

IN THE ARBITRATION PROCEEDINGS BETWEEN
THE PARTIES BEFORE JOE H. HENDERSON

COUNCIL OF PRISON LOCALS
(AFL-CIO)
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 1169, Florence, CO

and

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL
COMPLEX, Florence, CO

DECISION AND AWARD

FMCS Case No. 16-1030-50651-3

Dates of Hearing: July 27, 2017

Reassignment/Augmentation Grievance

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INTRODUCTION

This matter was heard on July 27, 2017 at the Administrative Maximum Facility of the Federal Correctional Complex, Florence, Colorado. The Union/Local 1169 was represented by Joshua L. Klinger of Minahan Muther Klinger P.C. The Agency was represented by Michael A. Markiewicz for the U.S. Department of Justice, Federal Bureau of Prisons, Labor Management Relations West.

The parties were given an opportunity to present oral and documentary evidence, to examine and cross-examine witness, and to argue its case. The Union and the Agency submitted post-hearing briefs timely on September 6, 2017.

All oral and documentary evidence having been considered, this Arbitrator now makes his findings, decision and award.

ISSUE

Union's Statement of the Issue

Whether or not the Agency changed a working condition at FCC Florence without negotiating with the Union? If so, was there a violation of law or contract in doing so? If there was a violation of contract, or law, then what is the appropriate remedy?

Agency's Statement of the Issue

1. Was the Grievance untimely filed? If so, then it should not be arbitrable.
2. Did management violate the Master Agreement or 5 USC § 7116(a)(5) when it did not negotiate reassignment (also known as augmentation) procedures with the Union? If so, what is an appropriate remedy?

RELEVANT MASTER AGREEMENT PROVISIONS

ARTICLE 1 – Recognition

ARTICLE 3 – Governing Regulations

ARTICLE 4 – Relationship of this Agreement to Bureau Policies, Regulations, and Practices

ARTICLE 5 – Rights of the Employer

ARTICLE 18 – Hours of Work

ARTICLE 28 – Uniform Clothing

ARTICLE 31 – Grievance Procedure

ARTICLE 32 – Arbitration

BACKGROUND

The Federal Correctional Complex (FCC) Florence consists of four correctional facilities: the Administrative Maximum (ADX); the United States Penitentiary (USP); the Federal Correctional Institution (FCI); and the Federal Prison Camp (FPC or the Camp). The Correctional Services Department (or Custody Department), consisting mainly of Correctional Officers, is the largest department at the institution. The term “augmentation” means the reassignment of an employee from one location/department to work on a short term basis in the Correctional Services Department.

The Agency states that bargaining unit employees work throughout the various departments at the various institutions. All of these employees receive specific training in correctional work when initially hired and yearly in Annual Refresher Training (ART). All employees who work at the prison facilities are classified as federal law enforcement officers and are all qualified to work in a correctional officer post as needed, which is delineated in their position descriptions. Applicants applying for a job with the Agency are also notified of this requirement in vacancy announcements. Accordingly, all employees are correctional officers first and their job specialty second.

The Master Agreement is the parties' nationwide CBA. On September 24, 2015, the local Union at the Federal Correctional Complex Florence (FCC) filed a formal grievance claiming management committed the following violations:

1. The Union was not afforded to negotiate augmentation beginning on July 17, 2015.
2. The Union was not given 30 day notice of change.
3. The Union was not allowed to be present in discussion/meetings with management regarding augmentation.
4. Reasonable efforts were not made to keep sick and annual assigned to single shift.
5. Employees were not given signed written confirmation of assignment change.
6. Non-custody employees were not given a clothing allowance or boot allowance.

On October 19, 2015, management responded to the Union's grievance and rejected the grievance on procedural deficiencies. The Agency informed the Union that even if the grievance was not procedurally deficient, it would have been denied because management has the statutory right and contractual right to reassign employees. Management had no further duty to bargain since the Union already negotiated procedures and arrangements [aka I&A (impact and implementation bargaining)] in the Master Agreement.

On October 22, 2015, the Union submitted a memorandum indicating they were invoking arbitration.

UNION POSITION

When augmentation occurs, non-custody employees are utilized to fill custody posts. Prior to 2015, augmentation only occurred to cover staff for firearms training and annual refresher training.

The grievance is arbitrable. It is well established in labor arbitration that the party who raises an affirmative defense of arbitrability has the burden of proof to establish that contention by

a preponderance of the evidence. In the present case, the Agency has failed to meet its burden of proof as to its assertions that the present grievance is non-arbitrable.

On July 15, 2015, Union President Johnson sent an email to Wardens Cozza-Rhodes and Oliver regarding implementing augmentation procedures for non-custody staff. Warden Oliver responded that he would meet with the group on July 16, 2015 to discuss the augmentation process. On July 16, 2015, the Union sent a notification to the Agency regarding their request to bargain and negotiate Augmentation procedures. On August 17, 2015, the Agency sent a response claiming that "this has already been negotiated at the National level; therefore, management has no duty to bargain augmentation." After the Agency's refusal to negotiate, the Union timely filed a grievance regarding the issue within 40 days of the August 17, 2015 notification.

The Agency had the obligation to bargain augmentation when augmentation procedures changed. Augmentation is a continuing violation, which has an impact on bargaining unit employees every time the Agency allows augmentation to occur after the Union's demand to bargain over the change. The violation is renewed each time this occurs, and this has occurred and continues to occur on an ongoing basis at the Agency's facilities. The doctrine of "continuing violation" has been consistently maintained by arbitrators, who find continuing violations to be an exception to any contractual time limits, regardless of whether the CBA uses the term "continuing violation."

There is nothing in the Master Agreement that covers augmentation, so the parties are required to negotiate Augmentation. Augmentation is a "practice of understanding" between the parties implementing the Agency's right to augment staff. The previous past practice and procedure should not have been "changed unless agreed to in writing by both parties." While the Agency and the Union did meet to discuss the possibility of changing the Augmentation

procedure, no agreement was reached and no change should have been made unless it was agreed to "in writing by both parties."

The Agency argued this was "covered by" issue. The FLRA reviewed this claim in AFGE Local 1034 v. BOP Pollock, FLRA OALJ 13-24 (ALJ Center August 29, 2013). The FLRA found that it was not covered by and the Agency had the obligation to negotiate the change in Augmentation procedures.

Employees and the BOP mission were impacted by the unilateral change. Non-custody employees are regularly reassigned to work custody posts even though this procedure was never negotiated. Another concern is the fact that every time a non-custody employee is augmented it is not captured in their daily roster. When employees tried to capture the change and/or augmentation on their time and attendance sheets, the Agency went back and changed these documents to hide augmentation. The Union believes these actions were taken by the Agency to cover up the change in working conditions and deny employees the chance to receive credit for the augmentation shifts that were worked.

Staff members were directly impacted by augmentation. Personal issues were a direct result of the Agency's unilaterally implemented Augmentation and the constant changing of shifts and positions during period of Augmentation. Furthermore, during the periods of Augmentation of non-custody staff, they would have to complete and return all paperwork for their non-custody positions as well as the required paperwork for their custody positions. Non-custody staff was also denied uniform allowances even though they were working the custody posts when augmented. The personal issue, paperwork issue and uniform issue could have been negotiated and discussed if the Agency would have agreed to meet with the Union regarding the change in working conditions.

Case Manager Goodwin testified how the Unit team is unable to handle legal phone calls or separation assignments; Receiving and Discharge employee Ms. Heir testified during augmentation she was unable to process records; Recreation Specialist Henderson testified when staff was pulled because of augmentation an inmate was assaulted in the gym and there was an attempted murder in the paint room when staff was pulled. Inmates notified these employees that they wait until staff are pulled or augmented to assault other inmates because they know there will be less coverage. These issues concerning the impact on the BOP mission could have been discussed if the Agency would have agreed to meet with the Union regarding the change in working conditions.

The Agency did not follow the Master Agreement when they unilaterally decided, without any notification to the Union or the Grievants(s), to augment various staff members. The Agency's only justification to do so was the budget and/or to avoid paying overtime to bargaining unit employees. As a direct result, the Agency violated the Kane Memorandum as well as the Master Agreement. The Union has proved that the Agency violated the past practice of only augmenting non-custody staff during times of mandatory training.

Therefore, the Union seeks the following remedy which is authorized pursuant to Back Pay Act (5 USC §5596):

1. That the Agency cease and desist from refusing to bargain Augmentation;
2. That the Arbitrator order the Agency to pay back pay with interest for all lost overtime as a result of the violation of the Master Agreement.
3. Order the Agency to pay uniform allowances for all staff being augmented;
4. That the Arbitrator award reasonable attorney fees for the violations and the unjustified personal actions that resulted from the violations of the Augmentation MOU; and
5. That the Arbitrator retain jurisdiction for 120 days to enforce, clarify, and otherwise resolve any outstanding issues, as may need to be made in order to carry out his decision.

AGENCY POSITION

The Correctional Services Department, consisting mainly of Correctional Officers, is the largest department at the institution. At various times, this department may run short of staff. During those times, management may decide to reassign staff from other departments on a short term basis to cover Correctional Officer posts, as allowed by the Master Agreement. Bargaining unit employees work throughout the various departments at the various institutions. All of these employees receive specific training in correctional work when initially hired and yearly in Annual Refresher Training (ART).

Article 31, Section e, allows any party to raise a timeliness threshold issue and does not require that timeliness be raised at or by any specific point in the proceedings.

The undisputed evidence showed that the Union was notified on July 17, 2015 that augmentation of non-custody staff would be effective on July 20, 2015. The Union argues the grievance is timely based on a continuing violation theory. First, there is no provision in the Master Agreement which allows grievances to be filed based on a continuing violation. Second, the continuing violation theory is based on an idea that the same thing happens every single day. The Union did not establish that augmentation has been occurring every single day. The 40 calendar day time limit is the negotiated term and the Master Agreement clearly states a grievance must be filed within the time limit of the alleged grievable occurrence or once a party becomes aware of an alleged grievable event. The Union was aware of an alleged grievable occurrence on July 17, 2015. The technical requirements for filing a grievance were negotiated by the Union and the Agency. The Union's grievance was filed past the deadline date, on September 24, 2015. Based

on the undisputed evidence, the Union failed to file a timely grievance and the grievance is not arbitrable.

The burden is on the Union to prove their allegations. The Union alleges that the Agency changed a working condition without negotiating with the Union. The various memorandums the Union relies upon are not law, federal regulation, a negotiated agreement, or an inclusion to the Master Agreement. Although these memorandums may be a goal of a management official, they do not, and cannot, circumvent or disregard the clear and unambiguous language of the law and the CBA.

The law gives management the right to reassign employees from one department to another department (5 USC §7106). The language of the law is also incorporated in Article 5 of the Master Agreement. The law, as well as the Master Agreement, allows management to determine its budget, to determine the number of employees, to determine internal security practices, to hire, to assign, to direct, to assign work, and to determine the personnel by which agency operations shall be conducted.

In the exercise of these rights, management is only obligated to negotiate the procedures and/or appropriate arrangements [aka impact and implementation (I&I) bargaining]. However, if the subject has already been negotiated in a CBA, then the parties are absolved of any further duty to bargain about that matter during the term of the agreement.

Various provisions in the Master Agreement show that procedures and/or arrangements (or I&I) bargaining related to management's right to reassign employees has already been negotiated and is "covered by" the parties' Master Agreement (Article 18, Sections k, n, o, r, s and Article 28, Section a.2). These various provisions are a product of impact and implementation (I&I) bargaining, aka procedures and arrangements bargaining, at the national level. While local

management may choose to further bargain on these issues, they are not required to do so under the Master Agreement.

The Union is attempting to tie management's hands by requiring the Agency to staff all posts at all times. This would require the Agency to 1) over-hire the maximum staffing level in order to fill-in for those employees who are on leave, who are in training, who transfer, who retire, who resign, or who are suspended or fired; or 2) fill every vacant position with overtime.

The Union failed to show any provision in the Master Agreement which states that all posts must remain filled at all times or that a post must be filled with overtime in lieu of reassignment. The Union also failed to show any Master Agreement provision which requires that a certain amount of overtime be given to employees.

In a prison work environment, management must make daily decisions to ensure the best possible security and safety to the public, the employees, and the inmates. Additionally, in these fiscal times, management must be a good steward of tax-payer monies. At times it does require use of overtime. However, there are other times where reassignment of staff is a viable option with the need of overtime.

The Federal Labor Relations Authority (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. The Authority has long held that the right to assign work under 5 USC §7106(a)(2)(B) encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. The right to assign work also includes the right to assign overtime and to determine when the overtime will be performed.

Arbitrators should not substitute their judgment over management's decisions, unless it can be shown that management abused their authority.

To conclude that management must always remain at 100% staffing level or must fill all posts, even if that requires overtime, would be an abrogation of management's rights. In order to always fill vacant posts, it would require filling some posts with overtime and this would nullify 5 CFR §550.111(a)(1) and (c). Additionally, the language in Article 18, Sections n, p, r; Article 39, Furloughs; and Article 5 would be meaningless.

Since the Agency is not prohibited from reassigning employees, then the Union's reliance on remedies for overtime would not be applicable – the written grievance never identified Article 18, Section p, as being violated. The Master Agreement does not dictate that overtime must be used. It states that management determines when it is necessary to use overtime.

The Union filed an untimely grievance and the grievance should be denied for failing to follow the negotiated grievance procedures.

As to merits, nothing in law, rule, regulation or the Master Agreement prohibits management from reassigning employees from one assignment/department to another assignment/department on a short term basis. The Union failed to prove violations for any items listed in their grievance. Additionally, the statute and Master Agreement give management the right to determine when, and if, overtime will be used.

The Union failed to prove their allegations and the Agency requests that the grievance be denied.

ARBITRATOR'S COMMENTS, FINDINGS AND DECISION

The Federal Correctional Complex (FCC) Florence consists of four correctional facilities: the Administrative Maximum (ADX); the United States Penitentiary (USP); the Federal Correctional Institution (FCI); and the Federal Prison Camp (FPC or the Camp). Each facility consists of a variety of departments. The staff in the institution is divided between the custody department and the non-custody departments. The Correctional Services Department (or Custody Department), consisting mainly of Correctional Officers, is the largest department at the institution.

The issue in this matter relates to the Agency violating the Master Agreement by augmentation of staff. Augmentation is the practice of the Agency whereby they take an individual that is not normally a correctional officer (a non-custody staff member) and they assign them to a custody post (a correctional officer position). It is the reassignment of an employee from one location/department to work on a short term basis in the Correctional Services Department.

TIMELINESS/ARBITRABILITY

Agency

The Agency rejected the grievance because it was procedurally deficient. The Union was notified on July 17, 2015 that augmentation of non-custody staff would be effective on July 20, 2015. The Union had 40 calendar days from the email notification dated July 17, 2015 to file their grievance, yet filed it on September 24, 2015. Even if the date the augmentation was effective was used, the Union's grievance was filed well past the deadline date.

The Master Agreement states a grievance must be filed within the time limit of the alleged grievable occurrence or once a party becomes aware of an alleged grievable event. The Union was aware of an alleged grievable occurrence on July 17, 2015. The technical requirements for

filing a grievance were negotiated by the Union and the Agency. Therefore, the Union should be expected to comply with the technical aspects of the grievable procedure.

This is not a continuing violation. First, there is no provision in the Master Agreement which allows grievances to be filed based on a continuing violation. Second, the continuing violation theory is based on an idea that the same thing happens every single day. The Union did not establish that augmentation has been occurring every single day.

Union

On July 15, 2015, Union President Johnson sent an email to Wardens Rhodes and Oliver regarding implementing augmentation procedures for non-custody staff. Warden Oliver responded that he would meet with the group to discuss the augmentation process. Based on the response, on July 16, 2015, the Union sent a notification to the Agency regarding their request to bargain and negotiate augmentation procedures: "The Union requests that these proposed changes be fully negotiated with Local 112 prior to implementation."

On August 17, 2015, the Agency responded to the Union claiming that "this has already been negotiated at the National level; therefore, management has no duty to bargain augmentation." After the Agency's refusal to negotiate, the Union timely filed a grievance regarding the issue within 40 days of the August 17, 2015 notification. Based on the plain reading of Article 3 and Article 31, the Union properly filed the grievance once it received notification that the Agency was refusing to negotiate and after the 30 day period for negotiations to begin.

Augmentation is a continuing violation that has an impact on bargaining unit employees every time the Agency allows augmentation to occur after the Union's demand to bargain over the

change. The violation is renewed each time augmentation occurs, and this has occurred and continues to occur on an ongoing basis at the Agency's facilities.

ARBITRATOR'S DECISION ON ARBITRABILITY

Article 31, Section d, reads as follows: "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."

The Agency takes the position that the date the Union was aware of the grievable occurrence was July 17, 2015, the date of Warden Oliver's memorandum. The Union contends that the date of violation was on August 17, 2015 when the Agency notified them that they had no duty to bargain augmentation.

On July 15, 2015, Union President Johnson inquired about augmentation procedures and requested notice to negotiate impact and implementation proposals. Warden Oliver responded that he would meet with the group on July 16, 2015 to discuss the augmentation process. Apparently, that did not take place. Based on the response to the email, on July 16, 2015, Johnson prepared a notification to the Agency regarding their request to bargain and negotiate augmentation procedures (stamped received by the Agency on July 17, 2015).

On July 17, 2017, the Agency notified on the Union that augmentation would be effective on July 20, 2015. On August 17, 2015, the Agency sent a response claiming that "this has already been negotiated at the National level; therefore, management has no duty to bargain augmentation." The Agency states that at no time prior to August 17, 2015 did the Agency notify the Union they were refusing to negotiate the change in working conditions.

The Arbitrator is of the opinion, based on the manner that the augmentation procedure was implemented and the Union's request to negotiate, that the grievance was timely filed. The grievance was filed on September 24, 2015, within 40 days of the August 17, 2015 notification.

Continuing Violation

The Union asserts that Augmentation is a continuing violation that has an impact on bargaining unit employees and continues to occur on a regular ongoing basis and the violation is renewed each time. The Agency states there is no continuing violation because it does not happen every day and there is no provision in the Master Agreement allowing grievances to be filed on a continuing violation.

The Arbitrator is not convinced by the Agency's argument, particularly in light of the fact that the grievance is over "augmentation" which is also not found in the Master Agreement.

The Grievance filed on September 24, 2015 indicates the date(s) of violation as August 17, 2015 and continuing. The Arbitrator is of the opinion that this is appropriate notice for the Agency to know that the grievance was not filed for a single day or event, but a continuing violation of the Union's right to negotiate over the change in the augmentation process that was implemented on or about July 20, 2015.

AUGMENTATION/PAST PRACTICE

Union

Prior to 2015, augmentation only occurred to cover staff for firearms training and annual refresher training. After this grievance was filed, the Union and the Agency met to discuss augmentation. Proposals were sent back and forth. Between 2015 and present day, the Agency has continually and regularly changed the practice of how they augment employees. There is nothing in the Master Agreement that covers augmentation, so the parties are required to negotiate augmentation.

The Agency seemed to argue that they could violate past practice and/or the Augmentation MOU because of budget issues. The Agency also attempted to offer emails showing that they were notifying the Union of their attempt to change past practice and/or violate the Master Agreement. However, none of the emails or exhibits provided any basis under law or the Master Agreement to refuse to negotiate. To the contrary, Augmentation at FCC Florence was “a practice or understanding between the parties” where staff were only augmented during annual refresher training. The Union and Agency had past practice regarding augmentation that could “not be changed unless agreed to in writing by both parties.”

The Agency argued this was “covered by” issue. The FLRA reviewed this claim in AFGE Local 1034 v. BOP Pollock, FLRA OALJ 13-24 (ALJ Center August 29, 2013). The FLRA found that it was not covered by and the Agency had the obligation to negotiate the change in Augmentation procedures.

Employees and the BOP mission were impacted by the unilateral change. While the Agency and the Union did meet to discuss the possibility of changing the Augmentation procedure, no agreement was reached and no change should have been made unless it was agreed to “in writing by both parties.”

Agency

The Agency states that all employees who work at the prison facilities are classified as federal law enforcement officers and are all qualified to work in a correctional officer post as needed, and is delineated in their position descriptions. Accordingly, all employees are correctional officers first and their job specialty second. Even if the Union’s grievance had not been procedurally deficient, it would have been denied because management has the right to

reassign employees and management had no duty to bargain because what the Union sought to negotiate was already covered by the Master Agreement.

Local negotiations are a permissive subject of bargaining. Although the Master Agreement, Article 3, Section c, provides for the Union and Agency representatives to engage in negotiations over changes in working conditions, the Preamble and Article 1, Section c, defines “the Union” as the Council of Prison Locals 33, and not each individual local union at the institution level.

The Master Agreement is clear that the law and the Master Agreement allows management to reassign employees for any reason. Further, the procedures and appropriate arrangements have already been negotiated in the Master Agreement (Article 18, sections k, n, o, r, s, and Article 28, Section a.2).

Nothing in law, rule, regulation, or the Master Agreement prohibits management from reassigning employees. This decision is a management decision and should not be disturbed. Article 18, Section p.1, gives management the ultimate decision on whether overtime will be used (“when Management determines that it is necessary to pay overtime...”). The Master Agreement gives management overtime as one option. There are other options available to management, such as hiring, leaving posts vacant, or reassignments/augmentation. Management’s use of reassignment was not done arbitrarily, but rather based on legitimate business reasons and within the terms of the Master Agreement.

ARBITRATOR'S COMMENTS

The October 23, 2014 memorandum regarding Augmentation was issued to bargaining unit members stating that the Agency would only augment the custody roster with non-custody staff during annual refresher training and for firearms and DCT training. The Union had no objection

as this had been the practice on the complex. There was testimony that this had been the practice for some time. No grievance was filed on that matter and it is not part of this grievance.

Union President Johnson testified that “things came about where this augmentation thing was revving up” (RT 37). On July 15, 2015 he emailed Wardens Cozza-Rhodes and Oliver regarding augmentation and said if there were going to be any changes to notify the Local immediately for Impact and Implementation Notice. Warden Oliver (then Complex Warden) sent an email to meet as a group on July 16, but apparently that did not take place.

The Union was then notified on July 17, 2015 that the augmentation process would be changed and would be effective on July 20, 2015. The Union requested to bargain and negotiate augmentation procedures prior to implementation and subsequently was informed that this had been negotiated at the National level and management had no duty to bargain.

The Union’s grievance was not based on a single act, but the overall process relating to the implementation of the Augmentation procedures. In the Agency’s closing brief, the Agency responded to the Union not being afforded an opportunity to negotiate augmentation beginning July 20, 2015 as follows:

The law, Master Agreement, and case law, clearly show that I&I bargaining for reassignments (augmentation) already occurred in the Master Agreement. Therefore, it is covered-by and there was no further duty to bargain.

This is the crux of the issue and the Agency’s argument.

The Arbitrator cannot agree with the Agency’s position. Augmentation is not mentioned in the Master Agreement. The word “Reassignment” is not found in the “index” of the Master Agreement, nor is the word “Augmentation.” The Agency stated during the hearing that the matter had been resolved at the National level, but no documentation was presented to substantiate that statement. The Agency did not provide support for their assertion that augmentation had been

negotiated at the National level and they have no duty to bargain. The Agency did cite provisions of the Agreement that the Agency has the contractual right to assign/reassign employees, i.e., Articles 5 and 18. However, the Agency ignored Articles 4 and 7 of the Agreement with regard to changes in practices and understandings and/or conditions of employment that provide the Union the opportunity to negotiate concerning the changes. The Arbitrator does find that "augmentation" was "a practice and understanding" between the parties where employees were augmented during mandatory training, i.e., annual refresher training, firearms training.

As the Union indicated, the Master Agreement language is instructive where it states in Article 4:

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 both parties.**

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

The Union, under the Master Agreement, is given the right to grieve the actions of management that may, in the opinion of the Union, be a violation of the rights of the bargaining unit members. One of the items the Union may grieve is the impact on the Union members due to changes in working conditions, as found in Article 7 – Rights of the Union, Section b, which reads:

In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligation imposed on it by the statute and this Agreement. This includes, in accordance with applicable laws and this Agreement, **the obligation to notify the Union of any changes**

on conditions of employment, and provide the Union the opportunity to negotiate concerning procedures the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

The Agency has the right to assign and reassign personnel as it deems necessary, so long as the assignment or change does not violate the Master Agreement or past practices of the parties. Warden Oliver's memo stated "FCC Florence is currently facing serious budget concerns. To financially meet our budget through the end of the Fiscal Year, non-custody stall will be augmented to adhere to our budgetary constraints." The Agency's statements of the necessity to start augmentation July 20, 2015 due to budgetary constraints does not give the Agency the right to disregard their obligation to negotiate the proposed changes with the Union as set forth in the Agreement. The Union under the Master Agreement is given the right to grieve the actions of the Agency that may, in the opinion of the Union, be a violation of the rights of members of the bargaining unit.

As the Agency points out, the "covered by" doctrine is based on matters already contained in or covered by an existing agreement. However, the Agency's reliance on various provisions relate to management's right to reassign employees. While the Agency is correct in stating that the law and the Master Agreement allows management to reassign employees for any reason, it does not absolve the Agency from negotiating a change in working conditions if the change is grieved.

The principal issue to be decided by the Arbitrator as stated by the Union and the Agency is whether or not the Agency was required to negotiate Augmentation:

Union - Whether or not the Agency changed a working condition at FCC Florence without negotiating with the Union? If so, was there a violation of law or contract in

doing so? If there was a violation of contract, or law, then what is the appropriate remedy?

Agency - Did management violate the Master Agreement or 5 USC § 7116(a)(5) when it did not negotiate reassignment (also known as augmentation) procedures with the Union? If so, what is an appropriate remedy?

Augmentation procedures were changed. Management did not meet nor negotiate with the Union on any changes in the augmentation process. The Agency contends they had no obligation to negotiate on the issue. Their statement was that it had been settled at the National level. The Agency did not present any documentation or signed memorandums/agreements showing that the change had been made at the National level.

There is no question that the Agency failed to negotiate with the Union when they initiated changes in the augmentation procedures in a manner other than using augmentation during annual refresher training and for firearms and DCT training. The Master Agreement gives the Union the right to negotiate changes in working conditions and assignments. Even if the Agency made augmentation changes for "budgetary conditions" and to reduce "overtime," they were still required to negotiate the changes.

FINDINGS

The Arbitrator finds there was sufficient evidence and testimony to show that:

1. The Agency changed augmentation procedures without negotiating with the Union on or about July 17, 2015.
2. The Agency violated past practice by changing augmentation procedures for non-custody employees without negotiating with the Union on or about July 17, 2017.
3. The Agency had a duty to negotiate "augmentation" on or about July 17, 2017, and continues to have a duty to do so.

DECISION

The Agency violated the Master Agreement when it changed a working condition – augmentation procedures – by memo dated July 17, 2015 to be implemented on July 20, 2015 without negotiating with the Union.

REMEDY

1. The Agency and Union shall commence negotiations within thirty (30) calendar days from the date of this Decision regarding the implementation and the procedures associated with the Augmentation, including the issue of a clothing allowance for augmented staff.
2. All negotiations will be in “good faith” by both parties to reach a mutually agreeable method/procedure of the use of Augmentation.
3. Any agreement shall be in writing and signed by both parties.
4. The Agency shall pay to the Union reasonable attorney fees for the adjudication of this arbitration.
5. The Arbitrator shall retain jurisdiction for a period of 120 days from the date of this Decision to assist the parties in implementing the remedy, if requested to do so by the parties.

DATED: December 8, 2017

Respectfully submitted,


JOE H. HENDERSON
Arbitrator