American Federation of Government Employees Council of Prison Locals (C-33)	)	FMCS Case No. 15-57054-A
and	)	Opinion and Award Issued: October 3, 2016
U.S. Department of Justice Federal Bureau of Prisons	)	

BACKGROUND

This grievance was filed as a national grievance on April 27, 2015, alleging the following "[c]ontinuing" violations:

> Including but not limited to the following provisions of the Master Agreement to Preamble, Article 1; Article 3; Article 4; Article 5; Article 6; Article 7; Article 18; Article 19; Article 32; 5 U.S.C. 7116(a)(5) to refuse to consult or negotiate in good faith; (8) to otherwise fail or refuse to comply with any provision of this chapter; 5 U.S.C. 7103; 5 U.S.C. 5596 Back pay act and any other Applicable Laws, Rules and Regulations.
>
> (J-3)

The remedy requested on the face of the grievance reads as follows:

1. The arbitrator order a cease and desist.

2. The arbitrator order the agency to abide by the collective bargaining unit (CBA), specifically the roster committee, article 18 and Article 19 for all health services rosters.

3. The arbitrator order the agency to post full rosters of available posts for bargaining unit staff to bid on by seniority prior to PHS officers being assigned to the remaining available posted (CBA Article 18 & 19).

4. That the arbitrator orders the agency to abide by Title 5 USC 7103, PHS non bargaining status.

5. The Arbitrator will order the agency to pay damages for loss of shift differential, daycare costs and loss of overtime due to their violations.

6. That all Bargaining Unit employees affected be made whole.

7. Any other compensation or remedies the Arbitrator deems appropriate.

8. The arbitrator order the agency to incur all cost of this arbitration due to their continuous violation.

(J-3)

After informal resolution efforts failed (J-2) and the Agency denied the grievance as procedurally deficient and substantively without merit (J-4), the Union invoked arbitration on June 26, 2015 (J-5). On March 10 and 11, 2016, an arbitration hearing was held, where all parties had full opportunity to present evidence and argument. A transcript of the proceeding was taken. As of August 3, 2016, the Arbitrator had received the parties' post-hearing briefs.

Relevant provisions of the Master Agreement between the parties include:

ARTICLE 1 - RECOGNITION

Section a. The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71.

* * * *

Section c. The former Director, Bureau of Prisons, Commissioner, Federal Prison Industries, Inc., Myrl E. Alexander, in a letter dated January 17, 1968, said letter being issued in accordance with Executive Order 10988, did certify the Council of Prison Lodges (currently known as the "Council of Prison Locals") exclusive recognition as the representative of all employees employed by the Federal Bureau of Prisons, with the exception of the employees of the Central Office. The term "employee" as used in this Agreement means any employee of the Employer represented by the Union and as defined in 5 USC, Chapter 71.

* * * *

ARTICLE 3 - GOVERNING REGULATIONS

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

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

Section b. In the administration of all matters covered by this Agreement, Agency

officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

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

* * * *

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

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

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

Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the

local level. Such changes will be negotiated in accordance with the provisions of this Agreement.

ARTICLE 5 - RIGHTS OF THE EMPLOYER

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

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

2. in accordance with applicable laws:

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

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

* * * *

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

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

technology, methods, and means of performing work;

* * * *

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

* * * *

ARTICLE 6 - RIGHTS OF THE EMPLOYEE

* * * *

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

* * * *

2. to be treated fairly and equitably in all aspects of personnel management;

3. to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership, or Union activity;

* * * *

ARTICLE 7 - RIGHTS OF THE UNION

* * * *

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

* * * *

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.

* * * *

ARTICLE 18 - HOURS OF WORK

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

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

2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally, there will be no changes to the blank roster after it is posted;

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

    b. employee preference requests will be signed and dated by the employee and submitted to the Captain or designee. Requests that are

illegible, incomplete, or incorrect will be returned to the employee. In order to facilitate Union representation on the roster committee, the employee is also encouraged to submit a copy of this request to the local Union President or designee;

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

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

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

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

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

than the following Wednesday, Management and the Union will meet to discuss the complaints or concerns received, and make any adjustments as needed;

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

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

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

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

Section f. Roster committees outside the Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union.

It is recommended that the procedures in Section d. be utilized. These rosters will be posted three (3) weeks prior to implementation. Copies will be given to the local President or designee at the time of posting.

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

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

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

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

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

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

* * * *

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

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

*** * * ***

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

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

*** * * ***

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

Section u. Except as defined in Section d. of this article, the words ordinarily or

reasonable efforts as used in this article shall mean: the presumption is for the procedure stated and shall not be implemented otherwise without good reason.

ARTICLE 19 - ANNUAL LEAVE

* * * *

Section e. In the event of a conflict between unit members as to the choice of vacation periods, individual seniority for each group of employees will be applied. Seniority in the Federal Bureau of Prisons is defined as total length of service in the Federal Bureau of Prisons. Seniority for Public Health Service (PHS) employees will be defined as the entrance date for the PHS employee being assigned to a Federal Bureau of Prisons facility. It is understood that, as the Bureau of Prisons absorbed the U.S. Public Health Service facilities located at Lexington, Kentucky and Fort Worth, Texas, agreements were made to give those PHS staff seniority for leave purposes based on their entire PHS career.

* * * *

Section l. Total leave-year scheduling procedures may be negotiated locally provided that:

* * * *

2. after considering the views and input of the Union, the Employer will determine the maximum number of employees that may be on scheduled annual leave during each one (1) week [seven (7) consecutive days] period, and when scheduled annual leave will be curtained because of training and/or other causes such as

military leave. To the extent possible, such determination will be made and announced prior to setting up the annual leave schedule.

* * * *

ARTICLE 31 - GRIEVANCE PROCEDURE

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

* * * *

Section c. Any employee has the right to file a formal grievance with or without the assistance of the Union.

* * * *

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

* * * *

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

Section f.

* * * *

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

* * * *

4. in cases of violations occurring at the national level, only the President of the Council of Prison Locals or designee may file such a grievance. This grievance must be filed with the Chief, Labor Management Relations and Security Branch, Central office; and

* * * *

ARTICLE 32 - ARBITRATION

* * * *

Section h. ....

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

1. this Agreement; or

2. published Federal Bureau of Prisons policies and regulations.

* * * *

The evidentiary record includes five Joint Exhibits (J-X), 16 Union Exhibits (U-X), and four Agency Exhibits (A-X), as well as the testimony of 10 witnesses. Witnesses presented by the Union include: Customer Service Representative and Mid-Atlantic Regional Vice-President for the Council of Prison Locals Dewayne Person; Accounting Technician and Union National Vice-President for Women and Unfair Practices Sandy Parr; BOP Lock and Security Specialist and Union President of Local 4047 at FCI Allenwood Shane Fausey; Dental Hygienist and Union Chief Steward at FCI Otisville Paula Lisa; Special Investigator Service Technician and Union President of Local 3584 at FCI Dublin Edward Canales; Nursing Program Manager at the BOP Central Office Carrie Lynn Schuler; and Health Systems Specialist and Union Executive Vice-President of Local 408 at FCI Butner Cheryl Daniel. Witnesses presented by the Agency include: Chief of Staffing and Recruitment for the Health Services Division Scott Murchie; Chief of the BOP Labor Relations Office Christopher Wade; and FCI Otisville Warden Steven Merlak.

The facts underlying the grievance are substantially undisputed.

The Bureau of Prisons (BOP) is composed of more than 120 local prison facilities, which include a Health Services Department (HSD) which provides medical care to approximately 210,000 inmates. The Union is the exclusive representative for employees who work in a variety of medical positions in the HSD, including Physicians, Physician Assistants, Nurse Practitioners, Registered Nurses, Dentists, Physical Therapists and Dentists. Since the 1930s the Agency also has utilized United States Public Health Service officers (PHS employees) to provide this medical care. There is no dispute that the number of PHS employees utilized has increased over time, and the Agency states that currently out of about 3,600 medical professionals approximately 24% are PHS employees.

Bargaining unit employees and PHS employees work side-by-side to provide medical care to inmates, and all employees in the same staff position perform the same job function and duties. Because of the nature of the workplace, all employees also perform some correctional duties. Murchie testified that

that, along with less competitive pay than the private sector, increases the challenge of recruiting PHS employees to work in the BOP's facilities. He testified that the Agency struggles to provide adequate medical care to inmates, and he noted that failure to do so can lead to death, unrest, riots or lawsuits.

The grievance alleges that on a continuing basis at various local facilities the Agency violates Articles 18 of the Master Agreement as well as law by virtue of the manner in which it implements the bidding process for quarterly roster assignments as well as annual leave. The evidence shows that at various facilities the Agency follows the posting and bidding process for bargaining unit employees which is set forth in the Agreement, but the Agency first sets aside for PHS employees a number of available assignments, days off and shifts before the remainder of the available assignments, days off, and shifts are posted for bid by bargaining unit employees. The Agency also sets aside certain vacation slots for PHS employees so they no longer are available for bargaining unit employees or otherwise permits PHS employees to participate on a comingled basis in the contractual process for granting vacation slots to bargaining unit employees.

The PHS employees are not covered under the Agreement; in fact, they are specifically excluded from the right to bargain collectively pursuant to law. 5 U.S.C. 7103(a). The bargaining unit employees covered under the grievance are covered under the Agreement pursuant to Article 1, Section (a); as noted in Article 1, Sections (a) and (b), this bargaining unit is described in 5 U.S.C. Chapter 71. Christopher Wade is the Agency's national head of Labor Relations. He testified that under Article 1, Section (c) the AFGE Council of Prison Locals (Union) is the exclusive representative of bargaining unit employees, and the Union and the Agency are the parties to the Master Agreement. As part of this relationship, he said, the parties participate in quarterly LMR meetings at the national level to discuss issues on an ongoing basis (A-2, A-3). He added that the Local Unions are not parties to the Master Agreement, but they are governed by it, as are the bargaining unit employees at local institutions.

The issue raised in the grievance has been percolating for some time in disputes between the parties at various local

facilities. Because of differences at local facilities, including medical classification levels, the ratio of bargaining unit and PHS employees is not consistent. At local facilities, the number of roster and vacation slots reserved for PHS employees before "available" slots are posted for bid by bargaining unit employees differs in number as well as the particular medical positions involved. But Fausey, Lisa, Canales and Daniel testified that in each of their local facilities -- respectively, FCI Allenwood, FCI Otisville, FCI Dublin and FCI Butner -- the Agency has, in effect, given the PHS employees' seniority priority over bargaining unit employees' seniority by reserving assignments for them to bid on before posting a roster with available assignments for purposes of the contractual bidding process, and also by reserving vacation slots for them.

Fausey testified that at FCI Allenwood even though PHS employees must use a specific form to request leave, a PHS Physician Assistant was given top seniority ranking over bargaining unit employees in that position for purposes of bidding on rosters and leave (U-4 and 5). Lisa and Canales testified that at FCI Otisville and FCI Dublin PHS employees were being allowed to participate in the bargaining unit bidding process and were being given priority over bargaining unit employees (U-7, 9, 10 and 11). Daniel testified that at FCI Butner there are 17 laboratory posts available, but the Agency has removed 10 of these posts for PHS employees to bid on, offering only seven laboratory posts for the bargaining unit employees to bid on (U-12 and 13). Regarding annual leave, she testified that: of the approximate 25 slots available for Nurses at a given time, the Agency offered only 20 slots to bargaining unit employees, reserving five slots for PHS employees; and of the two leave slots available each week for laboratory staff, only one is offered to bargaining unit employees, and one -- including prime weeks such as Christmas or Mothers Day -- is reserved for PHS employees. Schuler is a PHS employee now assigned to headquarters, but she testified that when she worked as a PHS Nurse at FCI Lexington, PHS Nurses were permitted to participate in the roster and leave bidding process with bargaining unit employees. She said PHS employees even used the same form for the quarterly preference request as bargaining unit employees, which appears in Appendix B of the Master Agreement (J-1).

The evidence shows that in recent years the Union has challenged what it characterizes as this improper bidding process at various local facilities. Daniel testified that Local 408 at FCI Butner and management agreed to hold their dispute about this issue in abeyance pending the resolution of this national grievance. Lisa testified that the Local Union filed a grievance over use of this improper bidding process at FCI Otisville, and Canales testified that Local 3584 filed a grievance on the same subject at FCI Dublin, and they both testified that the parties agreed to hold those local grievances in abeyance pending the resolution of this national grievance. Fausey testified that as the issues related to PHS employees and the contractual bidding process developed at FCI Allenwood, without resolution, he contacted the Union Council's National President, Eric Young, as well as National Vice-President for Women and Unfair Practices Parr.

In support of the Agency's contention that procedures used for the bidding process in issue are implemented at local facilities in accordance with local agreements, Merlak testified that when he was an Associate Warden at FCI Otisville from January 2014 to January 2016 (TR. 264), he was involved in a negotiated agreement concerning the yearly rotation between a bargaining unit employee and a PHS employee there. He described the agreement as follows:

> A That it would be rotating every year based on equitability that -- because at that time we had one PHS nurse -- or, I'm sorry, physician assistant, one PHS physician assistant and one nonPHS. But we were vacant a third one, who we were in the process of bringing that person on, which would be a Civil Service, a nonPHS PA.
>
> So we had decided we would simply rotate it every other year. One year, one of the PAs would get first pick, the next year, the next one. And so every three years, they would always get their first pick.
>
> (TR. 267)

Lisa, who is the Union Chief Steward at Otisville, testified that there is no written local agreement with respect to bidding pursuant to bargaining unit employees' seniority, but Merlak testified that the local agreement he described was oral rather than written. He said he reached this agreement with former Local Union President Don Druitt and Lisa during discussion in a break-out session at a June 2014 training conference for the Regional Labor Management Relations Partnership in Allentown, Pennsylvania (TR. 266-67, 269).

Wade testified that Article 9 addresses local supplemental agreements. He said an agreement made on a local level cannot modify, conflict with or supersede the Master Agreement. He acknowledged there may be impermissible local agreements in some institutions that he does not become aware of.

The evidence shows that four arbitration decisions resolving local grievances which challenged the bidding process for posts or annul leave as it relates to PHS employees have been issued. On September 8, 2008, Arbitrator David S. Paull issued a decision resolving a grievance which arose at FCI Lexington; on January 30, 2013, Arbitrator Robert A. Boone issued a decision resolving a grievance which arose at FCI Leavenworth; on February 27, 2015, Arbitrator Jerry B. Sellman issued a decision resolving a grievance which arose at FCI Lexington; and on March 14, 2015, Arbitrator John S. West issued a decision resolving a grievance which arose at FCI Butner.

Parr testified that before she filed this national grievance on February 27, 2015, she reviewed documents related to the bidding process used at prison facilities, and she also considered the local arbitration decisions. She noted that the two decisions issued within a month in 2015 cover only Nurses and apply only to two facilities, but bargaining unit employees in all medical positions at all facilities are affected by the Agency's implementation of the bidding process. She added that the Union's President contacted her concerning filing a national grievance, and she did so in order to enforce all bargaining unit employees' rights with respect to seniority and the bidding process. She added that after she filed the national grievance

additional local grievances on this subject were placed in abeyance pending resolution of the national grievance.

UNION CONTENTIONS

The Union frames the issue to be decided as follows: Did the Agency violate the parties' collective bargaining agreement, law, regulation, rule or policy when it allowed non-bargaining unit employees to participate in the bargained, bidding process for rosters, leave and holidays? If so, what shall be the remedy?

The Union contends that the Agency has failed to satisfy its burden of proving its claims that the grievance is procedurally defective because it was not appropriately filed at the national level and it was untimely filed. It is well established that doubts concerning the arbitrability of a grievance should be resolved in favor of reaching the merits. In any event, the Agency's claims are entirely unsupported.

The grievance form clearly states that this is a national issue, and Parr, a national officer, filed this national grievance on behalf of the Union's national Council. Also, Parr and Person both testified that this issue was arising at facilities nationwide, and the Agency failed to present factual witnesses to contest the widespread nature of the problem. The Union is seeking to avoid "piecemeal" results from local arbitrations of the same issue. In fact, four Union locals in different regions have filed and won similar PHS-related grievances.

Regarding the claim of untimeliness, this is a continuing violation, which has an impact on bargaining unit employees every time the Agency allows non-bargaining PHS employees to participate in the bargaining unit process for bidding on shifts and leave. 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 nationwide. 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 collective bargaining agreement uses the term

"continuing violation." *See DOJ, FBP v. AFGE, Local 1741*, 2006 WL 2418961 (June 21, 2006); *Navy, Naval Oceanographic Office v. AFGE Local 1028,* 1990 WL 1107072 (January 2, 1990). Also, Arbitrator Jerry B. Sellman found a local level grievance on the same topic as involved here to be timely despite the same claims of untimeliness the Agency now makes. *AFGE Local 817 and BOP, Lexington,* FMCS p. 24 (Sellman, February 17, 2015).

The Union rejects evidence submitted by the Agency in an attempt to show that the grievance is untimely because the Union has been aware of the issue for a long time: a List of Labor Management Relations (LMR) unresolved items from January 2011 (A-2); and the July 2012 LMR Minutes (A-3). These documents mention various issues with the PHS employees but do not specifically enunciate the issues involved in this grievance. Moreover, even if the issues were known in 2011, that is further proof that the violation is continuing and must be addressed by the Arbitrator.

On the merits, the Union contends that the Agency violated Article 18 of the parties' Agreement and 5 U.S.C. 7103 by withholding or removing posts from the departmental rosters on which bargaining unit employees bid and allowing non-bargaining PHS employees to be comingled with bargaining unit employees to participate in a collectively negotiated process of bidding on rosters, as well as annual leave. Article 1(c) states that employee for the purpose of the Agreement is as defined in 5 U.S.C., Chapter 71. Article 18(D)(2)(d) clearly states that roster committees will consider the bargaining unit employees' preference requests in order of their seniority, and Article 19 defines the seniority to be used for this purpose.

The Union points out that Arbitrators who have heard local grievances involving the same or similar issue as presented here have held that non-bargaining PHS employees cannot participate in benefits bargained for bargaining unit employees. The parties have negotiated a national Master Agreement which covers all bargaining unit employees and facilities nationwide, and the reasoning underlying these arbitration decisions applies to the bid for annual leave and the roster bid process on a national scale. The Union urges the Arbitrator to review and adopt Arbitrator Sellman's thorough and well-supported reasoning in the *Lexington* decision. It also

highly recommends that the Arbitrator review the other previous arbitration awards on these topics: ***AFGE Local 919 and US BOP Leavenworth,*** FMCS No. 11-58230 (Arbitrator Robert A. Boone, January 30, 2013); ***AFGE Local 817 and Federal BOP, Lexington,*** FMCS No. 070314-54707-8 (Arbitrator David S. Paull, September 8, 2008); and ***AFGE Local 408 and BOP,*** FMCS No. 13-56913-8 (Arbitrator John S. West, March 14, 2015).

The Union points out that the PHS employees are part of the uniformed services and they cannot be represented by the Union. PHS employees are not federal employees subject to Title 5 of the U.S.C.; thus, they are not bargaining unit employees and, by law, they do not have collective bargaining rights. 5 U.S.C. 7103(a)(2)(B)(ii); 10 U.S.C. 101(a)(5)(c). The United States Court of Appeals for the D.C. Circuit has held that "a union is the exclusive representative of employees in the certified or recognized unit, and those employees *only.*" (Emphasis in Original). ***Ass'n of Civilian Technicians v. FLRA,*** 353 F.3d 46, 51 (D.C. Cir. 2004), citing ***U.S. Dep't of Navy, Cherry Point v. FLRA,*** 952 F.2d 1434 (D.C. Cir. 1992). The Agency in the present case is not only reserving roster and leave selections for only PHS employees to bid on; it also is allowing PHS employees to bid on roster and leave slots with bargaining unit employees and improperly comingling PHS employees' seniority with bargaining unit employees' seniority.

The Union stresses that it is not challenging the Agency's right to assign work under 5 U.S.C. 7106(a). The Agency engaged in negotiations with the Union regarding the bidding process as well as seniority for the bargaining unit employees. The Agency now cannot be heard to claim that a topic upon which they knowingly and voluntarily bargained infringes one of its management rights. The Union seeks only to enforce the bargained terms and procedures for bargaining unit employees. The Agency remains free to assign work to both bargaining unit employees and PHS employees and to contract out work under 5 U.S.C. 7106(a)(2).

The Union contends that if the Agency is forced to comply with the Agreement in the manner sought in this grievance, that would not violate the Uniformed Services Employment and Reemployment Rights Act (USERRA). The FLRA upheld Arbitrator Sellman's reasoning in *Lexington*, where he

found that disallowing PHS employees from participating in collectively bargained roster and leave bids does not violate USERRA because they would be denied a benefit based on their non-bargaining unit status, not their current or former membership in the uniformed services. As the FLRA explained, USERRA's purpose is "to prohibit discrimination against a current or former member of the uniformed services based on that membership." *U.S. Dep't of Justice, Fed. B.O.P. Lexington and AFGE Local 817*, 69 FLRA No. 3 (October 16, 2015).

Finally, the Union urges the Arbitrator to reject any claim made by the Agency that under Article 18 it is required to provide bidding based on seniority only to Correctional Services employees, and not to HSD employees. Both Arbitrators Sellman and Boone rejected the notion that bargaining unit employees in the Health Services Department should not be bidding based on seniority. Arbitrator Sellman noted that "it is clear from the Agency's response [in a national LMR meeting], and the continued past practice of posting quarterly rosters for the Nursing department, that the bidding procedures in [Article 18] section d are applicable. *Lexington,* pp. 31-2.

Based on the foregoing, the Union asks the Arbitrator to grant the grievance and to direct the Agency to make whole all affected bargaining unit employees. The Agency must be ordered to cease and desist from allowing non-bargaining unit employees to participate in processes specifically negotiated for bargaining unit employees. The Agency also must be ordered to comply with the Agreement and law going forward, and not allow non-bargaining PHS employees to participate in the contractually bargained roster and leave bidding processes for bargaining unit employees. The bargaining unit employees must first bid on all available roster spots and leave preferences for which they are qualified, according to the Agreement, and the Agency is then free to assign roster spots and grant leave for PHS employees in any manner it pleases. The Union also requests any additional relief the Arbitrator deems appropriate.

AGENCY CONTENTIONS

The Agency frames the issues to be decided as follows:

1. Is the grievance untimely? If so, the grievance should be denied. If not, then;

2. Is the grievance improperly filed at the national level? If so, the grievance should be denied. If not, then;

3. Did the employer violate the Master Agreement when it did not implement two local arbitration awards on a national basis to all other local federal prisons? And;

4. Did the employer violate 5 U.S.C. Chapter 71 when it did not implement two local arbitration awards on a national basis to all other local federal prisons?

If so, then;

5. Does the employer violate 5 U.S.C. Chapter 71 by providing only those assignments that the employer deems available to bargaining unit employees? If so, what is an appropriate remedy?

At the threshold, the Agency contends that the grievance is procedurally defective because it was untimely filed and was not properly filed as a national grievance. According to the Agency, it is well established that arbitrators should and will enforce clear and unambiguous language of an Agreement even though the results are harsh or contrary to the original expectations of one of the parties. This includes enforcement of formal requirements of a grievance procedure, such as Article 31(d), which specifically requires a party to file a grievance within forty (40) calendar days of the alleged incident. Also, Article 31(c) provides that "[a]ny employee has the right to file a formal grievance with or without the assistance of the Union," and Article 31(e) allows any party to raise a timeliness issue and does not require that timeliness be raised at or by any specific point in the proceedings. *See, for example, AFGE Local 1242 and USP Atwater,* FMCS 06-50931 (2006) (Arbitrator Fincher); *FCC Coleman and AFGE Local 506,* FMCS 06-54258 8(2007) (Arbitrator Overstreet; *FTC Oklahoma City and AFGE*

Local 171, FMCS 08-57010 (2009) (Arbitrator Nicholas); *FCI La Tuna and AFGE Local 0083,* FMCS 08-56151 (2010) (Arbitrator Hughes); *FCC Yazoo City and AFGE Local 1013,* FMCS 11-5218581 (2011) Arbitrator Bendixsen).

In its grievance, the Union addresses the local arbitration decision in the *Lexington* case, which is dated February 17, 2015 -- 69 days before the present grievance was filed. This places any issues related to this arbitration decision outside the negotiated 40 calendar day timeframe; this grievance was filed 29 days late.

Moreover, there is no statutory or Master Agreement provision which dictates how PHS employees and civil service employees will be assigned to HSD rosters, and the testimony of local union officials shows that each local facility has established its own set of procedures. It is undisputed that both union and management have been aware of how PHS employees and civil service employees have been assigned to particular posts at each particular local facility. At each facility, the practice is clearly defined, has occurred for a long period of time, and has been consistently applied over many years. These practices not only show that the issue in the case is clearly beyond the 40-day time limit, but also that the procedures used at each facility have evolved into a past practice.

The Agency also contends that the filing of the grievance at the national level is inconsistent with the negotiated provisions of where to file a grievance. Under Article 31(f)(1), grievances involving issues which occur locally should be filed at the local level with the Chief Executive Officer, and Article 31(f)(4) provides for national grievances for violations occurring at the national level. Chief of Staffing and Recruitment Scott Murchie testified that national management officials have no role whatsoever in the creation of HSD rosters at any local facility in the country, which, without exception, are developed at the local level. Therefore, any grievable issue must be filed locally pursuant to Article 31(f)(1). Also, pursuing one result through a grievance at the national level is at odds when procedures differ at the local level.

On the merits, the Agency contends that the Union has failed to meet its burden of establishing the violations which are alleged in the grievance.

The undisputed testimonial evidence shows that the local prison facilities have different missions, different security and staffing levels, different positions, and even different medical classification levels. Also, this case pertains only to the HSD, and, depending on the local prison's mission and security level, the personnel assigned to the Medical Department varies from location to location, including the common positions of Doctors, Physician Assistants and Nurses. The personnel hired into the HSD at a particular location might consist solely of civil service employees or a combination of those employees and non-bargaining unit PHS employees, and there also may be other non-bargaining unit personnel. In order to ensure adequate medical care to inmates, local management officials assign employees hired at local facilities to certain posts. This is accomplished through the application of statutory and contractual provisions, as explained below.

The Agency points out that 5 U.S.C. 7106 and Article 5 give management the right to determine the number of employees; to hire; to assign; to direct; to assign work; to make determinations with respect to contracting out; to determine the personnel by which agency operations shall be conducted; and to determine internal security practices of the agency. Based on these rights, the Employer has the right to determine where employees will be assigned and what posts/assignments it will offer to employees for bidding. Moreover, under the Reserved Rights Doctrine, the Employer retains all its rights unless contractual language creates a clear and concise exception. Non-bargaining unit employees are not covered under the Agreement; therefore, management has the right to assign this group of employees to any post, at any time, and in any method or procedure it chooses.

Additionally, the Supreme Court has noted that there are many different security concerns in a correctional facility than in other work environments, thus prison administrators are entitled to more deference on the issue of internal security. *See Bell v. Wolfish,* 141 U.S. 520, 547 (1979) and *Rhodes v.*

Chapman, 452 U.S. 337 (1981). The FLRA also has agreed with this judgment. *See AFGE, AFL-CIO, Local 683 and Department of Justice, Federal Correctional Institution Sandstone, Minnesota,* 30 FLRA 497, 500-01 (1987). The Authority has held in a number of cases that management's right to determine security practices under §7106(a) includes determination of degree or type of staffing, including the filling of supervisory (non-bargaining unit) positions.

As Murchie testified, all HSD employees must perform correctional duties in addition to health care duties, and failure to provide adequate inmate medical care can lead to inmate unrest, potential riots, deaths or lawsuits. The experience level of both bargaining unit and non-bargaining unit employees varies, and the Agency has the right to ensure the best possible coverage at any time or in any situation, based on qualifications and experience level.

A decision dictating to all local prisons who is entitled to certain posts/assignments or the order in which they must be filled would abrogate management's rights as well as the Agency's ability to carry out its essential function of providing adequate care to inmates. It is well established that Arbitrators should not substitute their judgment for management's unless it is shown that management abused their authority. Management has the right to determine crew size for its operation so long as its determination does not violate another provision of the Agreement. In the present case, there are no contract provisions which prevent management from assigning PHS employees to any post at any time or to any particular week for annual leave or limit its right to make these assignments.

Also, the Union has standing only to file grievances pertaining to bargaining unit employees and their conditions of employment. The Agency's assignment of non-bargaining unit employees is not a matter affecting conditions of employment of bargaining unit employees for purposes of a grievable issue. The Union has no standing to file a grievance concerning the timing of post assignments to non-bargaining unit employees.

In any event, the Union relies on Article 18(d)(2), which provides no support for its position:

> Seven (7) weeks prior to the upcoming quarter, **the Employer** will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, **for the purpose** of giving those employees advance notice of **assignments**, days off, and shifts **that are available** for which they will be given the opportunity to submit their preference requests.
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> (A-4; Emphasis Added)

In no way does this provision state that Employer is prohibited from assigning PHS employees to posts prior to issuing a blank roster to the civil service employees. It also does not state that Employer must post a blank roster which includes all posts/assignments in a department. Rather, the language clearly states that Employer will post a blank roster listing those assignments which the Employer has determined will be **available** to the employees. Merriam-Webster's dictionary defines "available" as "present or ready for immediate use" and "accessible or obtainable," not as every possible choice or all in existence.

Additionally, this specific provision has been reviewed by the DC Circuit Court. In that case, the Employer argued that this provision did not limit its right to determine which assignments, days off, and shifts would be made available to bargaining unit employees at the beginning of each and every quarterly roster period. The court's ruling in Employer's favor supports the Agency's argument in the present case. *See BOP v. FLRA,* 654 F.3d 91 (D.C. Cir. 2011).

Regarding annual leave, the Union relies on Article 19(1), which also provides no support for its position:

> Total leave-year scheduling procedures may be negotiated locally provided that: ... 2. After considering the view of the Union, the Employer will determine the maximum number

> of employees that may be on scheduled annual leave during each one (1) week [seven (7) consecutive days] period...
>
> (A-4)

This provision clearly states that the Employer determines the maximum number of civil service employees who may be on scheduled annual leave. There is nothing in this provision which states that the Employer is limited in assigning non-bargaining unit employees to scheduled annual leave on any week of the year. For example, if management determines that two civil service employee leave slots are available for the first week of January, there is no contract provision which states that management is prohibited from granting one PHS employee annual leave during that same week.

According to the Agency, even if it is determined that the Union has standing to file a grievance over non-bargaining unit employees and that the contract provisions relied upon are relevant, the practices which have been established at each local facility would be binding as past practices.

Many of the Union witnesses acknowledged that there are local procedures in roster assignments and leave assignment. Yet none of these local procedures were introduced into evidence by the Union. In fact, the Union failed to produce a complete roster package from a facility; it did not produce seniority rosters, employees' employment dates, all employees' preference request forms, or the locally negotiated procedures. In this grievance covering over 120 prison facilities across the country, the Union's case rested entirely on general inferences which did not meet the threshold of a preponderance of evidence.

The Agreement gives the local parties the ability to negotiate local procedures on rosters and leave. It would be quite inappropriate for a national arbitration decision to nullify local negotiated agreements, especially since these local negotiated agreements were not submitted as evidence and reviewed by the Arbitrator.

The Agency also rejects the Union's reliance on the arbitration decisions it has submitted, which resolved local grievances arising in local facilities. There is no law, rule, regulation or contract provision which requires a local arbitration decision to be applied nationally. Also, the facts, positions, local procedures and evidence pertaining in those cases were specific to each individual location; for example, the *Lexington* decision applied only to Nurses. To apply those local decisions to all other facilities nationwide would be irresponsible. Such a blanket ruling would jeopardize the Agency's ability to provide adequate inmate medical care, with all the risks detailed above.

Finally, the Agency contends that requiring it to follow the procedures for assignment and annual leave proposed by the Union would violate USERRA. The PHS employees are members of the "Uniformed Services" [38 USC 4303 (16)]; thus they are covered under USERRA. And that statute prohibits an employer from denying a member of the uniformed services benefits on the basis of his or her membership. 38 USC 4311(a).

The Merit Systems Protection Board (MSPB) held that these protections apply to USPHS officers who still are employed by their employing agencies. *See Gjovik v. Department of Health and Human Services*, 117 MSPR 30 (2011). In this decision, the MSPB held that "benefit of employment" includes "vacations" and "the opportunity to select work hours or location of employment," and the MSPB interpreted this to include the claim of a hostile work environment based on uniformed service. In the present case, the Union's position is that the PHS employees should be assigned to posts that the civil service employees would find undesirable after the civil service employees select their posts from "all" posts. If upheld, this proposition not only would deny the PHS employees a benefit of employment; it also would equate to a hostile work environment.

Based on the totality of the evidence, the Agency contends the Union has failed to prove a violation of law or the Master Agreement, and it asks the Arbitrator to deny the grievance.

FINDINGS

Based on my review of the evidentiary record submitted, the issues to be decided here are: Is the grievance procedurally defective because it is untimely or is not properly filed as a national grievance? Did the Agency violate 5 U.S.C. Chapter 71 and/or the Master Agreement when it reserved for PHS employees certain assignments, days off and shifts, with the result that bargaining unit employees were prevented from submitting preference requests for those posts in the contractual bidding process, and when the Agency permitted PHS employees to participate in the vacation selection process on a comingled basis with bargaining unit employees, and, if so, what shall the remedy be?

Regarding the Agency's claim of untimeliness, the evidence shows that the bidding process alleged to be improper in this grievance has been occurring at certain local facilities for a considerable, although unspecified, period of time. But I do not agree with the Agency's assertion that because the Union was aware of the utilization of this bidding process at local facilities this grievance is untimely under the Article 31(d) requirement that a grievance "must be filed within forty (40) calendar days of the date of the alleged grievable occurrence."[1] It is well established that a contractual violation may be found to be a continuing violation if the harm to bargaining unit employees occurs each time the improper action is taken, with the result that the violation is deemed to have occurred once more each time. When a violation is found to be a continuing violation, this operates as an exception to contractual time limits, such as the 40-day deadline in Article 31(d).

In this case the Union claims that the Agency's improper application of the Article 18 bidding procedures results in harm to bargaining unit employees each time they are denied the opportunity to exercise their rights, by virtue of their preclusion from submitting preference requests for posts and annual leave slots which should have been available to them

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[1] The Agency also alleges that the grievance is beyond this 40-day limit because the utilization of the bidding process ripened into a binding past practice. The practice claim pertains to and will be addressed in the analysis of the merits below.

under the Master Agreement. This fits squarely within the definition of a continuing violation, and I do not find that the grievance is barred as untimely.[2]

I also do not find that the evidence establishes that the grievance is procedurally defective because it improperly was filed as a national grievance. In accordance with Article 31 (f)(4), the grievance was filed by one of the Union's three national officers, Vice-President for Women and Unfair Practices Parr. Also, the evidence shows that the issue on the merits which is presented here has been percolating at the local level for at least several years. Indeed, four local arbitration decisions resolving the same or a substantially similar issue, albeit often on distinguishable facts, have been issued, one in 2008, one in 2013, and two in the few months before the present grievance was filed in April 2015. As correctly asserted by the Agency, those local arbitrations cannot be enforced on a nationwide basis.

The Agency points out that national management officials have no role in creating the bidding rosters which are the subject of this grievance, which are developed at the local level. But all these rosters are developed pursuant to Article 18 of the Master Agreement, which covers all bargaining unit employees regardless of the location in which they work, and vacation slots for bargaining unit employees are awarded pursuant to Article 19 of the Master Agreement. Additionally, the record shows that the Union's national officers became aware that, despite the issuance of prior local arbitration decisions, the issue regarding the alleged improper bidding process continued to surface at other local facilities. The evidence shows: that two more grievances on this subject have been filed at institutions, and the local parties agreed to place them in abeyance pending resolution of this national grievance; and that the local parties at two other institutions have agreed to place their disputes on this subject in abeyance pending resolution of this national grievance.

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[2] To the extent the Agency seeks to bar as untimely the consideration of any issue addressed in the prior local arbitration decisions issued on the subject of this grievance, that argument pertains to and will be addressed in the analysis of the merits below.

In the present grievance, the Union seeks a resolution of the issues presented which can be enforced on a national basis. On this record, I find that the grievance properly was filed as a national grievance and properly is presented for decision in this arbitration.

Additionally, the Agency's contention that the Union has no standing to file a grievance concerning the timing of post assignments to non-bargaining unit employees is inapposite. Under Article 1(a) the Union is the sole representative of all bargaining unit employees, and the Union filed this grievance to assert the rights of these employees under the applicable provisions of the Master Agreement between the Union and the Agency. The PHS employees are not covered under this Agreement; in fact, they are specifically excluded from bargaining collectively pursuant to law. 5 U.S.C. 7103(a). The present grievance alleges that the process the Agency uses to award PHS employees post assignments and vacation slots adversely affects the contractual rights of the bargaining unit employees covered under the Master Agreement. In its capacity under Article 1(a) as sole and exclusive bargaining representative for all bargaining unit employees, the Union properly filed and processed this grievance pursuant to the procedures of the parties' Grievance Procedure, as set forth in Article 31.

With respect to the merits, I reject the Agency's contention that the prior local arbitration decisions cannot be considered in this proceeding because the Union failed to file this grievance within 40 days of the issuance of the last of those decisions on February 17, 2015. Article 31(d) requires that a grievance must be filed "within 40 calendar days of the date of the alleged grievable occurrence," and the Agency has provided no cogent explanation for how the issuance of an arbitration decision may be considered to be a "grievable occurrence," as contemplated in that provision. In any event, the Union does not contend that any of those prior decisions addressing bidding for posts or awarding of vacation slots constitutes binding precedent for purposes of the present decision. Rather, the Union asks that I review those prior decisions -- particularly Arbitrator Sellman's decision in *Lexington* -- for any interpretive guidance they may provide. I have done so, and, despite the factual differences between those

cases and the present case, I have found some generally useful guidance there.

On the merits, the Agency is correct in asserting that it has the right to assign work to employees under Article 5 of the Agreement as well as 5 U.S.C. 7106(a) as long as the manner in which it exercises this management right does not violate another provision of the Agreement. But I do not agree with the Agency's contention that there are no contractual provisions which prevent management from assigning PHS employees to any post at any time or to any particular week for annual leave or which limit its right to make this assignment.

This grievance is about the bidding process through which bargaining unit employees covered under the Agreement are entitled to submit their preference selections for assignment posts, and the parties' specific negotiated agreements on this subject are set forth in Article 18. For purposes of the present decision the controlling contractual language appears in Article 18(d)(2), but I do not agree with the Agency's contention that the DC Circuit Court's ruling in favor of the Employer in a case addressing this provision supports the Agency's argument in the present case. *See BOP v. FLRA,* 654 F.3d 91 (D.C. Cir. 2011). In that case, the Union argued a duty to bargain and challenged the Employer's right to determine which and how many posts it will fill. In this case, the Union relies on the existing negotiated language and presents the issue of whether, after the Agency has determined which and how many posts it will fill, it can assign PHS employees at its discretion rather than first posting these assignments for bidding by bargaining unit employees. The issues raised here are not analogous to those decided by the Circuit Court.

In relevant part, Article 18(d)(2) provides that prior to an upcoming quarter:

> the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are

> available for which they will be given the opportunity to submit their preference requests.

With respect to Annual Leave, Article 19(1) provides:

> Total leave-year scheduling procedures may be negotiated locally provided that...
>
> 2. after considering the views and input of the Union, the Employer will determine the maximum number of employees that may be on scheduled annual leave during each one (1) week [seven (7) consecutive days] period....

As acknowledged by both parties under Article 18(d)(2)(d), bargaining unit employees' seniority is to be considered for the purposes of the bids awarded, and seniority is defined in Article 19(e), which addresses Annual Leave:

> Section e. In the event of a conflict between unit members as to the choice of vacation periods, individual seniority for each group of employees will be applied. Seniority in the Federal Bureau of Prisons is defined as total length of service in the Federal Bureau of Prisons. Seniority for Public Health Service (PHS) employees will be defined as the entrance date for the PHS employee being assigned to a Federal Bureau of Prisons facility. It is understood that, as the Bureau of Prisons absorbed the U.S. Public Health Service facilities located at Lexington, Kentucky and Fort Worth, Texas, agreements were made to give those PHS staff seniority for leave purposes based on their entire PHS career.

In the absence of contrary bargaining history evidence, I do not agree with the Agency's claim that because Article 18(d)(2) does not expressly state that Employer is prohibited from assigning posts to PHS employees prior to posting a blank roster for bargaining unit employees it has the unfettered right to determine how many and which of the posts available for each position at a particular facility will be posted for bid by the bargaining unit employees. There is no language in that provision which limits or otherwise qualifies the term "available". I also do not agree with the Agency's claim that it is free to set aside vacation slots for PHS employees or to permit them to comingle their bids for vacation slots with bargaining unit employees' bids because Article 19(l) does not expressly prohibit those actions. That provision grants the Agency authority to determine the maximum number of employees who may be on scheduled vacation during one week, but it does not address the manner in which the number of slots will be filled.

Moreover, consistent with Article 1(c), which defines the term "employee" for purposes of the Agreement as "any employee represented by the Union and as defined in 5 USC, Chapter 71," the benefit of the negotiated bargain set forth in Article 18(d)(2) is reserved exclusively for bargaining unit employees.[3] The removal of some of the posts available for non-bargaining unit employees before the contractual bidding process has begun diminishes the value of the bargaining unit employees' seniority, which under Article 18(d)(2)(d) must be considered, and the Agency has cited no contractual or statutory authority for its circumventing the contractually-agreed bidding process to this effect.

I also am unpersuaded by the policy arguments advanced by the Agency in support of its positions in this case. In part, the Agency contends that it has the right to ensure the best possible medical care coverage at any time in any situation, and it points out: that there are differences in qualification and skill levels among both bargaining unit and

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[3] Similarly, in accordance with Article 1(c), the term "employees" used in Article 19(l) must be read as referring to bargaining unit employees.

PHS employees; and that it has the right under 5 U.S.C. 7106(c) to determine security practices.

As to the former, there is no dispute that all employees who work in a particular position perform the same duties and that all employees who submit preference selections in the Article 18 bidding process must be qualified for the involved position. There is no language in Article 18 which limits or conditions bargaining unit employees' right to participate in the contractual bidding process based on relative qualification to perform the duties of the involved job. There also is no evidence that any assignment posts or vacation slots previously reserved for PHS employees required qualification or skill levels that the bargaining unit employees qualified to bid on them did not have.

As to the latter, the Agency cites judicial authority which establishes that management in correctional facilities is entitled to heightened deference regarding internal security because of security concerns beyond those which may be present at other locations. But the evidence shows that all bargaining unit and PHS employees are required to perform some correctional duties along with the duties of their medical positions, and there is no evidence that PHS employees receive more or superior training or perform more or different correctional duties than the bargaining unit employees on the medical staff.

The Agency also claims that each local facility has established its own procedures for implementing the bidding process and vacation selection and that both parties have been aware of these procedures; thus, the procedures used at each local facility have evolved into a past practice. The evidence shows that the Agency has utilized PHS employees since the 1930s, but their number has increased over time to approximately 24% of 3600 medical professionals. Although the evidence includes no local written agreement regarding implementation of the bidding process at any particular facility, the evidence does indicate that there has been some effort by local parties to accommodate preference selections of both bargaining unit and PHS employees.[4] For example, the Associate Warden at FCI

[4] Under Article 9, local agreements may supplement the Master Agreement as long as they do not "conflict with, be inconsistent

Otisville from January 2014 to January 2016 testified that the local parties there reached an oral agreement in June 2014 at a point when a PHS Physician Assistant was being brought in, joining one PHS and one non-PHS Physician Assistant who already were working there. He testified that during a breakout session at a training conference the local parties agreed on "rotating every year based on equitability," with the result that each Physician Assistant would get first pick every three years (TR. 267).

It would exceed the limits of my jurisdiction under Article 32(h) to render a decision which is based on what I may think is a fair bidding process, either on a local or a national level. My jurisdiction is limited to interpreting and applying the contractual terms to which the parties have agreed as well as applicable law. Moreover, although certain local parties may have been able to resolve specific situations in a mutually acceptable way, the evidence fails to demonstrate that any departure from the bidding process set forth in Article 18 or the contractual vacation selection procedure constitutes a course of conduct that is the understood, accepted and exclusive way over a sufficiently extended period of time that it has ripened into a mutually binding and enforceable past practice.

Also, several local grievances on the subject of the Article 18 bidding process were resolved in arbitration over the last several years, and other local grievances and disputes were placed in abeyance pending the resolution of the present national grievance in arbitration. For purposes of the present decision, the evidence fails to establish the existence of a binding past practice whereby the parties to the Master Agreement understood and accepted over a sufficiently extended period of time that the bidding process for bargaining unit members no longer would be governed by Article 18 of the Master Agreement or that the awarding of vacation slots no longer would be governed under that Agreement.

Finally, I do not agree with the Agency's contention that requiring it to follow the procedures for posts and annual

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with, amend, modify, alter, paraphrase, detract from, or duplicate this Master Agreement except as expressly authorized herein."

leave proposed by the Union would violate USERRA. The PHS employees are covered under that statute, which prohibits an employer from denying a member of the uniformed services benefits on the basis of their membership. But excluding PHS employees from participating in collectively bargained roster and leave bids does not violate USERRA because they are being denied this benefit on the basis of their non-bargaining unit status, not on the basis of their status as members of the uniformed services. Moreover, the Agency's reliance on *Gjovik v. Department of Health and Human Services*, which addresses a claim of discrimination, is misplaced. If, consistent with its obligations under 5 U.S.C. Chapter 71, the Agency excludes PHS employees from a contractual right to a bidding process bargained exclusively for bargaining unit employees and codified in a collective bargaining agreement which does not cover PHS employees, the Agency's action would not create a hostile work environment for PHS employees.

As detailed above, the Agency has asserted certain policy arguments, which I have addressed. In accordance with the scope of my jurisdiction under Article 32(h), my decision is based on careful consideration of the arguments of both parties as they relate to the contract and applicable law. I find that while the Agency has the right to assign work and determine security practices under Article 5 of the Master Agreement and 5 U.S.C. Chapter 71, permitting PHS employees to participate in the contractual post and leave process along with qualified bargaining unit employees, including withholding available assignments, shifts and leave slots, is contrary to law and violates the Master Agreement.

On the totality of the facts and circumstances presented, I do not believe the Union's request for a compensatory remedy for all medical staff adversely affected by the Agency's use of improper bidding processes is appropriate or sufficiently supported. Such a remedy is not warranted by speculative inferences about compensable harm to employees who may have submitted different preference selections had the contractual bidding process been implemented properly. Therefore, the remedy issued under the Award below will not include a make-whole order.

AWARD

For the reasons expressed above, the grievance is sustained. The Agency is directed to follow the bidding process set forth in Article 18 of the Master Agreement at each facility. The Agency is directed to create a quarterly roster with all available assignments, days off, and shifts, with no posts withheld for assignment to PHS employees, and to process the bids of bargaining unit employees as set forth in Article 18. The Agency also is directed to refrain from withholding available annual leave slots from bargaining unit employees for PHS employees or otherwise permitting PHS employees to participate on a comingled basis in the contractual process for granting vacation slots to bargaining unit employees.

The Agency is directed to implement this Award immediately, including for the processing of the next quarterly roster. I retain limited jurisdiction for the sole purpose of resolving disputes which arise over the implementation of this Award. Either party may invoke this limited jurisdiction.

Kathleen Miller
Arbitrator