
OPINION AND AWARD

OF

DAVID S. PAULL

In the Matter of the Arbitration Between

**American Federation of Government Employees
(AFL-CIO), Local Union No. 817, Lexington, Kentucky**

AND

**Federal Bureau of Prisons, Federal Medical Center,
FCI Lexington**

(Annual Leave Bid Grievance)

Issued September 8, 2008
FMCS No. 070314-54707-8

OPINION

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Federal Mediation and Conciliation Service. The American Federation of Government Employees, Local Union No. 817 (Union) was represented by its president, Dwayne J. Pettit, assisted by its second vice-president, Steve Stamper. The Federal Bureau of Prisons, Federal Medical Center, Federal Corrections Institution (FCI) Lexington (Agency) was represented by Elizabeth (Liz) K. Blackmon, Labor Management Relations Specialist, United States Department of Justice.

A hearing was conducted in Lexington, Kentucky on May 29, 2008. At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. The proceedings were reported and transcribed by a stenographer. After the witnesses were heard and the exhibits were presented, the parties agreed to present simultaneous final arguments in writing, postmarked on or before July 18, 2008. The briefs were postmarked in a timely manner and the last brief was received on or before July 23, 2008.

On August 9, 2008, the Arbitrator contacted the parties and requested that a conference call be initiated for the purpose of discussing a possible supplementation of the record. The conference call was conducted on August 12, 2008. The parties were asked to produce certain agreements referred to in the collective bargaining agreement in Article 19, Section (e) that had not been submitted into evidence. Based on the statements of the parties, the Arbitrator determined that these agreements were not readily accessible due to their age and, in any event, did not apply to this dispute. Thereafter, the case was deemed submitted and the record was closed.

Issue

The parties stipulated to a statement of the issue to be presented on the merits:

Did the Agency violate Article 19 of the Master Agreement when it conducted a seniority bid for annual leave on January 10, 2007, and if so, what is the appropriate remedy?

In addition to the stipulated issue, the Agency raises two procedural issues for consideration:

- (1) Did the Union comply with Article 31, Section (b) of the Master Agreement, and if not, is the proceeding barred?

- (2) Did the Union properly invoke the grievance under Article 32, Section (a), and if not, is the proceeding barred?

Relevant Contract Provisions

ARTICLE 1 – RECOGNITION

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

Section b. The Employer recognizes the Union as the exclusive bargaining agent under the provisions of the Federal Service Labor Management Relations Statute, 5 USC, Chapter 71, 7101 et. seq., hereinafter referred to as “the Statute” and the Civil Service Reform Act of 1978, of all of the employees in the unit, as the recognized Union for bargaining purposes with respect to conditions of employment of employees represented by the Union. The Union has the full authority as provided by Statute to meet and confer with the Agency for the purpose of entering into a negotiated agreement, concerning changes in conditions of employment covering bargaining unit employees, and to administer the Collective Bargaining Agreement.

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 USC 7106, 7114, and 7117, and other applicable government-wide laws and regulations, prior to implementation of any policies, practices, and/or procedures.

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

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

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

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

ARTICLE 5 – RIGHTS OF THE EMPLOYER

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

1. to determine the mission, budget, organization, number of employees, and internal security practices of the Agency; and
2. in accordance with applicable laws:
 - a. to hire, assign, direct, layoff, and retain the 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;
 - c. with respect to filling positions, to make selections for appointment from:
 - (1) among properly ranked and certified candidates for promotion; or
 - (2) any other appropriate source; and
 - d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

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:

6. to have all provisions of the Collective Bargaining Agreement adhered to.

ARTICLE 7 – RIGHTS OF THE UNION

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

ARTICLE 19 – ANNUAL LEAVE

Section a. The Employer and the Union agree that annual leave is the right of the employee and not a privilege, and should be used by employees. All employees will be allowed utilization of their annual leave at least to the extent that annual leave carry-over will not exceed the statutory limitation for each individual. Any employee who wishes to accumulate up to the maximum, statutory carry-over will be allowed to do so. Annual leave will be scheduled as requested by

employees in accordance with the provisions of this article insofar as it does not decrease the safety, security, or mission accomplishments of the organization.

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

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 b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

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

1. after the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representative of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect not to participate;
2. if an employee filed a grievance without the assistance of the Union, the Union will be given a copy of the grievance within two (2) working days after it is filed. After the Employer gives a written response to the employee, the Employer will provide a copy to the Union within two (2) working days. All responses to grievances will be in writing;
3. the Union has the right to be notified and given an opportunity to be present during any settlement or adjustment of any grievance; and
4. the Union has the right to file a grievance on behalf of any employee or group of employees.

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

calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide of a longer filing period, then the statutory period would control.

1. if a matter is informally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

ARTICLE 32

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue of arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of “

1. this Agreement; or
2. published Federal Bureau of Prisons policies and regulations.

Summary of Facts

The Parties

The Agency operates two types of federal prisons at its Lexington facility - a low level minimum security unit for approximately 265 women and a low level security unit housing between 600-700 male inmates. The unit for male inmates is a medical center providing chronic and acute care for both medical and psychiatric illnesses. The Agency employs a total of approximately 500 persons, including non-Union staff, at the Lexington facility. Approximately 1700 inmates, requiring medical care at several levels, are incarcerated and are served there. The medical facility specializes in providing marrow bone transplants, wound care and pain control.

The Union is recognized by the Agency as the sole and exclusive collective bargaining representative for all bargaining unit employees as defined in *5 United States Code (U.S.C), Chapter 71*. Approximately 400 employees are covered under the Master Agreement, 241 of which are dues paying members of the Union.

The parties are signatory to a collective bargaining agreement effective by its express terms for the period beginning March 9, 1998 and ending March 8, 2001 (Master Agreement). On February 7, 2001, the Agency and the Union agreed to extend the Master Agreement until a new contract was negotiated. The parties are currently engaged in the negotiation process. The parties specifically stipulated and agreed that the Master Agreement governs the grievance and all issues arising in this matter.

This dispute concerns nurses in the Hospital Unit (F-4) of the Lexington facility. Two types of employees perform nursing work in this unit. The first type of employee includes those

who are covered directly by the Master Agreement pursuant to Article 1, Section (a). As Article 1, Sections (a) and (b) provide, this bargaining unit is more particularly described in *5 United States Code (USC), Chapter 71*.

The second type of employee performing nursing work within the Hospital Unit (F-4) is the Public Health Nurses (PHS). Unlike the employees covered by the Master Agreement, the PHS nurses are a part of the uniformed service and are specifically excluded from the right to bargain collectively pursuant to law. *See, 5 U.S.C. Section 7103(a)*.

The record establishes that Ms. L. Sue Fawkes is the Director of Nursing at the Lexington facility. The Agency and the Union agree that Ms. Fawkes supervises approximately 31 nurses and other employees at the facility.

Ms. Stinnett's Request for Annual Leave

Angela R. Stinnett, a License Practical Nurse assigned to the F-4 wing, testified that she was initially denied the opportunity to take Thanksgiving Week and Christmas Week off as annual leave in 2006. The reason for this denial, according to Ms. Stinnett, was due to the fact that the annual leave slot had already been granted to a PHS employee with higher seniority.

Ms. Stinnett was eventually able to take Thanksgiving Week and Christmas Week off as annual leave in 2006, in accordance with her original bid. However, as she testified, the leave slot was granted to her "at the last minute" due to a cancellation. Because of this timing, Ms. Stinnett was unable to make any formal plans.

There was evidence to indicate that other bargaining unit employees have been denied annual leave days that they would otherwise have been granted due to the participation of the PHS employees, some of whom have higher seniority dates.

The Annual Leave Bid – January 10, 2007

On or about January 10, 2007, Ms. Fawkes, conducted an annual leave bid for the nursing personnel in Hospital Unit (F-4), pursuant to the Master Agreement at Article 19, Section (e). As she had on previous occasions, Ms. Fawkes permitted the PHS nurses to participate in the bid based on their accrued seniority, along with bargaining unit personnel as defined in the Master Agreement.

The Union filed a grievance that same day. The grievance objected to the manner in which the Agency had conducted the seniority bid for annual leave. Specifically, the grievance alleged that Ms. Fawkes' action had given "annual leave preference to a Public Health Services (PHS) Nurse over a Bargaining Unit employee." The grievance further alleged that the bid, as conducted by Ms. Fawkes, was not proper because federal law "does not grant bargaining rights to PHS employees because they are recognized in 5 USC as being one of the branches of the uniformed services."

The Agency responded to the grievance by means of a letter dated February 9, 2007, from Stephen M. Dewalt, Warden of the Lexington facility. In his letter, Warden Dewalt affirmed that "all annual leave and work rosters will include the seniority dates as defined above for all Public Health Services employees." He denied the grievance on several grounds including (1) that the process is "necessary to ensure a fair and consistent practice among all employees in Health Services, (2) the Master Agreement "specifically defines seniority for both leave and work assignment for Public Health Services employee, (3) Article 19, Section (e) "clearly identifies the seniority for Public Health Service employees as the entrance date to the Bureau of Prisons" and (4) the process is consistent with 5 U.S.C. 7106, granting to the Agency

the legal right to “determine the mission, budget, organization, number of employees, and internal security practices of the agency.”

There is evidence that Mr. Pettitt, as well as previous Union presidents, have signed the rosters assigning annual leave. Ms. Fawkes testified that a signature on the roster from a Union office meant either approval or an indication “that you reviewed it.”

Bargaining History of Article 19, Section (e)

Only one witness was produced to testify about the bargaining history of Article 19, Section (e), Aubrey L. Francis. Mr. Francis testified that he was the elected AFGE Council of Prison Locals North Central Regional Vice-President in 2001, serving until 2005. Mr. Francis is a current Union negotiator, a position he has held since 2002.

Mr. Francis testified that the last two sentences in Article 19, Section (e) were never intended to apply to uniformed PHS personnel. Rather, according to Mr. Francis, the provision was specifically written to “encompass the Public Health nonuniformed employees, which is the current language in there today under the CBA we’re under now.”

In an attempt to place his testimony in a historical context, Mr. Francis stated that the operation of the Lexington facility was transferred from the Public Health Service to the Bureau of Prisons in 1973 or 1974. “They put it in there to cover the nonuniformed people that the Bureau did not want to recognize,” Ms. Aubrey declared. Mr. Francis also stated that the clause no longer applied to any current employees, as “they have all retired or are deceased.”

The Agency and the Union have stipulated that the last two sentences referring to the PHS personnel in Article 19, Section (e) do not apply to the PHS nurses currently employed in the Lexington facility.

Pre-Grievance Labor Management Discussions

The record contains evidence of several exchanges between the Union and Agency prior to the time the Union invoked the arbitration process.

There is evidence that discussion of the issue occurred at the Labor Management Relations Quarterly Meeting, conducted on July 6-8, 2004. The record shows that the Union and the Agency discussed the "rights of PHS staff when it comes to roster scheduling" at the Lexington facility. The Agency responded, in pertinent part that "the Master Agreement should be adhered to with respect to the roster procedures."

In a memo dated June 22, 2006, Associate Warden Joseph P. Meko advised Union President Dwayne Petitt that the Agency intended to continue the manner in which annual leave was assigned. According to the memo, the Agency would continue the procedure that would base the assignment of annual leave "on a single seniority roster of PHS officers and Civil Service members."

In responding memo drafted by Union President Petitt, the Union disagreed. The Union noted that PHS nurses, by virtue of their status as "uniformed services," were excluded from the bargaining unit. Mr. Petitt's memo also addressed the sentence in Article 19, Section (e) restricting the application of the clause to the "unit." The Union declared that because the sentence applied only to employees who were currently "retired or are no longer employed at FMC Lexington," it did not support the Agency's practice.

Post-Grievance Labor Management Discussions

The record indicates that the parties discussed the PHS seniority issue at a Labor Management Meeting conducted on February 22, 2007. According to a memorandum prepared

by "LMR Officials," the Union asked "why Management is not following Title 5 U.S.C. as it pertains to seniority . . . Management contends they are following the Master Agreement and also passed out information to explain their stance." In the memo, the Agency and the Union "both agreed to close this item." The memo made no reference to the grievance that had been filed.

There was evidence that the parties were free to raise an issue at future labor relations meetings, despite the fact that it had been "closed" at a previous meeting. Mr. Pierce, an Associate Warden at a different facility, testified that the closing of an item at the Labor Management Meeting did not necessarily bar the closed item from future discussion. Mr. DeWalt testified that, although "sometimes we agree to disagree and we close it . . . I've never heard that issue come up again either."

Ms. Fawkes, herself a PHS employee, testified that, in her view, splitting the PHS workers away from the bargaining unit employees might have an adverse affect on all employees. Specifically, Ms. Fawkes believed that unless PHS employees were included in the annual leave bid, there would be a detrimental schism among the employees, as well as less slots for bargaining unit personnel. At the hearing, Ms. Fawkes testified as follows:

Well, you'd have to work out a process to where they would have double rosters. That, in itself, would be double work. I would think that it would cause a division in my staff. That would be the most detrimental thing . . . I would pull out my PHS and I would put them in these slots. They probably just would be assigned to those slots and then whatever slots are left them I would open up for bid for my Civil Service.

Positions of the Parties

The Union

The Union addresses both procedural issues raised by the Agency. Article 31, Section (b) of the Master Agreement was complied with, the Union maintains, as established by the testimony of several witnesses, including Warden Dewalt, Associate Warden Johnson, Associate Warden Rickey Pierce, John King and Kevin Hicks.

The Union also asserts that the notice of Formal Grievance complied with Article 32, Section (a). The notice contains the alleged violations, as well as the requested remedy, the Union maintains. The Union further argues that the provision was waived, since the Agency was aware of the issues involved and they responded without referring to any alleged deficiencies.

The Union contends that two basic points require the grievance to be sustained. First, the Union argues that officers commissioned by the Public Health Service do not, and cannot have the right to collectively bargain with the federal government pursuant to *5 U.S.C. Section 7103*. Second, the Union asserts that the "Master Agreement [citing the exhibit number] and the language therein only applies to Bargaining Unit staff." These two points, the lack of a legal right to collectively bargain and the lack coverage under the Master Agreement, form the basis for the Union's position that the PHS staff should not be permitted to participate in bids for annual leave conducted pursuant to the negotiated contract.

In further support of these contentions, the Union refers to the Article 1 recognition clause, establishing that the Union represents only bargaining unit employees as defined in *5 U.S.C Chapter 71*, which specifically excludes PHS officers. The testimony of Mr. Francis and Mr. Johnson is also cited. The PHS, the Union argues, as well as their "commission empowering

them to be Supervisors, makes them ineligible to be covered by the Master Agreement . . . Any ruling giving them seniority rights would violate both the intent and goal of 5 USC 7103 . . . The laws' intent is clear that members of a uniformed services [sic] may not . . . enjoy the fruits of those negotiated policies.”

The Union offers a policy argument as well. “To give Commissioned Officers of a uniformed services [sic] seniority rights would upset the entire structure of the Federal Government,” the Union asserts. In this regard, the Union maintains that such a grant would not only set an incorrect precedent for PHS uniformed service employees, but might apply to the armed services as well.

In addition to its statutory and contractual positions, the Union asserts that the record displays a persuasive factual basis to sustain the grievance. “Testimony clearly shows,” the Union maintains, “that Ms. Angela Stinnett [citing the transcript page] was not granted Annual Leave on Thanksgiving week . . . based solely on the assertion that Ms. Fawkes gave seniority rights to Commander Jim Reid, a Public Health Service Commissioned Officer, over the objections made by Union Vice-President, Kevin Hicks.” The Agency not only failed to rebut this set of facts, the Union contends, they admitted them.

The Union anticipates the Agency’s position that its practice of including PHS staff in annual leave bids is permitted by *5 U.S.C. Section 7106*, in so far as that statute establishes the Agency’s right to assign work. In this regard, the Union takes the position that the Agency’s contention “conflicts with Federal Law.”

Additionally, the Union refers to the new Master Agreement in support of its contention. “The Agency has already admitted that PHS Commissioned Officers do not have seniority rights based on . . . the removal of all such language from the new Master Agreement,” pointing out

that the new agreement removes all references to Article 19, Section (e). "If the Agency felt so strongly about seniority rights for PHS Commissioned Officers," the Union asks, "why would they remove all PHS language from the new Master Agreement?" The Union confirms that the new contract is not yet in force, but contends that this fact does not "weaken" its position since the Mr. Wade has "already signed and approved" the changes. In this regard, the Union refers to uncontradicted testimony indicating the new agreement will be in force when approved by the Union at their 2008 convention.

The Union characterizes the Agency's contention that a decision in favor of the Union would necessitate the creation of two separate rosters as a "threat" and argues that this position constitutes a "tacit admission" that the two groups of employees are treated differently under the Master Agreement and federal law. In any event, the Union asserts, the Agency "did not make their case that a lack of seniority rights granted to PHS Commissioned Officers was detrimental to the secure or orderly running of the Institution." The Union recognizes the testimony of Warden Dewalt, that "the modification of these procedural assignments was necessary to ensure a fair and consistent practice among all employees in Health Services." However, the Union maintains that "fair and consistent" is not justification for failing to comply with the Master Agreement."

The Union takes issue with the Agency's written opening statement, asserting that it failed to present the testimony needed to support its contentions. Specifically, the Union takes the position that the Agency failed to establish that the participation of the PHS in the annual leave bid was a past practice and that the practice was necessary to the safe operation of the facility.

As a remedy, the Union proposes that all bargaining unit workers be granted seniority over the PHS staff and that supervisors be required to create "written directions" relating to the proper procedures to be observed. The Union further seeks a "written apology" from Warden Dewalt to the bargaining unit "for not following the rights granted them" by federal law. Additionally, the Union calls for a requirement that the parties "return to the bargaining table" to properly negotiate the issue and that the Agency be required to post "the Agency's violations" for a period of 60 days.

The Agency

The Agency argues that this particular grievance proceeding is "barred" because the Union failed to comply with several procedural mandates. The first, the Agency maintains, exists at Article 31, Section (b), requiring the contracting parties to "always attempt informal resolution at the lowest appropriate level before filing a formal grievance." In support of this position, the Agency notes that the alleged violation occurred on January 10, 2007, "and the grievance was filed on the same day; there was no time for informal resolution during LMR Meetings and/or discussions with the Associate Wardens and the Warden prior to filing the grievance."

The second procedural issue concerns Article 32, Section (a). This section, as described by the Agency, requires that all grievance notices contain a "statement of the issues involved, the alleged violations, and the requested remedy." The Agency contends that the notice filed by the Union were deficient in all of these requirements.

The Agency argues that both of these requirements are important, despite its status as procedural. "We MUST follow the negotiated Master Agreement, or all of the time, energy

expense and negotiation is for naught,” the Agency declares. “If there are no consequences to ignoring what the negotiated Master Agreement requires, then its provisions are meaningless.

On the merits, the Agency begins by taking several positions based on the facts of the case. The Agency argues that the Union “failed to prove a violation occurred.” Assuming for the sake of argument that the Union’s factual case is completely correct, the Agency maintains, “there was no harm.” In support of this contention, the Agency refers to Ms. Stinnett, who is described as testifying that, although she was originally denied leave over the Thanksgiving holiday due to the seniority of a PHS employee, she was eventually able to take leave at the requested time.

The Agency argues that the relief the Union seeks in the grievance “cannot be granted,” referring to the testimony of the Union Regional Vice President to the effect that “a remedy cannot affect non-bargaining unit employees.” The Agency also contends that the Union’s contention that “they did not sign the rosters” is contradicted in the record.

The Agency also maintains that the Union’s position is adverse to the mission of the Lexington facility. In support of this contention, the testimony of Ms. Fawkes is referred to in which she opined that the sustain of this grievance “would cause a split . . . I don’t like having two groups.”

The Agency takes the position that, in questioning the manner in which the seniority bid is conducted, the Union is “attempting to usurp the right to assign work,” in violation of *5 U.S.C. Section 7106*. “The union cannot dictate to whom or to what positions or personnel duties will be assigned or the procedures utilized in assigning work,” the Agency asserts.

The Agency takes the position that, because the PHS staff are referred to in the Master Agreement at Article 19, Section (e) dealing with annual leave schedules, they are “covered by”

the agreement and may be considered in annual leave bids. The Agency asserts that the language used in Section (e) is a basis to include PHS commissioned officers in all bids for annual leave. "The Union would have us disregard the negotiated Master Agreement by not allowing the PHS employees to bid as outlined in the negotiated Master Agreement," the Agency declares.

The Agency suggests that the Union's reference to the new Master Agreement is an attempt to "muddy the water," stating that "the current Master Agreement stands and was in effect on January 10, 2007.

The Agency concludes by reasserting that the issue was not raised in the manner provided in the CBA because the Union failed to attempt an informal resolution prior to filing the formal grievance and failed to properly "invoke" the grievance process. The Union, the Agency maintains, is "attempting to force management to violate the negotiated Master Agreement by disregarding the provisions regarding PHS seniority in Article 19 . . . It is management's right to determine the budget, determine internal security practices, and assign work/assign employees; and the issue has already been covered in the negotiated Master Agreement."

Discussion

Procedural Questions

Two preliminary procedural matters are raised by the Agency. First, the Agency takes the position that the Union did not comply with Article 31, Section (b) of the Master Agreement. This provision establishes the parties' mutual support for the concept of resolving contractual disputes prior to resorting to more formal proceedings and requiring a "reasonable and concerted effort . . . by both parties toward informal resolution." Second, the Agency contends that the Union failed to file the grievance in a timely manner, as required in Article 31, Section (d).

With regard to the first issue, the Agency contends that Union failed to make the required effort and "filed the grievance prior to any attempts at informal resolution." The Agency also contends that the grievance filed by the Union fails to contain the required specificity.

The record establishes that the Union's actions satisfied the requirement for an informal resolution effort. The Union raised this issue in the Labor Management Relations Quarterly Meeting, held between on July 6 and July 8, 2004, over two years before the grievance was filed. On June 22, 2006, the Agency issued a memo indicating its intent to continue the practice that had begun 20 years earlier, a practice that eventually became the subject of this grievance, to use one single seniority roster for both PHS officers and bargaining unit members. The testimony indicates that the parties had additional substantial discussions regarding the issue, both before and after the issuance of this memo. The record also shows that the parties continued to discuss the question, even after the grievance was filed in January of 2007.

The grievance was sufficiently specific to comply with the Master Agreement. Article 31, Section (f) requires that all grievances must be filed on forms provided by the Agency.

Article 32, Section (a), requires that the party seeking to submit an issue to arbitration “notify the other party in writing of this intent prior to expiration of any applicable time limit.” The provision further defines the term “notification.” To be valid, the notice must include a “statement of the issues involved, the alleged violations, and the requested remedy.”

The Union complied with this provision. The grievance form indicates that the Union was contending that the Agency’s action violated the Master Agreement and federal law. With regard to the facts, the grievance further alleged that the Agency “put forth an annual leave schedule for the nurses in the Hospital Unit (F-4) that gave annual leave preference to a Public Health Services (PHS) Nurse over a Bargaining Unit employee.” The grievance indicates that the grievance was “ongoing” in nature and specifies a requested remedy.

The grievance also appears to have been filed in a timely manner. In this regard, the Agency suggests that the grievance should have been filed within forty days of the memo issued by the Agency on or about June 22, 2006. However, because the Agency has been combining the seniority of the PHS officers and the bargaining unit members for at least the past 20 years without interruption, the grievance is continuing in nature. Under the “continuing grievance” rule, the filing of the grievance by the Union on January 10, 2007, the same day as the most recent alleged violation of the Master Agreement, is sufficient to satisfy the time requirement. *See, e.g. Kerr-McGee Oil Industries, Inc.*, 44 LA 701 (Hayes, 1965).

Annual Leave Bid

Neither party disputes that the bid for annual leave, conducted by Ms. Fawkes on January 10, 2007, included not only the employees specifically covered by the Master Agreement, but also the PHS nurses. The bargaining unit bidders, as they had for approximately the last 20 years,

had to compete with the PHS nurses for annual leave slots. Ms. Stinnett was initially denied the annual leave slot she preferred, because she was outbid by a PHS nurse with greater seniority.

The PHS nurses are not among those classes of employees covered by the Master Agreement. The Agency makes no contrary contention. Pursuant to *5 U.S.C. Section 7103(a)*, PHS nurses do not have the right to collectively bargain with the Agency and are excluded from the bargaining unit.

The Union's basic contention is correct. The PHS nurses are not part of the bargaining unit and are prohibited from collectively bargaining with the Agency by federal law. The Master Agreement covers only those workers specified in *5 U.S.C. Chapter 71*. Article 19, Section (e) specifically calls for seniority bidding only "[I]n the event of a conflict between unit members." Article 19 refers to "employees." Federal law prevents the inclusion of PHS nurses in that term. Unless the parties agree otherwise, permitting the PHS nurses to participate in a bid with bargaining unit members is a clear violation of Article 1 and Article 19, because the practice includes employees who are not covered in the Master Agreement.

However, the Agency contends that an agreement permitting the PHS nurses to participate in the seniority annual leave bid does, in fact, exist. In support of this contention, the Agency refers to the two last sentences of Article 19, Section (e), defining seniority for the PHS nurses and declaring that previous "agreements were made to give those PHS staff seniority for leave purpose based on their entire PHS career." In order to properly evaluate this contention, the intent of the parties as set forth in Article 19, Section (e), must first be determined.

The proper analysis must begin with comparing the words and phrases used in the last two sentences of Article 19, Section (e) and applying the applicable rules of contract construction. Several well-established principles are applicable. Where it can be determined

with certainty what the intention of the parties was from the writing itself, the agreement must be enforced as written. No other evidence can be considered. This includes all evidence outside the four corners of the agreement, such as bargaining history or past practice. However, where the words and phrases used by the parties are reasonably subject to more than one meaning, the provision is considered ambiguous. Because the parties' intent cannot be determined based solely on the written document, it is then permissible to consider extra-contractual evidence, such as bargaining history and past practices, to more definitely reveal what the parties established. *Klopfenstein's*, 75 LA [Labor Arbitration Reports] 1224 (Lumbley, 1981); *Andrew Williams Co.*, 8 LA 518 (Cheney, 1947).

The last two sentences contained within Article 19, Section (e) are ambiguous because they do not directly address the issue of whether PHS nurses may participate in the annual leave bid with unit members. It is not possible to determine the intent of the parties based solely on the "four corners" of the Master Agreement. The provision does define the term "seniority" as it applies to the PHS nurses. The provision also declares that certain "agreements" existed at one time granting to PHS nurses seniority for leave purposes "based on their entire PHS career."

However, neither of these sentences is sufficient to establish that the parties agreed to permit PHS nurses to compete in the same annual leave bid with employees who are covered by the Master Agreement as a matter of federal law. There is no language authorizing the PHS nurses to bid with the unit members for annual leave. On their face, these sentences are insufficient to support the Agency's practice over the years, permitting PHS nurses and bargaining unit employees to compete with one another and bid for their annual leave spots in the same procedure.

While they are insufficient to justify the Agency's annual leave practices, the existence of these two sentences in Article 19, Section (e) give rise to a very pertinent question. If these two sentences do not support the Agency's practice, why were they placed in Article 19, Section (e) in the first place? The bargaining history relating to these clauses supplies the answer.

The only bargaining history testimony was supplied by the Union. Mr. Francis testified that the last two sentences in Article 19, Section (e) were never intended to apply to uniformed personnel. Rather, the sentences were intended to apply to certain non-uniformed employees the Bureau did not want to recognize when the facility was transferred from the Public Health Service to the Bureau of Prisons. In contrast to the position it took at the hearing, the Agency now agrees that that the employees to whom these agreements at one time applied are now either retired or deceased. The Agency also agrees that these sentences have no application to this dispute. There is no bargaining history evidence suggesting that the Agency and the Union entered into any agreement permitting the PHS nurses to bid on annual leave with the bargaining unit employees.

The Agency contends that their actions are protected by its right to assign work pursuant to Article 5 and federal law. However, the right to assign work is not at issue in this grievance. The right to assign work must be distinguished with the right to take annual leave. In theory, all annual leave schedules impact the Agency's right and obligation to assign work because of the necessity to replace the temporarily absent employee on leave. However, the existence of Article 19 constitutes inherent agreement on the part of the Agency that work schedules will need adjustment during period in which annual leaves are taken. Without the Agency's willingness and contractual duty to adjust employee work schedules, annual leaves could not exist.

Application of the Federal Service Labor-Management Relations Statute (FSLRS)

Just as collective bargaining agreements are subject to government approval under 5 U.S.C. 7114 and must comply with all federal laws, rules and regulations, all arbitration awards similarly must comply with these standards. In accordance with 5 U.S.C. Section 7122(a)(1), the Federal Labor Relations Authority is charged with the duty of assuring that all arbitration awards are consistent with all federal laws and governing regulations. An arbitrator resolving a federal sector case cannot ignore the application of these rules and laws, or the award will be found to be legally deficient. It does not appear that this grievance decision adversely impacts any matter covered by 5 U.S.C. Chapter 71.

The Remedy

The Union requests several specific remedies including (1) an order requiring the Agency to comply with federal law, (2) an order requiring the Agency to supply written directions to supervisors outlining the proper procedures, (3) an order requiring an apology from the Agency, (4) an order requiring the Agency to return to the bargaining table to "properly negotiate the issue" and (5) a 60 day posting of the Agency's violation.

The appropriate remedy for violations of this type is a traditional and continuing problem. Direct remedies are difficult, because the employees are not totally deprived of the annual leave, but are required to take the annual leave in a different time slot. All of the Union's proposals for remedy have been considered. However, remedies of the kind suggested by the Union are not warranted by these facts and are not appropriate under the circumstances. For this particular violation, the parties are best served by making sure that the conduct that had violated the Master Agreement not be repeated in the future.

Conclusion

Having carefully considered the testimony and exhibits received into evidence, as well as the positions of the parties and federal law, the Arbitrator concludes that the Agency violated the Master Agreement at Article 19, Section (e), when it permitted PHS nurses to participate in the seniority bid for annual leave on January 10, 2007.

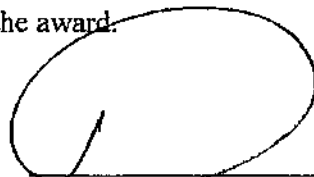
The grievance is therefore *SUSTAINED*.

A W A R D

1. **IT IS THE AWARD** of the Arbitrator that the Federal Bureau of Prisons FCI Lexington did not comply with the Master Agreement with the American Federation of Government Employees (AFL-CIO), Local Union No. 817, when it permitted PHS nurses to participate in a seniority bid for annual leave on January 10, 2007.

2. **IT IS THE ORDER** of the Arbitrator that the Agency cease and desist from permitted PHS nurses from participating in any seniority bids for annual leave conducted pursuant to the Master Agreement subsequent to the date of the award.

September 8, 2008
St. Paul, MN



David S. Paull, Arbitrator