacant for the entire eight hour shift on the specified date. (Un. Exhs. 8 and 14.) There is no evidence in the record indicating that the Agency reassigned another CO to the post, how the functions normally performed by the Tool Room CO may have been carried out and/or what if any measures were employed to ensure that the tools and other items were properly accounted for during this time period. Due to the absence of such evidence, and considering the risk to safety posed if the Tool Room is unattended and/or the vital functions of the Tool Room CO in accounting for the tools is not fully performed, I find that the Agency left this post vacant without without good reason. It thereby violated Article 27, Section a. of the Agreement.

Visiting Room post 3, March 14 and 15, 2014 (8:00 a.m. to 4:00 p.m.) – According to the record evidence the Visiting Room is typically open four days a week,

from Friday through Monday. There are usually the fewest visitors on Friday. (Tr. 2 at 39-40.) There are four COs assigned to the Visiting Room (Tr. 1 at 128.) who work a 4/10 compressed work schedule, i.e., four 10-hour work days per week. (Tr. 2 at 39-40.)

Typically Visiting Room COs 1 and 2 process visitors, including escorting them from the Front Lobby to the Visiting Room. COs 3 and 4 typically monitor the inmates and visitors in the room and search the inmates when they exit. (Tr.1 at 128-129.) The Visiting Room is one of the most common places through which contraband can enter the facility. (*Id.*)

There is no dispute that the Visiting Room 3 post was vacated on Friday, March 14 and Saturday March 15, 2014. (Un. Exh. 14.) It appears that the three other Visiting Room COs were on duty on those dates. There was evidence that safety is threatened if two Visiting Room posts are vacant at the same time. Senior Officer Specialist Justin Elrod testified that "more eyes" on the Visiting Room provides more security in terms of "catching inmates that may be trying to . . .receive contraband." He stated that at a minimum one CO is needed to monitor the room, one to escort visitors back and forth from the Front Lobby, and one to process inmates in and out of the Visiting Room.

Although more staff assigned to the Visiting Room post may be desirable, the preponderance of the evidence shows that the presence of three COs is generally adequate to ensure safety to staff and the institution. Moreover, one of the two dates on which Visiting Room Post 3 was vacated was a Friday, a light day for visitors. For these reasons I find that it has not been shown by a preponderance of evidence that the by vacating Visiting Room post 3 on March 14 and 15, 2014, from 8:00 a.m. to 4:00 p.m.

the Agency violated its obligation under Article 27, Section a. to lower threats to safety to the lowest possible level consistent with its management rights.

Compound post 2, January 15, 2015 (12:00 midnight to 8:00 a.m.) – The Compound is a large open area within the institution used for purposes such as inmate recreation. It is closed to inmates from about 8:30 p.m. to 6:30 a.m., during which times most inmates are confined to their residential units. (Tr. 2 at 119-120.) There are two COs assigned to the Compound, which is a post that must be staffed at all times. During the times when inmates have access to the Compound, the COs assigned to this post must supervise inmate movements to and from the dining hall, recreation programs, and other places within the institution that inmates travel to and from. (Tr. 1 at 142.) However, on morning watch, when inmates are for the most part confined to their cells, the Compound 2 CO is most frequently involved in assisting residential unit COs with taking inmate counts and the staff responsible for checking the security of the perimeter fences. (Tr. 1 at 130-131; Tr. 2 at 92.)

The record shows that on January 15, 2015 the Agency vacated the Compound 1 post during the morning watch and moved the CO assigned to the Compound 2 post to the Compound 1 position, leaving the Compound 2 post vacant. (Un. Exhs. 21 and 22.) The record shows that either the Count CO or the Compound 2 CO can assist housing unit COs with the inmate count that must be conducted on morning watch. Lieutenant McCullough testified that he would not allow both posts to be vacated at the same time.[3] (Tr. 3 at 99). There is no evidence in the record that there were any particular incidents

[3] There was some indication in the record that those posts had been left vacant at the same time on another occasion. (Un. Exh. 29.) However, there was some dispute about the accuracy of the records showing this fact. (Tr. 3 at 99-100.) As the record is clear that the two posts were not both left vacant on the date and time at issue here, I do not address this dispute.

that endangered CO safety or that the counts were not properly taken while the Compound 2 post was vacant, although this fact is by no means dispositive.

The Union submitted a February 25, 2015 memo from CO Lieutenant Reynolds from FCI Talladega, which was in the nature of a "staff assist" for the Aliceville facility. (Un. Exh. 24.) In that memo Lt. Reynolds noted that COs were "made to abandon their posts on the morning watch." As a recommended "corrective action," Lieutenant Reynolds said that morning watch staff "should not abandon their posts. Compound 1, Compound 2, and the Counting Officer should assist with the count." The Union argues that this memo, which it describes as comparable to a "peer review," supports its case. I disagree. Lieutenant Reynolds's memo is not explicitly aimed at CO safety nor address whether the Agency violated the Master Agreement. Rather, it seems to be aimed at more efficient and effective Agency operations. While as noted earlier having a full complement of staff at all times may be is preferable, leaving posts vacant does not necessarily mean that the Master Agreement has been violated. For the reasons set out above, I find that in this instance it was not.[4]

For these reasons I find that it has not been shown by a preponderance of the evidence that that by leaving vacant Compound post 2 on January 15, 2015 from 12:00 midnight to 8:00 a.m., the Agency's violated its obligation under Article 27, Section a. to lower threats to safety to the lowest possible level consistent with its management rights.

[4] Testimony from some Union witnesses (*e.g.,* Tr. 1 at 96) suggested that the content of the quarterly rosters, including which posts were to be included on the roster, was the result of collective bargaining negotiations. A possible implication of this claim is that any decision by the Agency to vacate a roster post is a violation of a locally negotiated agreement. I do not find any basis in the case to support this theory. It is clear to me that the role of Union representatives at quarterly roster committee meetings is only to ensure that employees are assigned to roster posts in accordance with the criteria, such as seniority, for assigning COs to posts. (Tr. 2 at 37-38.) This is also consistent with Article 18, Section d. of the Master Agreement, which does not provide the Union with any right to negotiate which posts will be staffed and which will not.

VIII. AWARD AND REMEDY

I find that the Agency violated Article 27, Section a. of the Master Agreement when it vacated the Front Lobby post on March 5, 2014 from 8:00 a.m. to 4:00 p.m., and the Tool Room on March 11, 2014 from 7:30 a.m. to 3:30 p.m. I further find that the Agency did not violate the Agreement as otherwise alleged in the grievance.

The Agency is ordered to cease and desist from vacating the Front Lobby and Tool Room posts absent good cause. This cease and desist order does not preclude the Agency from vacating these posts provided it implements measures to assure that the functions of the CO who would otherwise occupy the post are fulfilled in such a manner that it meets its obligation to lower threats to safety to the lowest possible level consistent with its management rights.

With respect to the Union's request for an award of overtime pay, the arbitrator in a federal sector case is authorized to award a remedy reasonably related to the provisions of the collective bargaining agreement found to have been breached and the harm being remedied. *See Fed. Deposit Ins. Corp. Div. of Supervision and Consumer Protec. San Francisco Region and Natl. Treas. Employees Union Chapter 273,* 65 FLRA 102, 107 (2010). It is not possible to make a definitive determination in this case as to whether, had the Agency not left the Front Lobby and Tool Room posts vacant on the dates and times at issue, it would have assigned a CO from the Sick and Annual list to work overtime or filled the post by other means, such as by reassigning a CO who had been assigned to some other post (and presumably leaving that second post vacant). There is no evidence in the record indicating what the Agency would have done specifically regarding these two instances when posts were vacated. However, according to the

preponderance of record evidence, at least one key factor management generally used in deciding whether to vacate posts was the avoidance of overtime. Further, on many occasions COs were assigned to work overtime so that posts on the quarterly roster would not be left vacant. Accordingly, I find that an award of overtime pay to the COs who the parties determine would have filled the the Front Lobby and Tool Room posts vacated on the dates and times specified, and for the hours they would have work, had the Agency utilized the Sick and Annual list to avoid leaving the posts vacated, to be reasonably related to the harm stemming from the breach of the Agreement found in this case. The parties are directed to confer to identify which COs are entitled to receive overtime pay pursuant to this award and in what amount.

Jurisdiction is retained for purposes of resolving any questions that may arise in implementing this award and to consider an application for attorney's fees should one be submitted.

February 3, 2016

Elliot H. Shaller

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Arbitrator