

Jean A. Savage, Esq.

Facilitator, Mediator and Arbitrator
Dispute Resolution Assistance

9214 NW 25th Ave.
Vancouver, WA 98665-6249

Tel: (360) 574 4758

Fax: (360) 574 4758

Email: jasavage@pacifier.com

March 31, 2014

Mr. Mike Markiewicz
DOJ/BOP/LRO
230 N. First Ave. Ste.201
Phoenix, AZ 85003



Mr. Joshua L. Klinger, Esq.
Minahan & Muther, P.C.
5132 West 26th Ave.
Denver, CO 80212

Re: Mission Critical, Littleton, CO 80123
FMCS No. 13-52891-3

Gentlemen:

Enclosed is a signed copy of my award in the above-captioned case. I will send an invoice for my fees by electronic mail.

It is my practice to request the parties' permission to publish my decisions and furnish them to others on request. Please inform me if you consent to my request for permission to publish. If I do not hear from you by May 1, 2014, I will consider your silence as consent.

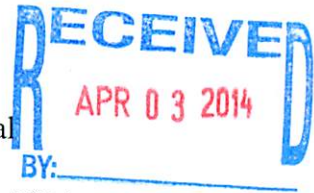
I appreciate the opportunity to work with you.

Sincerely,


(Ms.) Jean A. Savage
Arbitrator/Mediator

**In the Matter of the Arbitration
Between**

Grievance: Mission Critical
FMCS No. 13-52891-3
Date of Award: March 30, 2014



U.S. Department of Justice, Federal Bureau
Of Prisons, Federal Correctional Institution
Englewood, CO (Employer)

and

American Federation of Government Employees,
(AFL-CIO), Local 709 (Union)

ANALYSIS AND AWARD

I. Introduction:

The undersigned, Jean A. Savage, held a hearing in the above-captioned matter under the provisions of a Master collective bargaining agreement between the Agency and the Union dated as effective from March 9, 1998 through March 8, 2001. (Joint Exh. No. 1.) According to the parties, that agreement is still in effect. In addition, a Local Supplemental Agreement, signed on January 6, 1999, and effective “as stated in the Master Agreement” is applicable. (Joint Exh. No. 5.)

The hearing was held in the Unicor Building at 9595 W. Quincy Avenue, Littleton, Colorado on April 24 and 25, 2013, and on November 19 through 21, 2013. Mr. William E. Branch, Labor Management Relations Specialist, represented the Agency in April and Mr. Michael A. Markiewicz, Labor Management Relations Specialist, was the Agency’s representative in November. Mr. Joshua L. Klinger, Minahan & Muther, P.C., represented the Union. Ms. Cordelia Peterson, Human Resources Manager, assisted the Employer’s representatives and Mr. Todd Bull, Union President, and Mr. Jason Rusovick, Union Steward, assisted the Union’s representative.

The hearing proceeded in an orderly manner. Both parties were afforded a full opportunity to present evidence, to examine and cross-examine witnesses, and to argue in

support of their contentions. The advocates fully and fairly represented their respective parties. If the arbitrator awards a remedy, the parties agreed to hold an additional hearing if they are unable to resolve issues arising from a remedy and the arbitrator retained jurisdiction for 90 days solely to resolve disputes arising out of a remedy.

All witnesses testified under oath as administered by the arbitrator. The witnesses were:

Todd Bull, Union President;
Raul Maldonado, Captain, Chief of Correctional Services;
Rose Gonzalez, Facilities Administrative Officer;
Cordelia Peterson, Human Resources Manager; and
Jason Rusovick, Union Steward.

The following correctional officers also testified regarding their availability to work overtime: Adam Krueger, Wilfred A. Clark, Shawn Rafferty, Charles Johnson, Tamera Williams, Robert E. French, Jr., Ron Stevens, Rose Gonzales, Kelsey McCarty, Mark T. Heim, John Asay, Juan Carlos Diaz Del Campo, Robert Reynolds, David Michael Dollard, Bryon Lyon, and Del Duane Taylor.

Ms. Yvonne Clark, Planet Depos, LLC, recorded the hearing and a copy of the transcript was furnished to the arbitrator. The parties elected to file briefs and agreed that the briefs would be postmarked by January 24, 2014. Subsequently, they agreed to an extension to February 7, 2014 for the briefs. Upon receipt of the parties' briefs, the arbitrator officially closed the hearing on February 12, 2014. Subsequently, the arbitrator informed the parties that she would complete the award by March 31, 2014.

II. Issue:

The parties did not agree on an issue statement. The Union stated the issue as “Did the Agency violate the Master Labor Agreement or the Local supplemental Agreement when it vacated and/or did not fill custody posts on the roster? If so, what shall be the remedy?” (Union’s Brief at 1.)¹ The Agency’s statement is “Did the Agency violate Article 27 of the Master Agreement and Article 18 of the Supplemental Agreement on November 28, 2012, by vacating post[s] and not following the overtime distribution procedure set forth in the Supplemental Agreement? If so, then what is an appropriate remedy?” (Agency’s Br. at 1.)

In the absence of the parties’ agreement on an issue statement, the arbitrator finds that the issue is:

Whether the Agency violated Article 27 of the Master Agreement when it vacated posts and failed to use the overtime distribution procedures in Article 18 of the Local Supplemental Agreement to fill vacant posts? If so, what shall the remedy be?

III. Relevant Provisions of the Collective Bargaining Agreements:

MASTER AGREEMENT:

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 law:
 - a. to hire, assign, direct, layoff, and retain employees in the Agency, ...
 - b. to assign work, ... to determine the personnel by which Agency operations shall be conducted;
...

¹ Hereafter “Br.” will be used to reference the parties’ briefs.

ARTICLE 9 – NEGOTIATIONS AT THE LOCAL LEVEL

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

Section a. One supplemental agreement may be negotiated at each institution/facility.

...

1. [I]t is understood that local supplemental agreements will expire upon the same day as the Master Agreement, except as noted in a(2) below. If the Master Agreement's life is extended beyond the scheduled expiration date for any reason, local supplemental agreement will also be extended;

...

ARTICLE 18 – HOURS OF WORK

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

...

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

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

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.

ARTICLE 27 – HEALTH AND SAFETY

Section a. There are essentially two (s) 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

...

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

...

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence.

ARTICLE 32 – ARBITRATION

...

Section d. The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.

...

Section f. The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration.

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit. The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. This Agreement; ...

Section i. A verbatim transcript of the arbitration will be made when requested by either party, the expense of which shall be borne by the requesting party. If the arbitrator requests a copy, the cost of the arbitrator's copy will be borne equally by both parties. If both parties request a transcript, the cost shall be shared equally including the cost of the arbitrator's copy.

LOCAL SUPPLEMENTAL AGREEMENT:

ARTICLE 18 HOURS OF WORK

...

Section b: Should mandatory overtime in correctional services be required, the following procedures will be followed:

- 1) exhaust the overtime sign up sheet
- 2) contact those on post

...

Section d: The following steps will be followed using the sign up procedures:

- 1) Staff will be called in order as they appear on the list for the required shift. Staff will not work a second overtime during the seven (7) day period until the list has been rotated through beginning at the top of the list for each day.

...

- 5) Any such overtime for four (4) hours or less shall be at the Employer's discretion, after such time, the sign-up sheets will be utilized.

IV. Statement of Facts:

FCI Englewood includes four entities—a Federal Correction Institution (FCI), a Federal Detention Center (FDC), a Federal Prison Camp, and Unicor²--all of which include bargaining unit positions represented by the Union. There are approximately 900 to 1000 prisoners totally. About 800 are in FCI, which has a low level of security and about 100 in the FDC in two units. FDC has inmates at medium and high levels of security, as well as inmates held pending trial. Additionally, there are about 200 inmates in the Prison Camp.

The Union is the exclusive representative of approximately 260 bargaining unit employees at FCI Englewood. Under Article 18, Section d. of the Master Agreement, the parties established a shift roster which allows officers to bid on the post, shift, and days off that they want for a given quarter. At FDC and FCI, there are correctional biddable positions which must be manned 24/7.

This dispute arose with the Union's grievance filed on December 13, 2012. The Union stated the violation as:

On November 28th 2012 the Count Officer post was vacated so that the agency would not have to hire overtime. The vacating of different post[s] at the institution is a continual problem that compromises the mission of the Bureau of Prisons. Furthermore, the agency is not following the overtime distribution rules set forth in the supplemental agreement. Many attempts have been made to informally resolve this issue to no avail.
(Jt. Exh. No. 2.)

The Union attempted unsuccessfully to resolve the grievance informally with Captain Maldonado. On December 28, 2012, the Warden denied the grievance asserting that the post was not vacated. Rather, the Agency stated that it was filled from 1:00 p.m. to 9:00 p.m. by a Special Investigative Services Technician (hereinafter SIS Tech), leaving the post vacant for only three hours. The Agency noted that the Local Supplemental Agreement provides in Article 18, section d, 5, that any overtime for four hours or less may be filled at the Agency's discretion.

² Unicor is an operating name for Federal Prison Industries where inmates are employed under a quasi-private entity. There are bargaining unit employees in Unicor, but these positions are not involved in this dispute. (Tr. at 12-14.)

On January 24, 2013, the Union filed a notice that it intended to invoke arbitration. Union stated that the issues were:

The [A]gency has been vacating post[s] on the mission critical roster.³ They are engaging in this violation in an effort to limit the amount of overtime that they pay. The [A]gency has also failed to use the overtime sign up roster appropriately. Many attempts have been made to correct these problems informally, however, after a short period of compliance⁴ the Agency reverts to these violations in the name of saving money. Failing to properly staff the mission critical post puts the community, staff and inmates at risk.

The Union sought a number of remedies including that the Agency cease and desist from failing to fill mission critical posts, financial remedies to those employees who would have worked the overtime if called, a posted letter of apology, and attorney fees. The parties were unable to resolve their dispute and, using FMCS procedures, selected this arbitrator to hear and decide this matter.

V. Positions of the Parties:

A. The Union:

The Union argues that the Agency “increased health and safety risks and circumvented the employee bidding and overtime process by vacating posts⁵ in 2012 and 2013” and thereby violated Article 27 of the Master Agreement. (Union’s Br. at 2, underlining in original, footnotes omitted). The Union alleges that violations are continuing and provided evidence of occurrences between November 2012 and April 2013. The Union asserts that on certain dates two or three posts on a particular shift were left unfilled.

Health and safety are impacted, according to the Union because “homemade weapons are routinely found inside the institution,” the introduction of contraband is an on-going problem, and duties not performed “increased the health and safety risks to bargaining unit employees.” (Union’s Br. at 8, n.9.) The Union argues that Article 27 requires the Agency to “produce a safe working environment and have good cause for

³ There is no testimony in the record concerning the mission critical roster or which positions are included.

⁴ The Union did not explain what it meant by “a short period of compliance” either in the hearing or its brief.

⁵ These posts are discussed in Section VI. That section also includes the Union’s and the Agency’s positions on the effect of vacating posts in the prison environment.

leaving a post vacant.” (Union’s Br. at 8.) In support, the Union cites arbitration awards⁶ and reviews of awards by the Federal Labor Relations Authority (hereinafter FLRA).

The Union also asserts that the Agency violated the Local Supplemental Agreement by not utilizing the overtime sign up lists as required in Article 18. In its brief, the Union argued that the Agency reassigned “bargaining unit/non-bargain[ing] unit staff to cover overtime assignments without regard to the local agreement’s overtime assignment process in section d.” (Union’s Brief at 16.)

B. The Agency:

The Agency asserts that the Union’s argument is “based on their belief that management may not leave a post vacant but rather must fill all posts, even if that requires the use of overtime.” (Agency’s Br. at 3.) According to the Agency, the Union’s demands 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.” (*Id.*) The Agency argues that the Union did not show any provision in the Master Agreement requiring management “to fill all posts at all times or that a vacant post must be filled with overtime.” (Agency’s Br. at 5.)

Citing a Supreme Court case and an FLRA decision,⁷ the Agency argues that the work environment in a correctional facility is different from most places of employment. Some inmates have “violent temperaments” and the Agency uses various tools, such as “working radios; working alarms; providing gloves for searches; drug testing for inmates; and safe havens to name a few” to lower the inherent hazards. (Agency’s Br. at 6.)

The Agency asserts that the goal of Article 27 is to “balance the obligation to reduce workplace hazards with its statutory rights under 5 U.S.C. § 7106 to manage the institution.” (Agency’s Br. at 5.) The Agency asserts that “management’s use of reassignments or leaving posts vacant was not done arbitrarily but rather based on legitimate business reasons.” (Agency’s Br. at 10.)

⁶ Federal Bureau of Prisons, Federal Correctional Institute, Talladega, Alabama and Council of Prison Locals, American Federation of Government Employees and AFGE Local, unpublished award (2012) (Clarke, Arb.) (Talladega). Department of Justice, Federal Bureau of Prisons and American Federation of Government Employees, Local 3584 (Dublin, CA), 109 LRP 4789 (2008) (Tamoush, Arb.) (Dublin) [the Union provided the unpublished award to the arbitrator]; United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin California and American Federation of Government Employees, Local 3584, 65 FLRA No. 185 (2011) (exceptions denied).

⁷ Bell v. Wolfish, 141 US 520, 546-47 (1979); AFGE, AFL-CIO, Local 683 and Department of Justice, Federal Correctional Institution Sandstone, Minnesota, 30 FLRA 497, 499-500 (1987).

Citing FLRA cases, the Agency argues that the right to assign work under 5 U.S.C. § 7106 includes duties assigned, when work assignments will occur, and to whom or to what positions the duties will be assigned. Further, the Agency asserts that the right to assign work includes “the right to not assign work.” (Agency’s Br. at 5.) The Agency also argues that the right to leave posts vacant is granted under 5 U.S.C. § 7106, which is cited in Article 5, and encompasses the right to assign employees, including the right to fill or not fill vacant positions. The Agency also argues that “[r]estricting the agency’s right to staff its correctional facility with fewer correctional officers than it had scheduled would limit the agency’s authority” to determine its internal security practices under 5 U.S.C. § 7106(a)(1). (Agency’s Br. at 8.)

The Agency asserts that while ensuring “the best possible” security and safety to the public, the employees, and the inmates, management “must also be a good steward of tax-payer monies.” (Agency’s Br. at 3.) According to the Agency when a post is vacant, overtime is sometimes used, but other times reassignment is an option. For example, the Agency asserts that when there is no visiting on Thursday, visiting room officers may be reassigned. To do otherwise, according to the Agency, would be a “travesty to the U.S. tax-payers.” (Agency’s Br. at 4.) The Agency also notes that there have been no serious employee assaults or deaths of employees on duty and no inmate work stoppages, food strikes, riots, or escapes at FCI Englewood.

Finally, the Agency asserts that the Union has taken Article 18 of the Local Supplemental Agreement “out of context.” (*Id.*) According to the Agency, Article 18, Section d.5 lists procedures to be followed “**after** management has determined to fill a post with overtime.” (*Id.*, emphasis in original.) Furthermore, the Agency asserts that Article 18 allows management discretion not to fill a post if the overtime is 4 hours or less.

VI. Discussion and Analysis:

A. Whether the Union’s Grievance Constitutes an Allegation of a Continuing Contractual Violation:

During the first two days of the hearing, the Agency asserted that the grievance must be confined to the Count Officer position specifically cited on the grievance form, which the Union alleged was vacated on November 28, 2012. However, the Agency did not assert at the hearing that the Union’s continuing violation allegation was a procedural arbitrability issue, and the Agency did not argue that it was unaware of the Union’s view that many posts were being vacated in violation of Article 27. Furthermore, the Agency

did not pursue the argument in its brief. The Agency states only that “it is also *a concern* that in their grievance, the union only identified one post on one particular date yet at the hearing expanded their grievance to include other posts and other dates. This creates the appearance of an ambush tactic and goes against Article 32, Section a.” (Agency’s Br. at 10, emphasis added.)

The Union argues that vacating posts is a continuing violation and therefore the violation period started 40 days prior to the date the grievance was filed and continues until the Agency stops the practice of vacating posts. In its brief, the Union cites Elkouri & Elkouri, How Arbitration Works (hereinafter Elkouri and Elkouri) and numerous court cases and asserts that the “continuing violation theory has also achieved acceptance in the employment discrimination field. This is particularly so when salary claims are involved.” (Union’s Br. at 3, n.7, citations omitted.)

In drafting the grievance, the Union stated that “vacating of different post[s] at the institution is a continual problem and one that the Union had made ‘many’ attempts to resolve.” (Jt. Exh. No. 2.) Further, in completing the grievance form, the Union wrote “Ongoing” in Box 7, which is titled “Date(s) of Violation(s).” (Id.) There is also evidence in the record that the parties discussed the issue of “SIS Staff Providing Coverage for Custody Posts” at Labor Management Relations meetings throughout 2012. (Jt. Exh. No. 6.) The Agency, in fact, noted these discussions in its opening statement.

The arbitrator notes that in arbitration the general practice is that a union is not required to state its grievance with specificity, particularly if the employer is aware of the union’s allegations.⁸ In this case, the arbitrator rejects the Agency’s assertion that the Union “ambushed” the Agency by presenting evidence at the hearing about numerous vacated posts. (Tr. at 705.) The Master Agreement requires that the parties exchange witness lists prior to the hearing. (See Article 32, f.) Therefore, the Agency knew, or should have known, that by calling numerous witnesses concerning its grievance, the Union intended to raise more than one occurrence of a vacated position.

Elkouri and Elkouri state that “[m]any arbitrators have held that ‘continuing’ violations of the agreement (as opposed to a single isolated and completed transaction) give rise to ‘continuing’ grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new ‘occurrence.’”⁹ Based on the

⁸ “Even if the collective bargaining agreement requires an employee grievance to specifically identify the provision that allegedly has been violated, arbitrators will rarely dismiss a grievance that does not mention the term or terms so long as the employer understood the nature of the dispute.” Elkouri & Elkouri, How Arbitration Works 7-3-D (Kenneth May 7th ed. 2012) (citations omitted).

⁹ Elkouri & Elkouri, How Arbitration Works 5-28-29 (Kenneth May 7th ed. 2012) (citations omitted).

circumstances in this case, the arbitrator finds that the Union grieved that vacating positions was a continuing violation and that the Agency was aware of the Union's allegation.

B. Whether the Agency Violated Article 27 in Vacating SIS Positions:¹⁰

1. SIS Positions: Duties and Bargaining Unit Status:

There are three SIS positions—SIS Tech 3¹¹ and SIS Techs 1 and 2. Generally, the goals of SIS are to detect plans to escape, detect contraband that is brought into the prison, and watch for any disturbance, such as an assault or grouping of inmates. In pursuit of these goals, duties of the SIS Techs are to monitor inmate phone calls and video that is generated by cameras in the prison and the visiting rooms, assist in preparing subpoenas, read mail of inmates on a watch list, conduct investigations of inmates, review confidential information from inmates, process photos of crime scenes, and act as liaison with local law enforcement. The SIS Techs are required to attend two weeks of specialty training at the Management and Specialty Training Center. The three positions are non-biddable posts, that is, applicants must respond to position announcements and if hired, the officers remain in that position and work an 8-hour shift five days a week.

At the hearing, the parties disagreed about the bargaining unit status of the SIS Techs 1 and 3 before March 30, 2013. Before that date, the Agency asserted they were non-bargaining unit positions and the Union claimed they were in the unit. However, in its brief, the Union refers to the SIS Techs 1 and 3 as non-bargaining unit positions prior to March 30, 2013. For example, the Union states “[i]n vacating the post on November 28, 2012, [management] reassigned non-bargaining unit staff [SIS Tech 1] to cover and fill a bargaining unit position.” (Union’s Brief at 12.) From this statement and similar ones, the arbitrator finds that the Union is not pursuing an argument that the two positions were in the bargaining unit prior to the MOU.¹²

The parties reached a Memorandum of Understanding (MOU) on February 19, 2013, that clarified that the SIS Techs 1 and 3 are in the bargaining unit. The MOU states “SIS Technician, GL-0303-08 occupied by Rebecca Noble and Michael Barrera” is

¹⁰ Throughout the remainder of this decision, the arbitrator credits the testimony of Union President Bull and Captain Maldonado unless otherwise noted.

¹¹ The SIS Monitor position was re-titled “SIS Tech 3” about the time that the MOU was signed. Although the MOU was not signed until February 2013, for clarity the arbitrator will refer to this position as the SIS Tech 3 throughout this decision and award.

¹² The Agency did not address this issue in its brief.

included in the bargaining unit¹³ and that “[t]he appropriate personnel processing codes (i.e. bargaining unit eligibility) will be implemented no later than March 30, 2013.” (Union Exh. No. 43.) Therefore, the SIS Techs 1 and 3 were bargaining unit positions only after March 30, 2013. Considering that the purpose of the MOU was to clarify bargaining unit status, the arbitrator finds that the SIS Tech 1 and 3 were non-bargaining unit positions prior to March 30, 2013. As such, they were not covered by the Master Agreement or the Local Supplemental Agreement until that date.

During the hearing, there was testimony that suggested that the SIS Tech 3 primarily performed monitoring duties, leaving the other duties to the SIS Techs 1 and 2. Post orders for the SIS Tech 3, dated June 17, 2012, were introduced and these orders show that most of the day was devoted to telephone and video monitoring.¹⁴ Testimony about SIS Tech duties also focused on monitoring of telephone calls and the cameras, including monitoring of inmate visits. The position description for the SIS Tech positions emphasizes assistance “in conducting investigations and investigative research.” (Agency Exh. No. 5.) Regarding monitoring duties, the description only states that an incumbent “must conduct a high volume of search/retrieval operations involving computerized monitoring operations.” (*Id.*) Based on this evidence, the arbitrator finds that while the monitoring duties of the SIS Techs are significant, they are only one aspect of the job.

The record shows, however, that when other correctional officers are assigned to SIS, their duties are primarily the monitoring tasks. Evening Relief 4 (hereinafter ER4), is assigned to work in the SIS Tech 3 position two days per week with the primary duties of monitoring telephone calls and video. The Captain testified that the reason for the ER4 position is to fill in for the Compound Officer, a position that must be filled 24/7. On Mondays and Tuesdays, the Compound Officer is off duty and the ER4 works in that position. The ER4 is assigned to the SIS Tech 3 position on Saturday and Sunday from 4:00 p.m. to midnight and on Friday, the ER4 is on special assignment. Union Steward Rusovick testified that while working in the SIS Tech 3 post, he monitored phones and cameras and sometimes did research at SIS Tech 2’s request. He did not prepare subpoenas or do inmate investigations which are also SIS Tech duties. Based on the

¹³ At that time, Ms. Noble held the SIS Tech 1 position and Mr. Barrera held the SIS Tech 3 position. Contrary to the Union’s assertion in its brief, the position clarified by the MOU is not the SIS Tech 2. The MOU specifically names Ms. Noble and she held the position of SIS Tech 1 as noted in Union Exh. No. 72.

¹⁴ The Agency questioned whether June 17, 2012 post orders were accurate during the grievance period and stated that the Union has access to post orders. The Union President testified that he checked and found no updated orders for the SIS Tech 3. The Agency did not dispute that assertion and no subsequent post orders for that position were introduced. Consequently, the arbitrator finds that the June 17th post orders accurately reflect the SIS Tech 3’s daily duties.

record as a whole, the arbitrator finds that other officers reassigned to the SIS Tech positions, particularly to SIS Tech 3, primarily performed monitoring duties. Significantly, it is those tasks that the Union argues are critical to the safety of officers.

2. The Union's Allegations and Position:

The Union asserts that the Agency vacated the three SIS Tech positions multiple times from November 6 through April 21, 2013. The Union alleges that the Agency vacated the SIS Tech 1 position on March 14, 2013, when the SIS Tech 1 went on sick leave and did not work from 1:00 p.m. to 9:00 p.m. With regard to the SIS Tech 2 position, which was in the bargaining unit throughout the grievance period, the Union alleges that the Agency improperly vacated that position on April 11 and 20, 2013. On April 11, 2013, the Union President testified that the SIS Tech 2 position "was vacated due to sick leave" from 8:00 a.m. to 4:00 p.m. (Tr. at 346.) On April 20, 2013, a Saturday, the SIS Tech 2 position was vacated from 8:00 a.m. to 4:00 p.m. when management reassigned the SIS Tech 2 to the FDC Lobby. The Union also alleges that on 49 separate dates from November 6, 2012, through April 21, 2013, the Agency vacated the SIS Tech 3 position. In some cases, the vacancies were on the ER4's shift on Saturdays and Sundays from 4:00 p.m. to midnight.

By leaving SIS Tech positions vacant, the Union argues that the Agency has failed to lower the "inherent hazards of a correctional environment." The Union President testified that in the absence of one of the technicians:

[Y]ou could miss a significant event. The SIS monitors live-camera feeds. There's a lot of ... inmate-on-inmate assaults that are not reported, and the SIS [Tech 3] is a person that could see that ... an assault is going on on an inmate and call ... staff to respond to the situation. (Tr. at 71.)

The President also testified that:

In an emergency situation, the SIS [Tech 3] can monitor and control the cameras and capture evidence that could lead to prosecutions and also help with staff safety. ... [I]f a staff member is assaulted and the radio doesn't work or they drop the radio, it's possible for the SIS monitor to see that – detect that and call for the assistance. (Tr. at 75.)

To illustrate the importance of the SIS Tech 3, the Union asserted that the officer in that position does not respond in emergencies. The post orders for that position provide that

the SIS Tech 3 “will not respond [to] emergencies. ... will observe the cameras in the area of the emergency and wait for further instruction from the Operations Lieutenant.” (Union Exh. No. 3.)

The Union also asserted the importance of the SIS Techs in locating drugs and contraband with the Union President’s testimony about an inmate’s phone call that led to the seizure of drugs and contraband when the call was overheard and reported. In addition, the President noted that the cameras may see what an officer on-site is unable to see:

[W]hen I work visiting [in the visiting room], the inmates would really keep an eye on you, but sometimes they would forget about the cameras. And since the cameras can pan, tilt, and zoom, they catch stuff that the officer in the room can’t catch, because they wait to pass the contraband when the officer is distracted, talking to another inmate or a visitor or is on the other side of the room. (Tr. at 78.)

Union President Bull also testified about the Union’s safety concerns. The Union President testified that “The number of inmates has increased. The staff-to-inmate ratio has increased. And the effect of that is, in 2008, we had an Officer Jose Rivera murdered by an inmate in a housing unit.” (Tr. at 404.) Although this murder did not occur at FCI Englewood, the Union argues that the murder shows the danger to staff. To illustrate that potential, during cross-examination the Union questioned the Captain about an assault at the institution. The Captain testified that a correctional officer was slapped by an inmate who got “so close to our officer that he – he slaps her, because she’s telling him, [y]ou can’t go in there.” (Tr. at 903.) At the officer’s direction, the inmate returned to his cell. An additional safety concern is the fact that weapons are regularly found in the prison. The Union furnished photos of two such weapons that were recently found.

3. The Agency’s Position:

The Agency’s position is that under 5 U.S.C. § 7106 and Articles 5 and 18 of the Master Agreement, it is management’s decision as to whether positions should be filled and if overtime should be utilized. The Captain testified extensively about his reasoning in filling or not filling vacated positions although for the most part he did not discuss specific dates. According to the Captain, safety is “[f]irst and foremost, it’s interaction. ... the relationship that the individual has amongst the inmate population, physically being there.” (Tr. at 855.) He added that monitoring of cameras and phones are “normally responses to something that’s gone wrong.” (*Id.*)

The Captain admitted that “[t]he more staff we have, the better things will be.” (Tr. at 918.) However, he repeatedly stated that the FCI Englewood is “very safe” with the number of staff allotted. (*Id.*) The Captain explained that when more staff is present, that is fewer staff are using leave or are on training, more officers are available for special assignments and that such assignments make it easier for the staff to accomplish required duties. Even with less than a full complement, the Captain asserted that the staff accomplishes what is necessary. One example that the Captain noted was the week of the arbitration hearing. During that week, when fewer staff was working, a unit officer found homemade intoxicants when searching a unit.

The Captain also testified that he views the SIS office as a team with two lieutenants and three technicians responsible to assist the lieutenants. According to the Captain, if one person is unable to work, “the expectation is those other four staff pick up” the job duties and that he would not fill one vacancy in SIS if one staff member is absent. (Tr. at 728.) Although the Captain agreed that the SIS Tech 3 post order states that the technician “will not respond [to] emergencies” he noted that the post orders also state that the SIS Tech 3 will “wait for further instructions from the Operations Lieutenant.” (Union Exh. No. 3.) The Captain testified that “my lieutenants will utilize you for what your expertise calls for.” (Tr. at 921.) The Agency also pointed to the Union’s proposal for alternate work schedules for the SIS Techs as undermining its argument in that “these types of schedules result in fewer employees working particular hours and days.” (Agency’s Br. at 10.) The Captain testified that he also treated the ER4’s Saturday and Sunday assignment as special assignment days and assigned the ER4 to other posts if there were vacancies that the Captain regarded as more critical.

The Captain also emphasized that other correctional staff are also responsible for monitoring inmate telephone conversations and the 118 cameras located throughout the FDC and FCI. The FDC and FCI each have a control center and personnel in these centers also monitor. The Captain testified that the centers have “large monitors where every camera is being displayed.” (Tr. at 935.) The SIS office also has two, one for the lieutenants and one for the technicians, and there are additional terminals in the lieutenants’ office that can be accessed with a generic password.

Phone monitoring capability is “on everyone’s work station terminal,” the Captain testified, and using a password, officers can log in to any computer at multiple workstations. (Tr. at 937-38.) A certain percentage of calls must be monitored and staff exceeds the requirement, according to the Captain. He testified that the minimum is 15% per month, but FCI Englewood staff generally listens to 19 to 21% of the calls. In

addition to lieutenants listening to calls, the Captain testified that approximately eight officers each listen to 10 calls per shift and case managers and psychology staff also listens adding to the number of monitored calls.

4. Analysis and Conclusion:

There is no question that staffing is a significant aspect of the Agency's management of the "inherent hazards" of working in a correctional environment. SIS staffing, however, is even more critical because the SIS Techs are able to detect threats to the physical well-being of officers by monitoring telephone calls and video cameras. If there are vacated posts, that affects all officers' safety. The fact that FCI Englewood has experienced no injuries to officers does not equate to there being no danger.

To determine whether the Agency has violated the Master Agreement by vacating SIS positions, it is necessary to balance the Article 27 requirement that the Agency reduce these inherent hazards "to the lowest possible level" with the Agency's rights under Article 5 to assign work, assign employees, and determine its internal security practices. Article 5 restates management's rights under 5 U.S.C. § 7106 and the FLRA has recognized that Article 27 is an appropriate arrangement under section 5 U.S.C. § 7106(b)(3) designed to ameliorate the effects of the exercise of management rights. See, for example, United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin California and American Federation of Government Employees, Local 3584, 65 FLRA No. 185 (2011) (exceptions denied) (Article 27 provisions were negotiated under § 7106(b)). Thus, the question is where to strike a balance between management's rights in Article 5 and its Article 27 obligation to lower "the inherent hazards to the lowest possible level, without relinquishing its rights under 5 USC 7106."

The arbitrator finds no definitive standard in the Master Agreement or in FLRA cases cited by the Union to find the appropriate balance. The Union asserts that the Agency must have "good cause" to leave a post vacant. (Union's Br. at 8.) In support of its argument that "good cause" is an appropriate standard, the Union cited Talladega in which Arbitrator Clarke found that Article 27 required the agency to fill a mission critical post where the Agency lacked "good cause" for leaving such a post vacant.

A "good cause" standard is appropriate in this case. The Agency's argument is essentially that operational needs and, to some extent, the necessity to curb the use of overtime funds determines whether a vacant post will be left vacant or filled by reassignment rather than by overtime. In other words, the Agency is asserting that

management had good reasons to leave posts vacant. The Union is asserting that the Agency lacked good cause in the cited instances and that the Agency should have used the sign-up procedures in Article 18 of the Local Supplemental Agreement to fill posts with overtime. Given these arguments, the arbitrator finds that good 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.

The Union's allegation is that by vacating SIS Tech positions, the Agency violated Article 27's requirement that the management "lower the inherent hazards" in a prison environment "to the lowest possible level." Clearly, when positions were vacant there were fewer eyes and ears at work to check on inmates and possibly avoid harm to correctional officers. However, in many instances when there was an SIS vacancy, another SIS Tech was working some of those hours. For example, on March 14, 2013, when SIS Tech 1 went on sick leave and did not work from 1:00 p.m. to 9:00 p.m., SIS Tech 2 worked from 8:30 a.m. to 4:30 p.m. and the SIS Tech 3 worked from 8:00 a.m. to 4:00 p.m. As a result, there were two SIS Techs working during the daytime. On April 11, 2013, when the SIS Tech 2 position "was vacated due to sick leave" from 8:00 a.m. to 4:00 p.m.; the SIS Tech 1 worked from 6:00 a.m. to 2:00 p.m. that day and the SIS Tech 3 from 8:00 a.m. to 4:00 p.m. Again, there were two SIS Techs in the office during the daytime.

On November 6, 2012 and December 18, 2012, SIS Tech 3 was vacant from 8:00 a.m. to 4:00 p.m.; however, SIS Tech 1 worked from 1:00 p.m. to 9:00 p.m. and SIS Tech 2 from 8:30 a.m. to 4:30 p.m. Similarly, there were many dates when the SIS Tech 3 position was vacant, but there were other Techs working during the daytime. That situation occurred on January 17, 2013, and March 7, 2013, when the SIS Tech 3 position was vacant but the SIS Techs 1 and 2 worked other shifts.

This record shows that management often assigned only one SIS Tech during the daytime or assigned two Techs, but on overlapping daytime shifts. Therefore, there were a number of days when there was only one Tech on duty at any given time. The Union also apparently believes that one SIS Tech is adequate. In its alternate work schedule proposal, the Union proposed that the three SIS Techs would work overlapping daytime shifts and the ER4 officer would work 4:00 p.m. to 12:00 midnight on weekends.¹⁵

¹⁵ In the Union's proposal, SIS Tech 1 was scheduled to work 7:30 a.m. to 5:30 p.m. Monday through Friday; SIS Tech 2 would work 12:30 p.m. to 10:30 p.m. Tuesday through Friday; and Tech 3 would work 7:30 a.m. to 5:30 p.m. Friday through Sunday and 12:30 p.m. to 10:30 p.m. (Agency Exh. No. 3.)

Relying on the parties' expertise, the arbitrator finds that the Agency had good cause to leave a vacancy in one SIS Tech position during the daytime because there were overlapping shifts. While there is always the possibility that a second SIS Tech could see a problem, or a potential problem, and alert officials and thus avoid injury to an officer, there is no certainty that would be the result. In other words, another SIS Tech on duty would not necessarily lower the hazards to correctional officers. There is also the possibility that even with another SIS Tech on duty, a danger sign could be missed when a Tech was performing other duties. Thus, it is not possible to say that a vacancy in SIS Tech staffing will necessarily result in greater hazards than would otherwise exist.¹⁶

It is also significant that in addition to SIS Techs, other staff is monitoring cameras and phones. The control centers in FCI and FDC have video monitoring capabilities and telephone monitoring can be performed on many computers. FCI Englewood has exceeded its telephone monitoring goal of 15% by at least three percentage points which shows that telephone monitoring is not neglected. Considering the general SIS staffing pattern and the availability of other correctional officers to perform monitoring, the arbitrator finds that for most of the dates highlighted in the Union's brief, management had good cause to vacate an SIS Tech position and by doing so the Agency did not violate Article 27.

There are some instances, however, when vacating a SIS Tech position left a gap in monitoring during visiting hours for inmates. If monitoring is reduced, the likelihood that contraband can be introduced is raised and such contraband could raise the hazard level for correctional staff. As Union President Ball noted, "[o]ne of the ways that contraband is introduced into the facility is the visiting room. The visitors bring it in and pass it off to the inmates." (Tr. at 147.) The Union also emphasized the importance of visiting room monitoring in its alternate work schedule proposal. In its proposal, the Union noted that the proposed schedule would ensure "at least one SIS tech on site at all times during visiting" (Agency Exh. No. 3.)

For visiting hours at FCI, the correctional officers work from 8:00 a.m. to 4:00 p.m. on Saturday and Sunday and on Monday and Friday they work from 2:30 p.m. to 10:30 p.m. At the FDC, staff works on Saturday and Sunday from 9:00 a.m. to 3:00 p.m. for visiting.¹⁷ The record reveals that on some visiting days monitoring was significantly reduced. For example, the record shows that on Saturday, February 2, 2013,

¹⁶ The arbitrator distinguishes this dispute from the one in Talladega because in that case the Agency had designated certain posts as "mission critical" and agreed not to leave such posts vacant. In this case, there is no evidence that the Agency has designated mission critical posts or agreed not to vacate such posts.

¹⁷ The record does not include the actual hours inmates may have visitors. Additional staff time is allotted to clear visiting rooms and ensure inmates are in the housing units.

there was no SIS tech working until 4:00 p.m. The Daily Assignment Roster shows that SIS Tech 2 is “unassigned,” and SIS Tech 3 is also “unassigned.” (Union Exh. No. 37.) The Union President testified that “[o]n that day, in SIS, there was nobody there at all all day. ... There’s no lieutenant listed. There’s no SIS tech No. 2 or SIS tech No. 1 or SIS [Tech 3].” (Tr. at 243.) A similar situation occurred on Saturday, February 23, 2013 when the only SIS Tech working was the Tech 2 from 8:00 a.m. to 4:00 p.m. The record for April 5, 2013, a Friday, shows that the SIS Tech 3 position was vacated from 4:00 p.m. until 9:00 p.m., a 5-hour period. Although the SIS Tech 2 worked from 8:30 a.m. to 4:30 p.m., the Daily Assignment Roster shows that no SIS Technician was working from 4:30 p.m. to midnight. On April 20, 2013, a Saturday, the SIS Tech 2 position was vacated from 8:00 a.m. to 4:00 p.m. because management reassigned the SIS Tech 2 to the FDC Lobby. That day the SIS Tech 3 worked from 8:00 a.m. to 4:00 p.m., but the 4:00 p.m. to midnight shift, normally filled by the ER4, was unassigned.

The arbitrator has considered the importance of detecting contraband during visiting hours. Considering that goal of the SIS Tech position, as well as others, the arbitrator finds that the Agency’s reduction of monitoring during visiting is inconsistent with the Article 27 requirement to reduce inherent hazards to the lowest possible level. As noted above, an SIS Tech, even if on duty, could miss something being passed to an inmate. However, given the hazard contraband could pose for correctional officers and the fact that visiting occurs only on a few days for a limited number of hours, the arbitrator finds that leaving the SIS Tech positions vacant does not lower the inherent hazards of working in a prison environment to the lowest possible level. Put differently, the record does not show that the Agency had good cause to leave SIS Tech positions vacant during visiting hours. The fact that the SIS Techs 1 and 3 were non-bargaining unit positions during part of the grievance period does not change this outcome because it is the effect of vacating positions on Article 27’s requirements that is at issue.

The arbitrator has considered the Captain’s assertion that the SIS office operates as a team and if one Tech is absent, the others would pick up that Tech’s work.¹⁸ While this team concept is applicable to most of the SIS Tech duties, it cannot be applied to monitoring the FCI and FDC visiting rooms. During visiting, cameras are extra eyes on inmate activity and SIS Techs may spot something that the correctional officer in the visiting room does not see. Therefore, it is reasonable to conclude that monitoring must be done during the visiting periods to be effective. In the arbitrator’s opinion, the Agency did not have good cause to reduce or eliminate monitoring during visiting hours and thus

¹⁸ On this record, the arbitrator is unable to consider how the two lieutenants who work in the SIS office might effect this conclusion. There is little evidence as to when the lieutenants are scheduled to work. As to their duties, the record shows only that they are responsible for ensuring that required monitoring is completed.

failed to lower the inherent hazards of working in a prison environment “to the lowest possible level” as required in Article 27 of the Master Agreement.

C. Whether the Agency Violated Article 27 by Vacating Other Positions:

1. Count Officer #1:

There is no dispute that management vacated the Count Officer #1 position, which is in the bargaining unit, for three hours on November 28, 2012. (Union Exh. No. 9.) The duties of the Count Officer position are primarily to count inmates.¹⁹ The Union filed its grievance after the Agency reassigned the SIS Tech 1, at that time a non-bargaining unit position, to the Count Officer position and the SIS Tech 1 worked from 1:00 p.m. to 9:00 p.m., the hours of the technician’s regular shift. Normally, the hours of the Count Officer #1 are from 4:00 p.m. to 12:00 p.m., so management’s reassignment left three hours of that shift uncovered.

The Union asserts that management filled the position with a non-bargaining unit employee to avoid paying overtime and that vacating the post for three hours resulted in health and safety risks to staff. Management’s response was that the position was not vacated until 12:20 p.m. the same day leaving insufficient time to adjust the SIS Tech 1’s working hours. There is no dispute that the Agency filled the position with a non-bargaining unit position to avoid paying overtime. The Captain credibly testified that “we took an individual from our roster that we deemed available—that we agreed in labor management relations here locally to utilize to cover that post to avoid utilizing overtime moneys.”²⁰ (Tr. at 701.)

The arbitrator finds no requirement in the Master Agreement or the Local Supplemental Agreement, that the Agency fill posts using overtime. Article 18 of the Master Agreement provides “**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....”

¹⁹ Counts are performed at 4:15 p.m., 10:00 p.m., 12:00 a.m., 3 a.m., 5 a.m., and 10 a.m. on weekends and holidays. The Captain testified that two officers must perform the count and “and come in with the same count in order to ensure that there is a clear and documented count.” (Tr. at 762.) The Count Officer can work in the FDC, FCI, and in the Camp as needed on a particular day.

²⁰ The arbitrator found no reference in the record to an agreement by the parties that the SIS Techs would be utilized to fill bargaining unit posts. It also seems unlikely that the Union would have made such an agreement in view of their long-standing argument that vacating SIS posts creates safety risks. While there is a section in the LMR Meeting Minutes about management’s practice of using SIS Techs to fill vacant posts, the only reference to an agreement is management’s agreement to comply with Article 18, Section r of the Master Agreement. (Jt. Exh. No. 6.) Therefore, the arbitrator will disregard this aspect of the Captain’s testimony.

(Article 18, Section p., emphasis added.) Thus, management may decide to fill a position by reassignment. In this case, the reassignment left the Count Officer position vacant for three hours; and the Local Supplemental Agreement provides in Article 18, Section d, 5) that “[a]ny overtime for four (4) hours or less shall be at the Employer’s discretion, after such time, the sign-up sheets will be utilized.” Accordingly, the arbitrator finds that the Agency did not violate Article 18 by leaving a three-hour vacancy in the Count Officer #1 position.

The second question is whether either vacancy, the SIS Tech 1 or the Count Officer #1 position, resulted in a failure to “lower those inherent hazards to the lowest possible level” as required in Article 27 of the Master Agreement. First, the SIS Tech 2 worked on November 28, 2012, from 8:30 a.m. to 4:30 p.m., and there was no SIS Tech on duty after 4:30 p.m. As noted, it was not unusual to have only one SIS Tech on duty during daytime hours. Second, although the SIS Tech 1 was not available to assist in the required 10:00 p.m. count, the Captain credibly testified that the Compound 1 and 2 officers are able to perform the 10:00 p.m. count. Regarding the November 28th reassignment, the Captain testified that:

We were able to accomplish all of our duties safely and run a – an environment that was safe for the inmates and staff alike. We made that determination, again, knowing that it can be done. We did not have an inmate without staff supervision.²¹ We did not have staff in a dangerous position that evening. (Tr. at 759.)

After weighing the evidence, the arbitrator finds that the Agency’s reassignment of the SIS Tech 1 to the duties of Count Officer #1 with the resulting SIS Tech vacancy and three-hour vacancy in the Count Officer position did not violate Article 27’s requirement that the Agency lower inherent hazards in the prison “to the lowest possible level.”

2. Security Technician:

The Security Technician position was a bargaining unit position²² responsible for assisting the Security Officer, a management official, in repairing locks, making keys, and performing general maintenance on locks. In addition, the Security Technician had access to the armory to obtain chemical munitions which could be used in an emergency.²³ The

²¹ The Captain testified that inmates are behind locked doors in a housing unit after 8:30 p.m. Officers are assigned 24/7 in the housing units in FDC, FCI, and the Prison Camp.

²² The position has been abolished. The Captain testified that it was filled with Special Assignment staff.

²³ Chemical munitions, such as pepper spray, pepper balls, CS gas and CS fogger, are available for use in the prison recreation yard and some chemicals can be used inside the FCI and the FDC as well.

Union alleges that on 16 occasions from November 15, 2012 through April 25, 2013, management vacated this position leaving one less staff person to go to the armory for equipment.

The Agency asserts that the Security Officer had access to the armory and when he was not on duty, the Operations Lieutenant, a position that is filled 24/7, had access to munitions and, in the absence of the Captain, responsibility to determine when they would be dispersed. In addition, the Captain testified that chemical agents were available in the Control Center in case of disturbances.

Considering the evidence and applying the analysis set forth in Section B, the arbitrator finds that in leaving the Security Technician position vacant the Agency did not violate Article 27's requirement that the Agency lower inherent hazards in the prison "to the lowest possible level." Management still had access to munitions if they were required in an emergency.

3. Positions Related to Visiting at FCI Englewood:

The Union alleged that the Agency violated Article 27 by vacating various bargaining unit positions whose primary functions are associated with inmate visiting at FCI Englewood. Visiting hours at FCI and the Prison Camp are on four days—Friday, Saturday, Sunday, and Monday and at FDC there are hours on Saturday and Sunday. In addition, management arranges for visiting on holidays and permits legal visits²⁴ during the workweek.

The first group of these positions has duties in the FCI Front Lobby and the FDC Lobby. On visiting days, the officers process visitors and staff coming into FCI and FDC through metal detectors. At FCI, the officers take calls as the lobby phone acts as a switchboard during business hours while at other times calls go to the control centers. The Union alleges that there were ten days when these posts were vacated. All of these occasions, with one exception, were on days when there are no visiting hours.

The next group is at FCI: FCI VR#1, #2, and #3. The primary duties of these positions are to escort visitors from the front lobby to the visiting room and to sit in the visiting room with inmates. The Union alleges that these positions were vacated 36 times between November 8, 2012 and April 25, 2013. However, in every instance management vacated these positions on a Thursday when there was no visiting.

²⁴ Some inmates are being held pretrial, so apparently "legal visits" are inmate meetings with lawyers.

At the FDC, the Union alleges there were 17 days when the Agency vacated the FDC Visit post. All of these days were either Monday or Thursday between November 15, 2012, and April 25, 2013 when there is no visiting at FDC. As at the FCI, the primary duty of this position is to monitor inmate visits. At the Prison Camp, the Camp Visit post has the same responsibility. This post, the Union alleges, was vacated on 10 days from November 15, 2012, to April 11, 2013; however, all of these days were Thursdays when no visiting occurs at the camp.

The Union asserts that all these positions have additional duties when there is no visiting such as conducting random shake downs, performing urine analysis of inmates, conducting tunnel checks, monitoring inmate moves, assisting with the evening meal, performing pat searching, assisting with inmate counts, and performing roof checks. Most critically, the Union argues that if the positions at FDC were not vacated, there would be an additional person available to respond to emergencies. The Union repeated this argument for all, or nearly all, of the vacated positions. Union President Bull also noted that FDC includes inmates requiring a high level of security which makes additional help more important. The Union President also asserted that if the FDC Lobby post is not filled and someone comes in, the A/B corridor officer has to go to the lobby which results in that post performing two jobs.

The Agency's position is that on non-visiting days, the officers in these posts are considered available for Special Assignment and they are utilized to fill in for staff on leave, thus avoiding using overtime. For example, regarding FDC Lobby, the Captain testified that if "you're going to have a function on Saturday and Sunday ... but on Thursday, Friday, and Monday, you do not, you are considered, for all intents and purposes, to be a special assignment post." (Tr. at 772.) The Captain testified that no one can "enter either the FDC or FCI without the control officer on off shifts [outside of business hours] identifying you." (Tr. at 765.) So, if there is no staff in the lobby, the Captain testified that the lieutenant will be called and "[t]hey will either send a staff member up or they themselves will come and clear that staff member." (*Id.*) If a vacant position is "a vital function to mission," the Captain asserted that he will authorize overtime to fill that post. (Tr. at 685.) The Captain added that he is "mandated" to manage money "responsibly" and that in FY2013; he authorized overtime that required over \$100,000. (*Id.*)

The arbitrator has carefully considered the extensive testimony and exhibits concerning these positions. The evidence shows that these positions are staffed primarily to meet the institution's needs on visiting days. Given that need and the requirement that many custody positions must be staffed 24/7, it seems logical that officers in the visiting-

related positions are utilized to fill critical vacancies on non-visiting days. Fiscal realities necessitate that management exercise its judgment in utilizing officers in these positions on non-visiting days where they are most needed. It is significant, in the arbitrator's opinion, that the Union did not offer any examples of vacant positions in the FCI compounds or on the FDC corridors and units where correctional officers are interacting with inmates one-on-one. The arbitrator recognizes that more officers on duty might be advantageous in an emergency, as the Union argues, but there is no evidence to support the argument that more officers necessarily ensure a workplace with fewer hazards. Further, in addition to the correctional officers, non-correctional officers, who receive the same training, are also available and required to respond in emergencies. After weighing the evidence, the arbitrator finds that there is insufficient evidence to establish that by leaving these visiting-related posts vacant on non-visiting days, the Agency has failed to meet its obligation under Article 27.

D. Whether the Agency Violated Article 18 of the Local Supplemental Agreement:

The Union alleged that the Agency violated the Master Agreement and the Local Supplemental Agreement by assigning officers in non-bargaining unit posts to fill vacant bargaining unit positions. The Union asserted that on November 17, 2012 and January 26, 2013, the Agency vacated the SIS Tech 3 position, which was non-bargaining unit at the time, to fill a bargaining unit position "to avoid paying overtime." (Union's Br. at 10.) According to the Union, the Agency filled "the overtime slot ... with an employee who was not on the overtime sign up list." (*Id.*) Similarly, the Union asserted that on November 28, 2012, the Agency reassigned non-bargaining unit staff to a bargaining unit position "to avoid paying overtime ... under the local supplement to employees who were signed up to work overtime on that day." (Union's Br. at 12.) Although the Union asserted that such assignments of non-bargaining unit staff violate the Master Agreement and the Local Supplemental Agreement, the Union did not identify any provision in either agreement or explain the reasoning behind its argument.

The arbitrator finds no basis in the Master Agreement or the Local Supplemental Agreement that precludes the Agency from filling a vacant bargaining unit position with a correctional officer who is in a non-bargaining unit position for any reason, including avoiding overtime. Article 18, Section p. in the Master Agreement, provides that management may determine when it is necessary to pay overtime, and the Union has not shown that there is any contractual language which provides otherwise.²⁵ The sign up

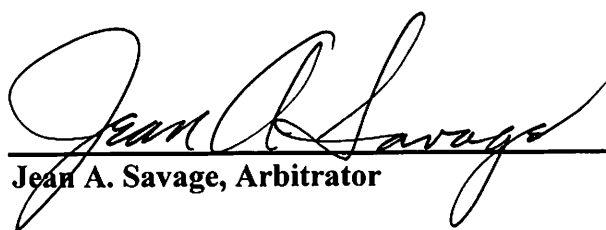
²⁵ Although the effect of assigning a correctional officer from a non-bargaining unit position to a fill a post in the absence of a bargaining unit member is to take work away from the Union's bargaining unit,

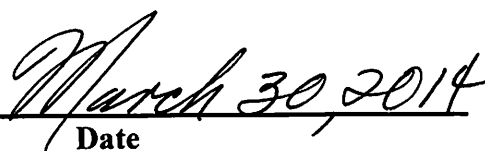
procedures in the Local Supplemental Agreement that provide for the equitable distribution of overtime do not take effect *until* management makes the decision to pay overtime. Therefore, the arbitrator rejects the Union's argument that the Agency violates either the Master Agreement or the Local Supplemental Agreement by assigning officers in non-bargaining unit posts to fill vacant bargaining unit positions to avoid paying overtime.

VII. Award and Remedy:

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Agency did not violate Article 27 of the Master Agreement, with the exception in the next paragraph, when management vacated certain positions. The arbitrator also finds that the Agency did not violate Article 18 of the Local Supplemental Agreement by failing to use the overtime distribution procedures in Article 18 to fill vacancies.

The arbitrator finds that the Agency violated Article 27 by reducing the hours or vacating SIS Tech positions during visiting hours at FCI and FDC without good cause. Therefore, the Agency is ordered to cease and desist vacating SIS Tech positions during visiting hours absent good cause. Inasmuch as the arbitrator is unable to determine whether the Agency would have reassigned a correctional officer to fill SIS Tech vacancies or would have used the overtime sign up roster as provided in Article 18 of the Local Supplemental Agreement, the arbitrator is unable to award back pay for the vacancies the Union cited.


Jean A. Savage, Arbitrator


Date

management has made these assignments sporadically and for one shift. Moreover, in the instances cited by the Union, management made the reassignments to fill temporary absences in critical posts.