

ROBERT A. BOONE
ARBITRATOR

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
USP LEAVENWORTH

DECISION
MASTER AGREEMENT
ARTICLE 18

and

FMCS # 11-58230

THE AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES LOCAL 919

A. INTRODUCTION

On September 1, 2011, this arbitrator was advised that he had been selected to hear the dispute between U.S. Department Of Justice Federal Bureau Of Prisons USP Leavenworth. (hereinafter referred to as "the Agency") and Local 919 of the American Federation Of Government Employees Local 919 (hereinafter referred to as "the Union").

After several cancellations of agreed dates, a hearing was eventually scheduled for November 8, 2012, in Leavenworth Kansas at the parties training center. The hearing commenced at 9 a.m. and recessed minutes afterward to allow the Agency to relieve/release the proper representative for the Union. At 12:15 p.m. the hearing was reconvened and continued until 2:25 P.M. at which time it was recessed with the arbitrator maintaining jurisdiction over the case. Witnesses testified and six joint exhibits were submitted. The parties agreed that briefs would be submitted by Midnight on January 15, 2013. All briefs were submitted in a timely manner.

The Agency raised a threshold issue of arbitral ability. The record reveals that the issue was not a part of the Agency's previous arguments. The Agency believed all the request of the grievance had been met except the removal of the challenged employee. They also contended the Agency could, or could not use the roster system because of the following contractual language, found in Article 18 Section d of the Master Agreement. [It is recommended that the procedures in Section d be utilized.] They contended the grievance was non arbitral because the grievance request had been implemented and the word recommended gave the Agency the unilateral right to use the roster procedure or not use it.

This grievance is arbitral. First of all, many issues remained unresolved concerning the parties' roster process; no agreement between the parties was submitted to the arbitrator resolving these issues, and the grievance request had not

been granted. Most importantly the contract language the Agency relies on does not give them a right to chose to implement, or not implement the roster process. Although the prior sentence to the questioned language gives the parties the right to waive a roster system in areas other than Correctional Services, the parties both concede they failed to invoke that option. Unit employees outside Correctional Service areas have a contractual right to Article 18 (MA) provisions. The language the Agency relies upon in an attempt to sustain non-arbitral status, simply tells the local parties it would be wise to implement the current processes of Article 18 Section d to make the roster process function. To implement other rules to accomplish that for non-correctional unit employees would be difficult at best.

The Union raised a avalanche of threshold issues:

1. The Agency denied the Union their chosen advocate to present their case before the arbitrator.
2. The Agency did not provide any witness for the Union, as provided for under Article 32 of the Master Agreement.
3. The Agency failed to provide proper paid leave time on several occasions to handle this grievance, as contractually required.

These issues were not a part of the current grievance, although they pertained to the processing of the current grievance. The Chosen advocate situation was resolved. It was untimely for the Arbitrator/Agency to subpoena witness. The paid leave time is the subject of a grievance and not in the hands of this arbitrator.

The relationship these parties currently have, could beyond question stand some repair. The above kinds of arguments tend to hinder the fair resolution of grievances rather than help. My only advice in this area is the parties need to solicit professional help, maybe from the national parties, before they cause serious damages to the facility they all rely upon.

B. APPEARANCES

The Agency appeared by Gail L. Elkins, Asst. Gen. Counsel, U.S. Department Of Justice Federal Bureau Of Prisons. She was assisted by Michele Cottingham Human Resources Manager. The parties presented six Joint Exhibits. The only witnesses to testify for the Agency were Gail L. Elkins and Michele Cottingham.

The Union appeared by Shawn M. Wagner, Secretary Treasure Local 919; Brian Hundley, President Local 919; and Pam Herod, Health Information Tech Local 919. They were the only witnesses for the Union.

Both the Agency and Union Representatives did admirable jobs in the performance of their duties both at the hearing and on the briefs.

C. PERTINENT CONTRACTUAL\LEGAL PROVISIONS

The Master Agreement in effect, dated March 9 1998 - March 8 2001, between the Union and the Agency provides as follows:

Language carrying the most weight on the parties' positions in this case is underlined.

ARTICLE 1 RECOGNITION

Section a.

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

ARTICLE 5 RIGHTS OF THE EMPLOYER

2. in accordance with applicable law:

- 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 labor organization from negotiating:

In the Federal Service Labor-Management Relations Statute [The Back Pay Act] you will find the duplicate language that exist in Section b above. "Nothing in this section shall preclude any agency and labor organization from negotiating."

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 Prison 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

Section a. The basic workweek will consist of five (5) consecutive workdays. 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), except in cases where compensation is at the election of the employee. Management will not, without good reason, fail to relieve employees for a duty-free lunch break.

There will be no restraint exercised against any employee who desires to depart the institution/facility while the employee is on a non-paid, duty-free lunch break. For the purposes of accountability, the employee leaving the institution/facility will leave word with his/her supervisor.

Section b. The parties at the national level agree that requests for flexible and/or compressed work schedules may be negotiated at the local level, in accordance with 5 USC.

1. any agreement reached by the local parties will be forwarded to the Office of General Counsel in the Central Office who will coordinate a technical and legal review. A copy of this agreement will also be forwarded to the President of the Council of Prison Locals for review. These reviews will be completed within thirty (30) calendar days from the date the agreement is signed;
2. if the review at the national level reveals that the agreement is insufficient from a technical and/or legal standpoint, the Agency will provide a written response to the parties involved, explaining the adverse impact the schedule had or would have upon the Agency. The parties at the local level may elect to renegotiate the schedule and/or exercise their statutory appeal rights; and
3. any agreement that is renegotiated will be reviewed in accordance with the procedures outlined in this section.

Section c. Every reasonable effort will be made by the Employer:

1. to ensure that all administratively controllable travel is performed in a paid duty status;
2. should an employee be required to travel outside of his/her regularly scheduled workday and/or workweek, such employee will be compensated to the extent allowable by applicable laws, rules, and regulations; and
3. to ensure that authorized travel and extensions to authorized travel will be made sufficiently in advance to ensure that the affected employee can receive advance travel funds, should the employee desire.

Section d. Quarterly rosters for Correctional Service 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 day's 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 in 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; the committee's roster will be posted and accessible to all Correctional Services
 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 h. Ordinarily, the minimum time off between shifts will be seven and one-half (7 1/2) hours, and the minimum elapsed time off on "days off" will be fifty-six (56) hours, except when the employee requests the change.

Section i. Employees, while serving on federal, state, or local jury duty, shall be considered as being assigned to the day shift with Saturdays and Sundays off until the completion of such duties. The change in work schedule shall be for the weeks during which such duties are performed.

Section j. No employee will be required to stand roll calls except on duty time. Where roll calls are not used, the Employer will provide other means of alerting oncoming employees to unusual or dangerous situations of which the employees should be made aware.

Section k. If a change in a job assignment involving a change from an inside position to an outside position or vice versa is necessary, and the employee has not been properly advised in advance, and adverse weather or conditions of the assignment warrant, the employee will be given an opportunity to obtain and change into appropriate clothing while on duty status. Other options may be explored, including the assigning of another employee to the position.

Section l. The Employer is committed to its responsibility regarding the health of all employees. Toward that end, the Employer may require that the health condition of employees requesting assignment changes for medical reasons be reviewed by the

Chief Medical Officer. If employees wish, medical evidence from their private physicians may be provided to the Chief Medical Officer, who will fully consider this information before making reports to the supervisors with appropriate recommendations.

1. employees suffering from health conditions or recuperating from illnesses or injuries, and temporarily unable to perform assigned duties, may voluntarily submit written requests to their supervisors for temporary assignment to other duties. Such employees will continue to be considered for promotional opportunities for which they are otherwise qualified;
2. the Employer will continue to accommodate employees who suffer a disability in accordance with applicable laws, rules, and regulations; and
3. employees must report any planned or anticipated requests for leave due to medical or psychiatric hospitalization, treatment, or recuperation as early as possible so that necessary staffing adjustments may be planned.

Section m. Employees may request to exchange work assignments, days off, and/or shift hours with one another. Supervisory decisions on such requests will take into account such factors as security and staffing requirements and will ensure that no overtime cost will be incurred.

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

Section o. Employees shall be given at least twenty-four (24) hours notice when it is necessary to make shift changes, except for employees assigned to the sick and annual leave roster [as specified in Section g(4).], or when the requirement for prior notice would cause the vacating of a post. For the purpose of this Agreement, a shift change means a change in the starting and quitting time of more than two (2) hours. Work assignments on the same shift may be changed without advance notice.

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

1. when Management determines that it is necessary to pay overtime for positions/assignment's 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
2. overtime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and the Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit.

Records will be retained by the Employer for two (2) years from the date of said record.

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, non probationary 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 s. Notification of shift or assignment changes for employees not assigned to sick and annual relief will be confirmed in writing and signed by the Employer, with a copy to the employee.

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.

D. STATEMENT OF FACTS, AS VIEWED BY THE ARBITRATOR

The parties have a unique agreement insofar as it allows unit members to move from one job assignment to another because they believe it is more desirable. Most labor contracts require a change in classification. It is evident from the case history that the unit members want the roster process to change assignments. It betters their work life because they may perform different job elements than they are currently required to perform. They may work for different managers, may get different days off, or any combination of these factors to make the assignments they may apply for more desirable to them.

The Master Agreement has been in effect and extended at this facility and others since March 1998. For language to have been in effect for some fifteen years and for no major problems to have occurred during that time frame, something must have had to change to create this dispute. The roster procedure worked for years without requiring arbitration to propel it along. It appears that lower managers or someone became fearful of the process and halted its success. If they became fearful of being contractually required to accept non-qualified unit members on assignments the language has not changed, and those fears are unwarranted, The Agency should go back to complying with what the parties agreed to since the beginning of the relationship.

The Union is the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71 and the contract. For frustrated and/or angered union representatives to walk away from the process, or not challenge such accusation made towards them, creates the same violation of the contract the Agency creates when it refuse to meet contractual requirements.

The only employees the parties were strapped with the responsibilities of negotiating for were, the defined unit employees. Other employees and/or contractors do not enjoy the spoils of the parties negotiating efforts.

To assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted are the rights of the Agency to manage the facility. This grievance has no party of interest, or as it is commonly known in the work place, no personal grievant. No unit employee has stepped forward and proclaimed, "I wanted that assignment". No unit employee has been economically violated or denied. The Agency currently has anywhere from four to six non-unit employees assigned to the area under protest, they are not under any challenge by the union. To remove the protested employee with the authority issued me on this grievance alone would be stretching my duties to interpret the agreement. The work is UNIT work, and with a party of interest, or a violated unit employee the assignment would have been vacated by me, and the party of interest would have been made whole and placed on the job.

Nothing in this section shall preclude any agency and labor organization from negotiating. This language is found within the contract. In the Federal Service Labor-Management Relations Statute [The Back Pay Act] you will find duplicate language that exist in Section b. "Nothing in this section shall preclude any agency and labor organization from negotiating." This language is not interpretable, gray nor vague. it is plain the parties were saddled with the responsibilities of negotiating for the unit employees. The national parties and legal community intended for the Union and Agency to negotiate for unit employees such items as roster procedures, or they would not have approved such contract language for the past fifteen years.

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. Evidence proves the National Parties placed checks and balances in place to avoid unneeded and repetitive contractual languages, but allowed the local parties the latitude to resolve local issues. The issues within this grievance hinges on national language only.

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). Again this language is not interpretable, gray nor vague. It is plain the local parties are given the responsibilities of placing unit employees on assignments from the roster

based on seniority, and the committee should follow that provision unless very unusual circumstances exist.

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. The word outside means that all other unit employees are entitled to Article 18 Section d opportunities, unless the local parties waive that right. The national parties used the term recommend, but within the same sentence explained what they recommended. They recommended the procedures in Section d. be utilized as the rules to operate the roster committee. The terms of section d apply to all roster committees outside the Correctional Services Department, by virtue of the local parties choosing not to negotiate any other term and/or waive the committee rights by mutual agreement Section d rules are in place.

E. POSITION OF THE AGENCY

The grievance is non-arbitral. If arbitral, did the Agency violate Article 18 of the Master Agreement and if so, what is the appropriate remedy?

F. POSITION OF THE UNION

The Agency violated Article 18 by

1. Having no roster committee.
2. No blank roster, and improper posting of such rosters.
3. Preference request not being utilized by seniority.
4. No union representative involvement.

G. QUESTION

Why would the national parties negotiate roster language for employees outside the Correctional Services Department if the work was not unit work? Do the procedures of Section d apply to all roster committees outside the Correctional Services Department? If not, what are the procedures for non Correctional unit members?

If non-unit employees were mingled with unit employees on roster placements what seniority system would the Agency use to make such placement? Since no contractual protections exist for such employees how long would they remain on such assignments? Could the Agency reassign them at will?

H. CONCLUSION

To allow non-unit PHS employees to participate in the contractual processes violates the law and contract. They are barred from such activities by Federal Law. The master contract only covers those employees specified in 5 U.S.C. Chapter 71.

This arbitrator breaks no new ground by ruling that non-unit employees cannot be mingled with the seniority contractual provisions of unit employees. In FMCS Number 070314-54707-8 Arbitrator Paul ruled "the Agency violated the contract when it

permitted PHS nurses to participate in a seniority bid for annual leave." That same thinking holds true in this case.

The new roster committee should, at least for the next six months, consist of at least one union member that is subject to the whim of the unit members (subject to elections for office) and has knowledge of the protested area. One of the Agency's members should be a higher-level manager that has the responsibility for the entire work force, maybe a human resource person, etc, who would have no personal ties with the non-unit workforce. After the six months has elapsed, the committee will revert back to the requirements of Article 18 of the Master Agreement.

The record was closed on this case on January 15, 2013 at midnight.

Because the relationship of the parties does not appear to be at its best, I believe my award must be clear, to the point, and in common English. I will do my best.

I. AWARD

Yes, the Agency violated Article 18 and the following is ordered: Immediately (NOW) the parties are to establish a functioning roster committee as outlined three paragraphs above. And under the terms of Article 18 of the master agreement, for all non Correctional unit employees. Any assignments are to cease and desist until this committee is in place and functioning. In cases of very unusual circumstances and/or emergency where an assignment must be made before the committees time limits can be complied with, it will be made from unit personal. The employee placed will be notified in writing that it is a temporary assignment and the position will be properly filled by the roster process under Article 18 Section d, at which time they may apply if they so wish. The union will be given a copy of this written notification.

The roster committee is to operate under all the conditions of Article 18 Section d. This means they must also use seniority for the placement of unit employees, unless unusual circumstances occur. Not just the seniority provisions of Section d apply to non-Correctional rosters, but all the provisions contained under Article 18 Section d of the Master Agreement apply.

Non-unit employees are not to be mingled/mixed with unit employees in filling the roster positions.

Dated at Ellsinore, Missouri, this
30, day of January, 2013.


Robert A. Boone
Arbitrator