

IN THE MATTER OF ARBITRATION

Between

**AFGE COUNCIL OF PRISON LOCALS,
AFL-CIO**

FMCS Case No. 05-03282
Mission Critical Roster Initiative

and

Robert T. Moore
Arbitrator

**U.S DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS**

OPINION and AWARD

Appearances:

For the Council of Prison Locals- (Union or Council):

Timothy M. De Bolt*

Union Representative

For the Federal Bureau of Prisons (FBP, the Agency or Management):

Docia M. Casillas,*

Senior Labor Relations Specialist

*/ Presented Party's case.

Issues Presented

The parties did not submit a stipulation as to the issues. However, from the record as a whole and the parties' arguments, the following issues emerge as those to be addressed:¹

¹Contrary to the Agency's argument that where the parties cannot agree on what the arbitrator is to decide the arbitrator is limited to the narrowest literal reading of the original grievance, the consequence of a failure of the parties to agree on the issues that are to be decided by the arbitrator is that the arbitrator is obligated to look to the Labor Agreement and the record as a whole, and with due consideration given to the parties' arguments, determine where compliance with one or more articles of the Agreement or applicable statutes and regulations were placed in issue by the evidence. In doing so the arbitrator faithfully observes the Master Agreement prohibition that, "the arbitrator shall have no power to add to, subtract from, disregard or modify any of the terms of the [Agreement]," and does no

1. Was the grievance which led to this arbitration filed at the proper level of Agency management in accordance with the grievance procedures prescribed by the parties' Master Agreement?

2. Did Management's adoption of its Mission Critical Roster initiative violate any provisions of the Master Agreement, and if so, what should the remedy be?

The Arbitration Proceedings

The hearing on the issues was held at the Washington , DC offices of the Bureau of Prisons on May 24 and 26, 2006 at which the parties were afforded a full opportunity to make their arguments , to present, examine and cross-examine witnesses and to place exhibits in evidence. Both parties filed post-hearing briefs which were received on or about August 8, 2006, and each party's reply brief was received on August 23, 2006.

Statutory Provisions in Issue

5 USC §7106. Management Rights

(a) Subject to subsection s(b) of this section, nothing in this chapter shall affect the authority of any management official of any agency;

(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. . . . ;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

* * *

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies

(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 subdivision , work project, or tour of duty, or on the technology, methods and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

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

Labor [Master] Agreement Provisions in Issue

Article 3, Governing Regulations ,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 U SC 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.

a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Union and Management shall have due regard for the obligations imposed [on them] by 5 USC7106, 7114,and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level.

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, shall not be changed unless agreed to in writing by the parties.

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

Article 6, Rights of Employees, Section b

* * *

2. [The] right to be treated fairly and equitably in all aspects of personnel management.

**Article 25,,Reduction in Force, Transfer of Function and Reorganization,
Section b**

1. Reduction in Force procedures are involved when a competing employee is released from his/her competitive level by furlough for more than 30 days, separation demotion or reassignment requiring displacement, when the release is required because of lack of work , shortage of funds, insufficient personnel ceiling, reorganization, the exercise of re-employment rights or restoration rights, or reclassification of an employee's position due to erosion of duties , when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.

2. Transfer of Functions means the transfer of a continuing function from one competitive area and its addition to one or more other competitive areas, except when the function involved is virtually identical to functions already being performed in the other competitive areas affected.

3. [Reorganization] for the purposes of this article, means the planned elimination, addition , or redistribution of functions or duties in an organization.

**Article 25,Reduction in Force, Transfer of Function and Reorganization,
Section f.**

"Reorganizations" as defined in Section b(3), which affect the working conditions of bargaining unit employees, are subject to bargaining, as appropriate.

Facts

The Federal Bureau of Prisons (FBP)is the part of the Department of Justice with the responsibility for the incarceration of persons convicted of federal crimes and sentenced to terms in prison. In total, it has approximately 26,000 employees.

Like all bureaus , divisions and agencies of the Department of Justice, the FBP must operate within an annual fiscal year budget and like the rests of the Department's operations, it frequently finds itself in a budget crunch necessitating cost reductions and the reduction of expenses, including payroll costs.

In anticipation of such a crunch arising, on June 17, 2004 Management sent every employee in the Bureau a notice of a Reduction in Force and Transfer of Function, actions that might become necessary if a series of other cost saving initiatives were not successful in bringing Agency expenditures in line with its budget.

One of those initiatives was the adoption in April , 2005 of what came to be called "Mission Critical Rosters," at most FBP correctional facilities. These rosters eliminated, in the sense of discontinuing to assign personnel to fill them, those posts which Management at the local or regional level, deemed not to be critical to carrying out the principal mission or functions of the institution. The personnel who would otherwise have been assigned to man the eliminated posts were reassigned to Correctional Officers positions, where cost savings were realized by making many of them available to fill in for employees absent on sick or annual leave and in other situations, rather than holding over employees from one shift to another or otherwise having to pay overtime to cover the vacancies. None of the affected personnel whose normal posts were eliminated from a roster suffered any decrease in their pay. However, there were adverse effects. Many of the eliminated post were specialized positions that had been filled through merit promotions , and carried with them such perks as assigned days off and specified duties hours as well as having to compete against a limited number of other employees when scheduling vacations and other use of annual leaves. In contrast to this stability and certainty, when relegated to the ranks of Correctional Officer, an employee had to compete on the basis of seniority in a much larger pool of employees for shifts , posts ,days off and scheduling of annual leaves. However, despite the loss of some preferential scheduling and other rights, most of the employees who were reassigned on a Mission Critical Roster to the ranks of Correctional Officer, had the seniority or just plain luck, to get the posts, shifts and days off for which they bid.

After the Union became aware at various levels of the FBP operations and facilities of the adoption of the Mission Critical Rosters it called for negotiations prior to their implementation , but, Management did not request or offer to negotiate. Thus, on February16, 2005, the Union filed a grievance at the headquarters level of the Bureau with the Chief of Labor Relation Management and Security Branch of the FBP.

The grievance. As just stated, on February15, 2005, the Union filed the grievance giving rise to this arbitration. In its February15, 2005 grievance, the Union complained that, "[the] Agency posted unilaterally changes in Correctional Services rosters nation-wide which eliminated positions [that had been filled by employees who] were selected by Merit promotion [procedures]. The affected employees were not given sufficient notice of [a Reduction in Force and the rights associated with it, in violation of the [parties'] Master Agreement.' Articles 25 and 33, as well as the government-wide RIF regulations found at 5 CFR §§351 et seq.

On March 17, 2005, the Agency denied the grievance on procedural grounds alleging that it had been filed at the wrong level of management. It also denied the grievance on substantive grounds for lack of specificity as to the affected employees and their circumstances and for failure to articulate any basis for the Union's claim that the Mission Critical Roster reassignment constituted a Reduction in Force (RIF) under Article 25 of the Master Agreement which would entitle the affected employees to RIF rights.

Positions of the Parties in the Arbitration

The Union argues that no matter how the Mission Critical Roster initiative is characterized prior to its implementation, the Agency had an obligation to negotiate with the Union concerning that implementation and its anticipated consequences and once implemented and the consequences became concrete, adversely affected employees were entitled to certain displacement rights which the Agency failed to provide to those employees.

The Agency argues that the Mission Critical Roster initiative and its implementation met none of the criteria which would render it a reduction in forces or any other personnel action that would trigger displacement rights under RIF regulations, and there was no Agency duty to negotiate over the initiative since in negotiating and agreeing to Article 18 of the Master Agreement, the Union had already recognized the Agency's right to change Quarterly Rosters and provided the procedures for doing so, and the Agency had faithfully observed those procedures.

Discussion and Opinion

Arbitrability The Agency's complain that the grievance was filed by the Union at the wrong level of Management must be rejected on the basis of Article 31 (f)(4) of the Master Agreement when applied to the fact. The contract provision in issue provides:

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...

At the hearing, Harley Lappin, the Director of the FBP, readily explained how the Mission Critical Roster initiative was an Agency-wide program that had been decided upon by him and his staff at the FBP headquarters level from where its implementation was directed. He also volunteered that the chief of labor Relations was the proper person and place for the Union to file any Agency-wide grievance about the implementation of the initiative. In his opinion, had the grievance been filed directly with him or

at any other level of Management, it would have been referred up to the chief of labor relations since as Mr. Lappin understood the Union's complaint, it raised legal questions which only the labor relations staff could fully address.

In short, Article 31 (f)(4) of the Master Agreement appears to have been specifically designed by the parties for grievances of the nature of that filed in this case, with the intent that it gets to the top level of the Agency right from the start, and not wander around at lower levels, and thus the agency's procedural challenge to the grievance is rejected.

The Merits. Coming up with a precise label for what the Mission Critical Roster initiative and its implementation constituted in the way of a personnel action is difficult. Mr. Lappin and his top assistants were careful in their testimony to avoid any of the Article 25 terms such as "Reduction in Force, Transfer of Function, or Reorganization." In any event, while the Mission Critical Roster initiative bore the hallmarks of what a layman would consider to be a "reorganization," it had none of the consequences which would trigger displacement rights under government-wide regulations for those employees who felt they were adversely affected by their reassignment to correctional services posts. No employee was separated or otherwise removed from federal service or furloughed, nor were any demoted to a lower grade level or forced to transfer to another correctional institution. All of the affected employees remained in their previous commuting areas and retained their grade and step levels.

To an extent, the Union recognizes that what occurred with the implementation of the Mission Critical Roster initiative did not compel the Agency to provide the Reduction in Force (RIF) rights it seeks. Furthermore, the Union's argument that because such rights and benefits were provided to employees affected by earlier Agency cost-cutting initiatives then ipso facto on the basis of the right of an employee to be treated fairly and equitably as provided for by Article 6 section b-2 of the Master Agreement, employees affected by a Mission Critical Roster were entitled to exactly the same rights and privileges, no matter the differences in circumstances. Clearly, what happened to employees reassigned within their institutions under the Mission Critical Roster initiative is far removed from the displacement that befell employees whose facility of employment was closed and all positions and posts abolished under the earlier initiative. The latter met the criteria of the OPM RIF regulations, and the former did not and the Agency was precluded by those regulations from providing benefits that the circumstances of the former employees did not warrant.

The limitation which the government-wide OPM regulations impose on what rights and privileges the Agency was empowered to dispense serve to defeat the Union's argument that the Agency violated various provisions of the Master Agreement by refusing to negotiate over the implementation and impact of the Mission Critical

Roster initiative. But before getting to the futility of the Union's demand for the negotiation of RIF rights, it must first be noted that the Union's claim that the Agency refused to agree to implementation and impact negotiation is refuted by the record which established that Agency officials met with top Union officials on at least three occasions. Those discussions got nowhere because the Union insisted on negotiating over the selection of the positions which would be on the Mission Critical Rosters, a subject the Agency refused to treat as open to negotiations on the grounds that Article 5 of the Master Agreement and 5 USC §7106 preserved Management's right to alone determine the mission of the Agency and to "assign and direct" its employees and "to determine the personnel by which Agency operations shall be conducted."

Furthermore, according to the Agency, there was nothing further to negotiate since the parties had negotiated and included Article 18 in the Master Agreement which covered the matter of the formulations of the Quarterly Rosters by providing that "seven 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." By implication, under Article 18, it is solely a Management prerogative to determine which posts will be filled each quarter.

In any event, while the parties did meet in response to the Union's request for implementation and impact negotiations over the Mission Critical Roster initiative, the discussions appear never to have reached the subjects of impact on affected employees, especially those who held positions being abolished which they had obtained through merit selection. While, for the reasons discussed, many of the Union's favored options for mitigating the effects of the removal of these employees' positions from the roster were probably beyond the authority of the Agency to grant, that does not mean that there were no other options or steps which could have been taken to lessen the adverse effects of the initiative, including the Agency requesting an exception from OPM to allow some RIF-like benefits, and using the Article35-Priority Placement Program over which the Agency has unfettered control.

Because the Agency treated (1) the Management Rights ruckus created by the Union's insistence on participating in the process of determining which posts were mission critical and thus to remain on the roster and which were not, and (2) the problems created by the Union's favored items of OPM-controlled RIF impact relief as reasons for terminating the discussion before undertaking serious discussions of 'appropriate [and available] arrangements for employees adversely affected by the exercise of [Management's right to undertake the Mission Critical Roster initiative],' the Agency failed to comply with its obligations under the provisions of the Master Agreement calling for negotiations over changes in conditions of employment, as well as

under 5 USC §7106(b) (3) governing permissible matters over which the Union may initiate negotiations.

Impact on Affected Employees. The Union presented a sampling of employees who had been moved from their merit selection positions to the general pool of correctional service personnel. These witnesses established that the loss of the certainty of their shifts, duty hours, days off, and leave scheduling created significant disruptions to their lives, from day care arrangements to car pooling and other facets of daily life. At least one witness appeared to have lost a pay raise he would have received but for the abolishment of his previous position. And, while the affected employees received pay retention, it appears that for some of the employees that retention may terminate after two years at which time they will suffer a reduction in pay.

Union Request for Information. The hearing record is far from complete as to all bargaining unit employees who may have lost promotional opportunities as a result of their displacement from their merit selected position, much less those for whom their period of pay retention has been exhausted or may soon be. The Union asked the Agency for information that would make it possible to identify such employees, but the request was denied by the Agency. In the course of the arbitration the Union asked for an order compelling the Agency to respond to its request for information. During the hearing, Agency officials testified that at various levels within the Bureau there was information existing as to the merit selection positions which have been removed from the quarterly rosters because the positions were deemed to be non-critical to the Agency's mission, and that the incumbents who were displaced from them as a result can be determined.

Since (1) the information exists and is maintained by the Agency in the regular course of its business and reasonably available, (2) the Union's request is reasonable and not overly burdensome and (3) is needed in order for me to discharge my obligations with regard to formulating such relief as may be appropriate, the Agency will be required to undertake in a cooperative effort with the Union to identify those affected employees who have been financially harmed by the implementation of the Mission Critical Roster initiative.

The Union's Request for Remedies. The Union seeks a broad range of remedies.

1. A Voluntary return to the Status Quo Ante. By "voluntary," the Union means at the election of each affected employee because it recognizes that some employees have adjusted to being part of the general correctional service pool and may prefer to stay there. There is authority for a status quo ante remedy where there has been a Management refusal to negotiate over the impact of a change in conditions of employ-

ment. Federal Correctional institution, Petersburg, VA and AFGE Local 252, 82 FLRA 1-1487(1982). However, that authority requires the weighing of a number of considerations in determining whether a status quo ante remedy is appropriate, the most important of which is "whether and to what extent it would disrupt the efficiency and effectiveness of the Agency's operations.' To the list I would also add the consideration of just how meaningful a return to the status quo ante would be for the affected employees and whether the benefits that would result could be obtained as a separate and less disruptive item of relief that should initially be sought through negotiations.

On the issue of whether and to what extent a status quo ante remedy would disrupt Agency operations, fixed in my memory is the testimony of Director Lappin to the effect that if the Mission Critical Roster initiative was halted, the Agency's need to cut personnel costs would remain and that either a similar initiative would have to be adopted or the Agency would have to undertake a full fledged Reduction in Force. Certainly a formal RIF with its loss of both personnel and positions would be highly disruptive to the ability of the Bureau to staff all of the posts necessary to maintain the security and safety of affected facilities.

As for remedial benefits that would be enjoyed by the affected employees with a return to the status quo ante, it would appear that the most important to those who testified would be the return of the certainty of their shifts and days off.

Those scheduling benefits, along with an extension of pay retention periods and the availability of voluntary listing of affected employees on the Priority Placement List maintained under the Article 35- Priority Placement Program set out in the Master Agreement, would seem to be better obtained through serious impact mitigation negotiations and would provide what would be the most meaningful relief as far as the affected employees are concerned without the disruptions to Agency operations which a status quo ante remedy would cause.

In conclusion, when all of the factors under Federal Correctional Institution, Petersburg, VA, plus that added by me, are weighed, the scale tips against a status quo ante remedy, and thus it will not be imposed.

Award

For the foregoing reasons, the grievance is granted to the extent and subject to the qualifications indicated below:

Arbitrability

1.The Agency-wide dispute between the Union and the Bureau over whether the

Agency violated provisions of the parties' Master Agreement was initiate at the proper level within the Agency's management and otherwise has properly come before me for arbitration pursuant to the grievance and arbitration provisions of that Agreement.

On the Merits

1. The Agency shall enter into serious negotiations with the Union concerning steps it can take to ameliorate the adverse effect on those employees who were removed from their merit selection positions under the Mission Critical Roster initiative² and any other similarly situated member of the bargaining unit. The negotiations called for need not include RIF relief or any other matter covered by government-wide rules or regulations, but can be confined to matters under the control and available at the discretion of the Agency to grant or adjust. As called for by 5 USC §§714(b) and 7117, the parties shall approach these negotiations and those implicitly called for in paragraph 2 below with a sincere resolve to reach agreement.

2. The Agency shall provide the Union with information from which, in a cooperative effort with Agency officials, the Union can identify the members of the class of affected employees who may have been financially harmed as a result of the implementation of the Mission Critical Roster initiative. However it will be the responsibility of the Union to canvas the employees identified to determine whether they have valid claims for back pay.

² One item of testimony that was particularly striking as calling for an easily provided remedy was that of witnesses who although now in the ranks of regular Correctional personnel were nevertheless being assigned to perform the very duties they had performed in their merit selected position. Specifically, I was impressed with the number of affected employees who were assigned telephone monitoring duties of listening in on inmate telephone conversation to assure that they werenot engaged in any prohibitd activity such as managing or otherwise articpating in a criminal enterprise, operating on the outside, from behind prison wall. A reasonable objective of negotiations would seem to be to restore such personnel to their former positions, and to eliminate the charade. that thy are ordinary correctional officers performing ordinaryy coorectional duties. This would also apply to those affected employees who for all practical purposes have been returned to prisoner property custodial duties, and /or the monitoring of inmate financial transactions. While in deference to Mangement's right to assgn and direct its work force, and in recognition of of my of the statutory and FLRA prohibition of against my treading on such right, I will not order the adoption of those remedies,I wil urge Management in the exercisee ofits discretion to give serious consideration to the repair of the morale problem within the ranks of affected employees that would be accomplished by includingsuch positions on the Mission Critical Rosters, not unlike whatwas done when parameter patrol positions were restored to those rosters on command of higher mangement.

Retained Jurisdiction


1. Jurisdiction is retained for the purposes of (a) any clarification of this Opinion and Award as may be needed and appropriate, and (b) the resolution of any disputes which may arise in the implementation of the Award.

2. Jurisdiction is also retained to resolve any impasse that may occur in the course of the impact negotiations mandated by paragraph 1 of the above Award.

3. While there was scant evidence produced at the hearing that any significant number of employees suffered a loss of earnings, accept a vague suggestion of lost promotion opportunities, nevertheless since the Agency's refusal to pursue serious implementation and impact negotiations was unjustified and unwarranted, the Union shall have 60 days following the identification of adversely affected employees pursuant to paragraph 2 of the above Award to submit to the Agency on an individual basis any claim for back pay which an employee may have and if 60 days thereafter the claim has not been resolved or withdrawn, jurisdiction is retained for the purpose of the submission of the claim with proof of its justification to me for resolution.

4. If either or both parties wishes for me to invoke my retained jurisdiction , they shall do so by a motion which shall set forth the action they seek for me to take with the reasons why it is necessary and appropriate and providing a date and place on which and where the parties have agreed the motion will be heard s

DONE this 8th day of September, 2006.



Robert T. Moore
Arbitrator