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In the Matter of the Arbitration

-between-

OPINION

Council of Prison Locals (AFL-CIO)
American Federation of Government Employees, and
Local 3148

-and- AWARD

U.S. Department of Justice
Federal Bureau of Prisons
Metropolitan Correctional Center
New York, New York
----------X (FMCS File No. 11-56584)

BEFORE: Janet Maleson Spencer, Esq.
Impartial Arbitrator

APPEARANCES:

For the Union: Philip W. Glover,
Northeast Regional VP, Council of Prison Locals

Tyrone L. Covington, President Local 3148
MCC New York

For the Agency: Michael A. Markiewicz,
Labor Management Relations Specialist

Dee Messam,
Assistant Human Resources Manager
MCC New York

PRELIMINARY STATEMENT

Pursuant to the collective bargaining agreement between the parties, the undersigned arbitrator was designated to hear and determine this unresolved dispute. Prior to the scheduled hearing, the Agency submitted a Motion to Dismiss, with supporting documents and authority, asserting that the Union's grievance was inarbitrable on its face; The Union asserted the same claim in an unfair labor practice (herein "ULP") proceeding before the Federal Labor Relations Authority (herein, "FLRA"), and therefore no hearing was necessary. The Union submitted a written statement arguing that the Motion to Dismiss should be denied as contractual violations

were being asserted in the grievance that had not been raised in the ULP proceeding and, furthermore, the parties did not have a practice of entertaining motions to dismiss. I denied the Motion on the ground that the question of arbitrability could not be determined on documents alone.

Accordingly, the previously scheduled hearing was held on July 11, 2012 at the Metropolitan Correctional Center in New York, New York (herein "MCC"). Both parties appeared and were given full opportunity to examine and cross-examine witnesses, to present all relevant evidence and to make their respective arguments, both with respect to arbitrability and merits. A stenographic transcript was made of the proceedings. Both parties filed post-hearing briefs.

ISSUES

The parties stipulated to the following issues:

Is the grievance arbitrable? If so,

Did Management violate the Master Agreement by taking lunch breaks from Correctional Officers? If so,

What shall be the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 3-GOVERNING REGULATIONS

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

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

Section b. …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. …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 internal security measures of the Agency; and

2. in accordance with applicable laws:

   a. to …assign, direct…employees…

   b. to assign work…

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;…

ARTICLE 18-HOURS OF WORK

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

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

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

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…

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

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) days to respond to the grievance.

1, If the final response is not satisfactory to the grieving party and that party desired to proceed to arbitration, the grieving party may submit the grievance to arbitration…within thirty (30) calendar days from receipt of the final response…

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 …

ARTICLE 36-HUMAN RESOURCE MANAGEMENT

The Union and the Employer endorse the philosophy that people are the most valuable resource of the Federal Bureau of Prisons. We believe that every reasonable consideration must be made by the Union and the Employer to fulfill the mission of the organization.

This will be achieved in a manner that fosters good communication among all staff, emphasizing concern and sensitivity in working relationships. Respect for the individual will be foremost, whether in the daily routine, or during extraordinary conditions. In a spirit of mutual cooperation, the Union and the Employer commit to these principles.

BACKGROUND

Correctional Officers at the MCC are assigned to one of three shifts, referred to as "watches": the evening watch (4 p.m. to midnight), the morning watch (12 midnight to 8 a.m.) and the day watch. The dispute in this case concerns the day watch. Whereas prior to the dispute, the evening watch, the morning watch and the weekend watches were 8 hours, the day watch Monday through Friday, for at least the last 12 years, was 8 1/2 hours, from 7:45 a.m. to 4:15 pm. The Correctional Officers worked an 8 1/2 shift on the day watch because they, unlike those on the evening and morning watches or those working Saturday and Sunday, had a 1/2 hour unpaid, duty-free lunch hour. Other bargaining unit employees and management personnel on the day shift also had a 1/2 hour unpaid, duty free lunch break; i.e. an 8 1/2 hour shift. It is undisputed that MCC is a much more hectic and busy place during the Monday through Friday day watch than it is at other times.

The dispute in this case arose as follows. On January 18, 2011, Associate Warden Hazlewood sent a written notice to the Union stating that MCC Management, on March 20, 2011[1], would be adopting a "straight 8 hour schedule" (on the day watch), i.e. would be eliminating the lunch break. Warden Suzanne Hastings and a former Associate Warden, Robert Hazlewood, testified to the reasons for the change. Warden Hastings stated that she had been told by an outside analyst from Labor/Management Relations, who had come to MCC to do an assessment of its vulnerabilities, that the MCC was vulnerable to claims for compensation because an 8 1/2 hour shift Correctional Officer might claim he or she had not taken a lunch break. Further, it would be difficult for the facility to prove that the Officer *had* taken a lunch break.[2] Warden Hastings had found that the management staff who were supposed to monitor the Officers' logging in and out for lunch, had not been carrying out this responsibility effectively.[3] There has, in fact, never been a claim for compensation related to a missed lunch break by a Correctional Officer.[4]

Unlike persons in other job titles, the Correctional Officer cannot leave his or her job for lunch without being relieved, a function performed by a supervisory employee at MCC. When pressed for additional reasons for her determination, Warden Hastings added that she liked to have her lieutenants available to interact with the inmates rather than relieving Correctional Officers. She added, further, that some Officers took longer than they should have for lunch (though none was written up). Despite these additional reasons, it seems clear to me, however, that the primary reason for her decision was the need to eliminate the possibility of future claims for compensation by Officers who missed lunch.

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[1] later moved to March 27, 2011.

[2] Warden Hastings testified: "It is a vulnerability for the Agency because the burden of proof that the officer had lunch falls on the Agency, and the Agency in a lot of portal to portal cases we can't prove it and it requires me monitoring every logbook for every correction officer to make sure that they received lunch, when really my attention should be on managing the institution and managing the security to keep people safe and inmates safe, and we have been very vulnerable across the bureau in paying out settlements because we can't prove that we provided lunch breaks." Tr. p. 65

[3] Warden Hastings had been transferred to MCC in 2009.

[4] Warden Hastings at first testified that there had been compensation claims (Tr. p. 57) but later conceded the claims she had in mind involved pre and post shift activity and not lunch breaks.(Tr. pp.66-67.)

On January 21, 2011, the Union, invoked a right to bargain over the elimination of the lunch break and submitted proposals to Management. On February 2, 2011, MCC Management advised Tyrone Covington, President of the Local, that MCC management had no obligation to bargain with the Union over the *decision* to eliminate the lunch period itself and it was only willing to discuss impact and implementation concerns [5].

The next day, on February 3, 2011, the Union filed a ULP charge with the Federal Labor Relations Authority alleging that MMC management had violated §§ 7116(a) 1, 5 and 8 of the Federal Service Labor Management Relations Statute, *i.e.* that in connection with its unilateral elimination of the lunch break it *had failed to bargain in good faith*.[6] Mr. Covington was interviewed over the phone on several occasions by Gail Sircoff, a lead FLRA attorney in the Regional Office. (Tr. p.122). Mr. Covington testified that the question of how long the day watch had had a lunch period was neither discussed nor raised. (Tr. p.123) There was no hearing.

While the ULP charge was being investigated, Mr. Covington assisted some 43 employees in filing individual grievances concerning the elimination of the lunch break. These were filed on March 7, 2011. (Jt. Ex. 3) Management denied the grievances on April 18, 2011.

In the course of a conversation in which she told Mr. Covington that the Regional Attorney was going to dismiss the Union's ULP charge, FLRA Attorney Sircoff told Mr. Covington that the Union should wait until the lunch break was actually eliminated before filing a grievance.[7] Thereafter, on May 5, 2011, the Union filed a new grievance. Agency Attachment 3. The grievance asserted a violation both of 5 USC 7116 and the Master Agreement. Jt. Ex. 1. Specifically, the grievance alleged:

> …On March 27, 2011, the agency removed the duty free lunch break. The agency is in violation of Article 18 (a) of the Master Agreement when it removes

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[5] Mr. Covington, the Union President, conceded that there was discussion about the *impact* of the elimination of the lunch period e.g. Warden Hastings agreed that if an Officer had to make an emergency call home, the Officer could ask a Lieutenant to replace him for this purpose.

[6] On February 24, 2011, the Union also filed a request for a Temporary Restraining Order with the Boston Regional Director (Agency Ex. 2).

[7] According to Mr. Covington, she said, "we [the Union] needed to wait until management actually committed the infraction of taking the lunch and then proceed with filing the grievance on the matter. "…we should file a grievance once the lunch had been removed." (Tr. p. 104)

> the duty free Lunch break from Correctional Services, Day Watch and ends the past practice of a duty free break. The duty free lunch break is covered by Article 18 (a) of the Master Agreement. Management is in violation of Article 36 of the Master Agreement when it does not endorse the philosophy that people are the most valuable resource, the remove (sic) of lunch makes it clear that the agency does not endorse Article 36.

The formal FLRA determination of the Union's ULP charge was not issued until May 25, 2011, when the Acting Regional Director of the Boston Regional Office of the FLRA, Philip T. Roberts, dismissed the charge. The Union did not appeal the dismissal.

The FLRA Regional Director had reasoned that there was no violation of the statutory duty to bargain. To reach this conclusion, the Regional Director interpreted Article 18(a) of the Master Agreement.[8] This provision states that the standard shift is 8 1/2 hours, including a 30 minute unpaid duty free lunch hour, but goes on to note that "there are shifts and posts for which the normal workday is eight (8) consecutive hours without a …lunch break." From this language the Regional Director concluded:

> The evidence demonstrates that the CBA expressly covers the subject of hours of work, and it specifically provides that some shifts may be eight consecutive hours without the paid lunch break. The [Agency]…followed the rules in the CBA and the [Agency] …had no further obligation to bargain on the subject matter.

On June 3, 2011The Regional Director of the Northeast Regional Office of the Federal Bureau of Prisons, J. L. Norwood, responded to the Union's March 5, 2011 grievance, stating that the grievance was "procedurally deficient" and, in any event, no contract violations had occurred. On the same day, June 3, the Union filed for arbitration.

DISCUSSION

Arbitrability: as a matter of law

The Agency argues, as a threshold issue, that the Union's grievance is inarbitrable as a matter of law because the Union is relying on the same theory in the grievance before me as it did in its ULP charge. It cites Article 5 U.S.C. Section 7116 (d), which provides:

[8] The Master Agreement is negotiated nationally and contains provisions applicable generally to all facilities. The Agreement contemplates the negotiation of local agreements applicable to the individual facility. MCC has such a local agreement. This agreement, however, does not contain any provision dealing with lunch breaks or shifts. Warden Hastings conceded, in testimony, that some practices just evolve over time and are not covered by the agreements.

> (d) …issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice…, but not under both procedures.

In *United States Department of Labor Washington D.C. (Agency) and American Federation of Government Employees Local 12 (Union),* 59 F.L.R.A. 112 (September 5, 2003), the Authority explained, " Whether a grievance is barred by an earlier-filed ULP, or vice versa, requires examining whether the grievance involves the same 'issues,' that is, whether the grievance arose out of the same factual predicate as the ULP and whether the legal theory advanced in support of the grievance and the ULP are substantially similar." See also, *American Federation of Government Employees, AFL-CIO, Local 1411 v. Federal labor Relations Authority,* 960 F.2d (1992). The Union maintains that the legal theories raised by its ULP charge are different from those raised by its grievance, *i.e*. the issues are different in the two proceedings.[9] I agree.

The Union's ULP charge (Attachment 1 to the Agency's Motion to Dismiss) asserted that the Agency was violating its *statutory* obligation to negotiate changes in working conditions.[10] *i.e*., the elimination of the lunch period. By contrast, the Union's May 5, 2011 *grievance* stated:

> The Agency is in violation of *Article 18 (a) of the Master Agreement* when it removes the duty free lunch break from Correctional Services, Day Watch and ends the past practice of a duty free break. The duty free lunch break is covered by Article 18 (a) of the Master Agreement. Management is in violation of Article 36 of the Master Agreement when it does not endorse the philosophy that people are the most valuable resource, the remove of lunch makes it clear that the agency does not endorse Article 36. (Emph. supp.)

The grievance thus asserted a contractual claim that the lunch break on the Day Watch was a *past practice* (binding on the Agency pursuant to Article 6(b)2 of the contract) that had become a part of Article 18(a); as such, it could not be eliminated by the Agency. Furthermore, the Union asserted that the elimination of the lunch break violated Article

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[9] Although the Union alluded to 5 U.S.C 7116 in its grievance, as well as to provisions of the contract allegedly violated, the Union stated, at the hearing, that it was not pursuing a statutory claim in this proceeding or asserting a refusal to bargain. It was asserting only violations of the contract.

[10] Section 7116 of the FLRA states:

> For the purpose of this chapter, it shall be an unfair labor practice for an agency--…
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;…

36 of the contract. The Union's argument that the legal theories relied on in the ULP proceeding and in the grievance proceeding differ is compelling, in my view. *U.S. Department of the Air Force, 62nd Airlift Wing, McChord Air Force Base and American Federation of Government Employees, Local 1501,* 63 FLRA 189. (2009) (where the legal theories proffered in the ULP proceeding and the grievance were deemed to be different although a supervisor's remarks made in the context of imposing a suspension were the basis of the statutory claim of interference, coercion, etc, and were also a factual element in the grievance arguing that the suspension violated the contract.) I conclude that the grievance is not inarbitrable on jurisdictional grounds.

Arbitrability: timeliness

The Agency argues that the Union's grievance is inarbitrable due to untimeliness. Its argument is as follows. Article 31(d) states that "Grievances must be filed within forty (40) days of the date of the alleged grievable occurrence." The Union implicitly acknowledged that there was a "grievable occurrence" on March 7, 2011 when it assisted individual bargaining unit employees in the preparation and filing of their individual grievances. Therefore, since the Union's May 5, 2001 grievance was not filed until 59 days later, its grievance was filed 19 days late. [11]

The Agency further makes the point that contractual time limits on filing must be honored by arbitrators, offering substantial authority in support of this principle. I do not disagree with this principle as a general rule. I find, however, that the Union complied with the applicable time limits; therefore, the issue of strict or lax enforcement of contractual time limits is not germane.

I find that the Union complied with the time limits for the following reasons. A key question in timeliness cases is the date of the relevant "grievable occurrence." To be sure, the May 5, 2011 grievance before me in this arbitration was filed more than 40 days from Management's notification to the Union that it was going to eliminate the correctional officers' lunch period on the day watch, more than 40 days after Management notified the Union that it was not going to bargain with the union over the decision, more than 40 days after the Union filed its ULP charge, February 3, 2011, and

[11] The Agency cites FCI La Tuna and AFGE Local 0083, FMCS 08-6151 (2010) (Arbitrator Hughes) as an example in support.

more than 40 days after individual employees, assisted by the Union, filed grievances with respect to the matter (the occurrence used by the Agency). The Union, at the hearing, argued, however, that the May 5 grievance was not based on any of the afore-mentioned occurrences. On all of these dates, the day watch Officers were still enjoying the lunch break. It was not until *March 27, 2011* that the lunch break *was actually eliminated.* The Union maintains that *this* was the grievable occurrence from which the 40 days should be measured; so measured, the May 5, 2011 grievance is timely. Relying on the March 27, 2011 date as the "grievable occurrence" was proper in the circumstances of this case, in my view.

There is reason to believe that the Union was, in fact, waiting for the lunch break to be eliminated before filing its own grievance. Mr. Covington testified about his conversations with Attorney Sircoff of the FLRA Regional Office, in which she, according to Mr. Covington, talked about "ripeness" and advised him that the Union could file a grievance when the lunch break had been eliminated.[12] This confirmed his own view that, until the lunch period was actually eliminated, a grievance claiming that the Agency had violated the contract might well have been deemed premature. The purity of the Union's position is somewhat blurred by its having initially asserted a statutory violation, 5 U.S. C. 1116, refusal to bargain, as well as a contract violation in the May 5 grievance, an assertion later abandoned. Still, I am satisfied that the Union was relying on the actual elimination of the lunch break as the grievable occurrence for purposes of determining timeliness of its claim of *contract* violation. This was reasonable. Accordingly, I find the Union's May 5, 2011 grievance to be timely.

Merits

Having rejected the Agency's arguments that the Union's grievance is inarbitrable , I turn to the merits of the Union's claim that the Agency violated the Master Agreement when it eliminated the lunch break on the Day Watch. I conclude that the Union's claim has merit. My reasons follow.

[12] The ULP charge was still pending when the grievance was filed,; it was denied on May 25, 2011. Mr. Covington testified, however, that Ms. Sircoff let Mr. Covington know in advance how the Regional Director was going to rule.

The Agency argues that Management was authorized to terminate the Correction Officers' lunch breaks on the Day Watch pursuant to Article 18(a). It is true that Acting Regional Director Philip T. Roberts, in his response to the Union's ULP claim, stated:

> Under Section 7116 (a)(1) and (5) of the Statute, it is an unfair labor practice for an agency to implement a change in working conditions without providing the union with notice and opportunity to negotiate. (Citation omitted) *There is no duty to bargain, however, when the express language of the contract reasonably encompasses the subject of the disputed matter* …The contract is presumed to have foreclosed further bargaining. (Emph. supp.)

I agree with the Agency that the FLRA holding, at this stage, disposed of any obligation of the Agency to bargain with the Union over the elimination of the lunch breaks. The Union's claim of *contract* violation, however, is *not* a claim that the Agency failed to bargain. The Union argues, here, that the Agency was precluded by the contract from eliminating the lunch break on the day watch. I turn to that claim.

As we can see, Article 18(a) identifies the 8 1/2 hour work week, with 1/2 hour being used as an unpaid non-duty lunch period, as the *standard* workday. It goes on to acknowledge that there can be shifts and posts that have *no* lunch break-- ("However, there are shifts and posts for which the normal workday is eight (8) consecutive hours without a non-paid duty-free lunch break.") This provision does not spell out how the allocation of types of shifts is determined.[13] The Agency argues that, although Article 18(a) is silent as to who decides whether an employee's shift or post will be 8 1/2 hours with a lunch break or 8 hours without a lunch break, it is the Agency that makes that decision under Article 18(a). I do not disagree. However, my analysis of the elimination of the lunch break in this case does not end here.

The Union argues that there are other contract provisions that bear on the Agency's exercise of its Article 18(a) right to decide whether the shift or post will be the

[13] In Article 18(a), 2nd paragraph , the parties clearly contemplated that employees compelled to work through the 1/2 hour lunch period would be compensated. While there was no evidence that correctional officers sought compensation under this provision, which they had a contractual right to do, the primary rationale for eliminating the lunch break was the possibility that they might do so in the future. It seems unlikely, to me, that the drafters of Article 18(a) would expressly articulate a right that employees have, here the right to be compensated for working through a lunch hour, while at the same time contemplating that the lunch break could be taken away altogether because that right might be exercised. Such an action for such a reason, in my view, could well act as a disincentive for other employees currently on an 8 1/2 hour schedule to refrain from exercising their right to compensation under the 2nd paragraph of Article 18(a). This cannot be what the drafters intended when they refrained from setting specific standards in Article 18(a) to be used in the allocation of 8 hour or 8 1/2 hour shifts .

8 hour shift without a break or 8 1/2 hour with a break. These contractual limitations on the Agency's right under Article 18(a) were not considered by the FLRA in the ULP case.

The Union argues that Article 18(a), insofar as it contemplates the Agency's determining whether the employee will have a shift with or without a lunch break, must be read together with Article 4(b)., which states, in pertinent part:

> Section b. …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.

The Union notes that the Correctional Officers on day watch have had an 8 1/2 hour shift with a lunch break for at least 12 years and possibly longer.[14] Thus, it argues, this is a "practice" within the meaning of Article 4(b). I agree.

The Agency argues that, while the day watch Correctional Officers have had a lunch break for 12 or more years, this does not amount to a "practice' within the meaning of Article 4(b). The Agency argues that that term "practices" in this provision means past practices that are not covered by supplemental agreements and which are negotiable . I am not persuaded that this observation bears on the status of the practice here. There is nothing in the language of Article 18 inconsistent with the development of a "practice" as to how that provision will be administered by the Agency. Notably, this matter of a lunch break, as the testimony from the employees indicates, is essentially a matter of personal comfort to them. Undoubtedly, it was put in place, in the first place, to ensure that the Correctional Officers on day watch, confronted with a uniquely hectic and busy workplace, would actually have enough time to eat lunch. As such, further, this kind of practice is not directly affected by the Management Rights clause, Article 5, which focuses on traditional management functions such as the right to assign work and determine internal security measures. I conclude that since Article 18(a) is silent as to how and on what basis the 8 hour or 8 1/2 hour shifts will be allocated, its administration in the same way under the same circumstances over an extended period of time not only sheds some light on the intent of the parties with respect to appropriate

[14] Notably, this unpaid non-duty lunch hour is enjoyed only by the day watch officers (among the correctional officers) and only Monday through Friday. It was obviously put in place in acknowledgement of the intense activity during the day watch (excepting the weekend) at the MCC, which would not, as a rule, leave much down time for the officers on that watch to eat lunch--in contrast to the other shifts and the weekends. Nothing has changed with respect to the daytime atmosphere that would make the need for the lunch break unnecessary.

standards to be applied in administering Article 18(a), but also amounts to a "practice" within the meaning of Article 4(b). Pursuant to Article 4(b), the existence of this practice precludes the elimination of the Correctional Officers' lunch breaks on the day watch. I conclude that the Agency violated Article 18(a) and Article 4(b) when it eliminated the lunch break of the day watch Correctional Officers.

The Union also argued that Article 6 "Rights of the Employee," is implicated here. Article 6(b), ¶2, provides that employees will have the right "to be treated *fairly* and equitably in all aspects of personnel management." The Union points out, and this is uncontested, that all employees on the day shift in other bargaining units, including management employees, have 8 1/2 hour shifts with a lunch break. That means, as the Union argues, that, to the extent they, too, are confronted with a hectic and busy workplace during the week days, they have a chance to go outside, eat away from the workplace, smoke a cigarette, make a personal call, etc., a privilege denied to the Correctional Officers. Warden Hastings justified changing *only* the shift of the Correctional Officers by stating that the other employees have more "flexibility." I presume that Warden Hastings meant that it is easier for these employees to take their lunch break during the prescribed period, making it less likely that they would claim compensation for a lunch not taken. I believe she alludes to two administrative problems vis a vis the Correctional Officers: the need to have someone relieve the Correctional Officer and the failure of the management staff to effectively monitor whether the Correctional Officers are signing in and out for their lunch breaks in the log book.[15] There was ample testimony at the hearing that the elimination of the lunch break on the day watch, where there is little or no down time, has made it frequently, and in some cases always, impossible to have an uninterrupted lunch and, further, that in denying the Officers the short respite from the intense pressures of their jobs on day watch that they had had, Management has adversely affected their well-being.

We may assume that all employees on the day watch are subjected to a busy and hectic workplace. I find that the cited administrative problems, which could surely be otherwise dealt with, are not a justification for denying a lunch break only to the Correctional Officers. I agree with the Union that treating the Correctional Officers

[15] The second paragraph of Article 18(a) requires that the lunch break be taken between 3 and 5 hours after the start of the shift.

disparately, with respect to the lunch break, is unfair treatment and thus violates Article 6(b). [16]

Since I have found for the Union on the merits, there remains the question of remedy. It seems to me that an adequate remedy in this case is to order that the Correctional Officers on the day watch be returned immediately to an 8 1/2 hour shift with a lunch break. No monetary remedy is called for.

For the foregoing reasons, I issue the following

AWARD

The grievance is arbitrable.

Management violated the Master Agreement by taking lunch breaks from Correctional Officers, as explained in the decision accompanying this Award.

Management will restore the 8 1/2 shift with lunch breaks to the day watch Correctional Officers immediately.

I will retain jurisdiction for 60 days from the date of this Award for the sole purpose of assisting the parties in the implementation of this Award, should such assistance be required.

_____
JANET MALESON SPENCER, ARBITRATOR

I hereby affirm that I am the Arbitrator in the above matter and that I have executed the foregoing as and for my Opinion and Award.

_____
Janet M. Spencer, Esq.

Dated: October 30, 2012

[16] My findings with respect to the other alleged contractual violations make it unnecessary for me to address the Union's independent claim that the Agency violated Article 36.

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Since I have found for the Union on the merits, there remains the question of remedy. It seems to me that an adequate remedy in this case is to order that the Correctional Officers on the day watch be returned immediately to an 8 1/2 hour shift with a lunch break. No monetary remedy is called for.

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Janet Maleson Spencer
JANET MALESON SPENCER, ARBITRATOR

I hereby affirm that I am the Arbitrator in the above matter and that I have executed the foregoing as and for my Opinion and Award.

Janet M. Spencer
Janet M. Spencer, Esq.

Dated: October 30, 2012

[16] My findings with respect to the other alleged contractual violations make it unnecessary for me to address the Union's independent claim that the Agency violated Article 36.