

**DECISION & AWARD**

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**In the Matter of Arbitration**

**Between**

**Bureau of Prisons,  
Department of Justice  
Washington, DC  
(BOP/Agency)**

**-and the-**

**American Federation of  
Government Employees,  
Council of Prison Locals # 33  
(AFGE/Union)**

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**FMCS Case No. 05-02697-A  
("Mission Critical Posts")**

Before: Laurence M. Evans  
Arbitrator

Appearances:

For BOP: Docia M. Casillas, Senior Labor Relations Specialist  
ist  
Suzanne Courtney, Esq., Labor Relations Specialist  
Washington, DC

For AFGE: James E. Nickels, Esq.  
North Little Rock, Arkansas  
Daniel P. Bethea, Regional Vice President  
Summerfield, Florida

**I. Statement of the Case**

Faced with Congressionally-reduced funding for FY 2005, Agency management initiated several operational actions to reduce costs. This dispute involves one such action, referred to by the parties as "Mission Critical Posts [also referred to as rosters]." In a January 5, 2005, Message to All

Staff, BOP Director Harley G. Lappin announced certain cost savings initiatives, to include, as relevant here,

The identification of “mission critical posts” on the custodial roster, thereby allowing us to meet three key objectives: first, establish posts that would be vacated only under rare circumstances; second, reduce the reliance by correctional services on other departments to cover custody posts; and third, substantially reduce overtime costs. These objectives would be achieved by making available other correctional service posts for relief, medical escorts, and special assignments---areas that have often been covered by use of overtime or non-custody staff. Our goal is to save at least \$25 million in overtime for Fiscal Year '05. We do not plan to reduce the number of correctional services positions at the present time.

Shortly before Director Lappin issued his January 5, 2005, Message to All Staff, BOP's Assistant Director, Correction Programs Division, John M. Vanyur, on December 23, 2004, issued a detailed memorandum to all Agency Regional Directors concerning “Mission Critical Posts.” Vanyur's memorandum provided instructions and guidelines, in relevant part, as follows:

Likewise, [Captains] were instructed to create a new quarterly roster to be reviewed and approved by their respective Warden and Regional Director. A number of the rosters submitted included the elimination of posts (removal of one or all perimeter patrol assignments) that are required by current policy, and a change in national policy would be required to effect such changes. **Therefore, we request that Captains resubmit a draft roster to include policy mandated posts previously excluded, as part of their mission critical posts.** Please submit this information through the Warden to the Regional Director no later than Wednesday, January 5, 2005.... [Emphasis in Original.]

Once reviewed and approved, the new blank Mission Critical Quarterly Roster must be posted by February 6, 2005, in order to allow staff an opportunity to review and bid on posts in accordance with the Master Agreement, Article 18.

Those eliminated posts will be placed on the sick and annual leave

roster.[<sup>1</sup>] By daily roster management by the Captain, our objective to significantly reduce Correctional Services overtime...should be met.

Therefore, if you do not accurately construct a “mission critical” roster, and only identify posts absolutely need for the daily operations of the facility, you will likely fail to meet needed overtime reductions....

Additional posts will not be added to the “mission critical” Quarterly Roster without the approval of the respective Regional Director [subsequently amended to respective Warden]....

Below are guidelines for mission critical posts...Regional Directors have the discretion to accommodate specific institution mission, design and other factors.

It should be understood that essential missions still need to be accomplished even if there is no longer a dedicated post to that mission. For example, urinalysis testing, telephone monitoring and searches are still essential even though the title or post “urinalysis officer,” “telephone monitor,” or “metal detection officer” may no longer be on the roster or on every shift.

Vanyur’s memorandum then went on to identify those posts which could be eliminated or modified to conform to the new staffing requirements/guidelines, summarized below in relevant part.

**Center Towers**

Eliminate 24-hour coverage in Center Towers....

**Compound Officers**

All Security Levels will generally staff two Compound Office positions....

**Chapel Officers**

[N]o requirement to specify a mission critical post.

**Control Room Officers**

Normally will be staffed with no more than two officers.

**Emergency Preparedness Officers**

To the extent possible [noting certain exceptions] positions ...will be returned to the Correctional Services Roster....

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<sup>1</sup> Sick and annual leave rosters, generally speaking, function as reserve staffing pools for officers who are off-work on sick or annual leave, among other circumstances. Being placed on this roster is not, generally speaking, considered desirable by correction officers.

### **Front Gate Officers**

Ordinarily, not deemed mission critical and should be eliminated....

### **Hospital Officers**

These will normally [be] critical posts at medical centers.

With respect to Housing Units Officers in Low, Medium and High Security prisons, Vanyur's memorandum provided "guidelines" for (reduced/adjusted) staffing in these facilities. The memorandum also identified which other posts were no longer considered "mission critical." They were Housing Unit Floaters, Intelligence/STG Officers/Criminal Investigators, Rear Deck Officers, Special Housing Unit (SHU) Property Officers, Tool Room Officers (upon incumbent attrition), and Urinalysis Officers. Other posts had assigned staff reduced; *e.g.*, Telephone Monitors "will be limited to one per installation," Rear Gate Officers where "[m]ore than one...is not deemed mission critical, and excess should be eliminated." Each prison was advised that it could have only one time and attendance clerk for the Captain.

Vanyur also advised Regional Directors/Wardens in his December 23, 2004, Memorandum that the rosters should be "shared" with the Union locally. However, he stressed that

[w]hile we will not bargain over the roster, local officials should be given the opportunity to offer input and possibly other alternatives that would achieve the initiative (These meetings are not negotiating sessions....)

On January 5, 2005, Union President Phillip Glover, during a meeting with top Agency management, learned of Director Lappin's January 5, 2005, Message to All Staff. On January 13, 2005, Glover made a request, in writing, to Lappin to bargain at the national level "completely" under Article 3, Section 3(c) of the parties' Master Agreement<sup>2</sup> over changes announced by Lappin in his January 5<sup>th</sup> Message, changes to be implemented on February 6, 2005. Subsequent to January 5, 2005, the parties met several times to dis-

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<sup>2</sup> Article 3, Section c provides, in relevant part, that "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...prior to implementation...."

cuss—but not to negotiate—Union concerns over changes in mission critical posts.<sup>3</sup>

On January 18, 2005, AFGE National President John Gage and Union President Glover jointly sent a letter to Director Lappin outlining the Union’s position on mission critical rosters. In relevant part, they wrote:

For more than 6 years employees have been able to bid on working assignments by shift, days off and post. Assignments were made by seniority among equally qualified employees who made that request. The proposed change would give managers discretion to change work assignments, days off, and shifts without any prior notice. An employee might be on a day watch with Thursday and Friday off. Under current procedures he would expect that arrangement to last for an entire calendar quarter. The proposal would allow managers to change this worker’s assignment on a weekly basis. The effects on that employee’s personal life would be enormous. Employees would be unable to make long-term child care arrangements, plan vacations, schedule medical appointments.... The Agency’s intent of saving money in the short term would instead result in a drastic increase in costs, as productivity plummeted and employees left the Bureau in ever increasing numbers to find more security and more family friendly work elsewhere....

On February 4, 2005, Director Lappin wrote to Union President Glover essentially taking issue with the position advanced above by the Union. In part, Lappin advised the Union that

It is the agency’s belief that there is no duty to bargain over changes to the roster, as it is covered by the Master Agreement.... In accordance with the Master Agreement, the new rosters will be posted on February 6, 2005.

On February 10, 2005, the Union, through Regional Vice-President Daniel Bethea, filed a Formal Grievance with Joe Chapin, Chief of Labor Relations for BOP, alleging that BOP violated 5 USC 7116 (the Statute) and Articles 3 & 4 of the parties’ 1998 Master Agreement, among others, when it directed its Regional Directors to identify mission critical posts without negotiating with the Union over the impact and implementation of changes to those mission critical rosters.

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<sup>3</sup> Neither side claims that these “discussions” constituted “negotiations” within the meaning of the Federal Service Labor-Management Relations Statute, 5 USC 7101 *et. seq.* (the Statute).

On March 11, 2005, BOP denied the Union's grievance both on procedural as well as substantive grounds.<sup>4</sup> On the merits, L. Christina Griffith, Chief, Labor Management Relations and Employee Security Branch, wrote:

[T]he agency's position is that the utilization of mission critical rosters is covered by the Master Agreement. Specifically, the agency and the union negotiated the roster procedures in the current contract [Article 18(d)(2)]....Thus this issue is expressly contained in, and thus covered by the current contract. Accordingly, the agency has no duty to bargain again over this matter. As such, there is no violation of Articles 3 or 4, or any other provision of the Master Agreement.

The Union timely invoked arbitration on March 11, 2005. Hearings on the substantive portion of this matter were held on June 14-15, 2006, and on January 3, 2007, at BOP's Washington, DC Headquarters. At the hearings, the parties had ample opportunity to examine and cross-examine witnesses under oath, present evidence, and argue their respective positions. A verbatim transcript of the proceedings was taken by a court reporting service. On or about March 12, 2007, the parties' representatives filed post-hearing briefs. The record was closed on March 13, 2007.

## **II. Positions of the Parties**

### **A. The Union:**

#### **1. The Merits**

The Union contends that the FLRA's well-established "covered-by" doctrine is simply not applicable to BOP's unlawful nationwide unilateral implementation of "Mission Critical" in February 2005, an action taken solely to cut operating costs. Neither of the "prongs" established by the FLRA in *SSA, Baltimore, MD and AFGE, Council 220*, 47 FLRA 1004 (June 30, 1993) apply here. The Union stresses that this case is not about BOP's managerial prerogatives to determine "which posts go in the [quarterly] roster" and how they are filled. That is all that Article 18(d) of the Master Agreement is concerned with. The Union, in effect, concedes that manage-

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<sup>4</sup> BOP's procedural argument was presented to the undersigned on November 16, 2005. I subsequently found the Union's grievance to be arbitrable in a Decision & Award issued on January 3, 2006. That award was not appealed.

ment can set prison posts as it sees fit under its managerial prerogatives. To the Union, Article 18(d) represents the parties' negotiated agreement as to the procedures to be employed in filling prison posts after the Agency has determined which posts it wants to fill in its prisons. The Union points out in its post-hearing brief that:

Article 18(d) covers the ability for Corrections Service employees to bid on a particular post. The Agency in effect [in "Mission Critical"] realigned the posts....[T]he Agency reduced posts at some locations and transferred the employees who would normally have been assigned those posts to the sick and annual rosters.

Article 18 covers the procedures for filling posts. What the Union is asking for is to engage in impact and implementation bargaining when the Agency reduced the number of employees assigned to an existing job (posts) and the resultant impact of that reassignment – not how the remaining positions are filled according to the procedures of Article 18(d).

The Union argues that this case is not about BOP's right to set quarterly rosters with certain posts; rather, it is about the BOP's legal duty to bargain over the impact and implementation of its "Mission Critical" nationwide policy change enunciated by Director Lappin on January 5, 2005, and previously discussed in detail by Assistant Director Vanyur on December 23, 2004. BOP's claim that it had no duty to bargain under the "covered by" doctrine in the circumstances of this dispute is simply wrong.

Contrary to the repeated claim of high level management officials, including Director Lappin, Associate Director Vanyur, and Chief, Labor-Management Relations, Griffith, BOP had a duty to bargain over the impact and implementation of its decision to implement "Mission Critical" nationwide, to include procedures for its implementation and appropriate arrangements for adversely affected bargaining unit employees, citing, among others, *BOP, FCI, Bastrop, Texas and AFGE, Local 3828*, 55 FLRA 848 (1999). To the Union, the impact of "Mission Critical" was, and is, much greater than *de minimis* and was "reasonably foreseeable" at the time it was implemented nationwide, citing, among others, *IRS and NTEU*, 56 FLRA 906 (2000).

The Union points out, in effect, that “Mission Critical” is fraught with significant impact, including (but not limited to) the use of non-custody staff to fill custody staffs,<sup>5</sup> the reasonably foreseeable likelihood of increased inmate violence *vis a vis* each other and prison staff with fewer correctional officers on duty, where prison population is increasing,<sup>6</sup> the elimination of merit-filled positions with reassignment to sick and annual rosters, the working of correctional officers’ and others outside of their position descriptions, the obviously increased work-load, the loss of fixed schedules, the impact on staff rotations and days-off, and the resulting personal and family issues that arise when scheduling patterns are in extreme flux.

In sum, on the merits, the Union maintains that “Mission Critical” is not “covered by” Article 18(d) in any respect, that BOP had a duty to bargain over the impact and implementation of “Mission Critical,” that the impact of “Mission Critical” was much greater than *de minimis* and was reasonably foreseeable at the time BOP unilaterally implemented “Mission Critical.” The Union also points that it made a timely request to negotiate over the impact and implementation of “Mission Critical” and that it has not waived its statutory right to so negotiate.

Thus, BOP violated various articles of the parties’ Master Agreement<sup>7</sup> as well 5 USC 7116(a)(1) and (5).

## 2. The Remedy

The Union seeks a *status quo ante* remedy, to include a customary bargaining order directing BOP to negotiate, upon request, over the impact and implementation of “Mission Critical.” Under the FLRA’s lead case on rescinding a change affecting conditions of employment and returning to the *status quo ante*, *Federal Correctional Institution and AFGE, Local 2052*, 8 FLRA 604 (1982),<sup>8</sup> the Union argues that, in the instant case, the facts and

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<sup>5</sup> Non-custody staff, although trained in custodial duties, do not wear uniforms; they normally work at other prison functions such as case management, secretarial, counseling, *etc.* It is significant to the Union that in Case No. BN-CA-5-0123, BOP entered into a stipulation with the General Counsel that “the issue of having non-custody staff working custody posts as done in the manner here is a change more than *de minimis*.” The Union contends that this stipulation, under the doctrine of collateral estoppel, has relevance to the instant dispute.

<sup>6</sup> The Union adduced representative testimony on this point from corrections officers from four (4) prisons.

<sup>7</sup> Article 3, Sections (c) and (d); Article 4; and Article 7, Section (b), all dealing generally the Agency’s duty to bargain over the impact and implantation of changes in employees’ conditions of employment. For brevity, these contract provisions have not been restated here.

<sup>8</sup> See also, *DOD, Defense Commissary Agency, Peterson Air Force Base*, 61 FLRA 688 (2006)

circumstances meet the requirements for such a remedy. The Union stresses that it got no advance notice of “Mission Critical” implementation. When it did, after-the-fact, it made a timely request to negotiate. BOP “willfully” refused to negotiate, having pre-determined that it had no duty to bargain under the “covered by” doctrine. The impact on bargaining unit employees was, as described above, “major.” Finally, the Union insists that BOP failed meet its burden that a return to the *status quo* would disrupt Agency operations. It points out, citing a DC Circuit case, that an agency’s budgetary problems do not immunize an agency from *status quo ante* relief. Here, according to the Union, even BOP’s top executives had a hard time persuasively explaining what would be disruptive about returning to the *status quo* during their testimony in this proceeding.

Thus, BOP has failed to demonstrate why a *status quo ante* remedy would not be warranted in the facts and circumstances of this particular dispute. To the Union, here, a *status quo ante* remedy would effectuate the purposes and policies of the Statue, and requests that such be remedy be ordered.

#### B. The Agency:

The primary thrust of BOP’s position in this matter is that it had no duty to bargain with the Union over any matter involving its actions with respect to “mission critical posts” at issue herein because those actions are covered by Article 18(d) of the parties’ collective bargaining agreement.<sup>9</sup> Among other applicable provisions, Section (d)(2 ) provides, in relevant part, that:

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

2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted in an area that is accessible to all correctional staff, for the purpose of giving those employees advance notice of assignments, days off, and shifts that are available for which they will be given the opportunity to submit their preference requests. Normally, there

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<sup>9</sup> In total, Article 18(d) contains eight (8) subsections all dealing with, in one way or another, technical procedures for filling prison shift positions.

will be no changes to the blank roster after it is posted; [for brevity, subsections a-d of Section d.2 have been omitted].

According to BOP, the instant dispute falls squarely within the FLRA's well-established "covered by" doctrine, which dictates that I dismiss the Union's grievance in its entirety. In support of that position, it relies essentially on three (3) FLRA decisions: *SSA, Baltimore, MD and AFGE, Council 220*, 47 FLRA 1004 (June 30, 1993); *U.S. Customs Service, Miami, Florida and NTEU, Chapter 137*, 56 FLRA 809 (September 29, 2000); and *NATCA and FAA*, 61 FLRA No. 83, (January 4, 2006). The first two (2) cited cases involve unfair labor practices; the third involves a negotiability dispute.

In *SSA, Baltimore*, the FLRA established a "definitive test" for what is now well-known as its "covered by" doctrine. The "test," in relevant part, at pages 1018-19, follows:

In sum, in examining whether a matter is contained in or covered by an agreement, we must be sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter. Thus, the stability and repose that we seek must provide a respite from unwanted change to both parties; upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining...[citation omitted].

With these principles in mind...Initially, we will determine whether the matter is expressly contained in the [agreement]. In this examination, we will not require exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. [Known as the "first prong" test.]

If the provision does not expressly encompass the matter, we will next determine whether the subject is "inseparably bound up with and...thus [is] plainly an aspect of...a subject expressly covered by the contract. [Citations omitted.] In this regard, we will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have

foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision. If so, we will conclude that the subject matter is covered by the contract provision....[Known as the “second prong” test.]

We recognize that in some cases it will be difficult to determine whether the matter sought to be bargained is, in fact, an aspect of matters already negotiated....To determine whether such matters are covered by an agreement, we will examine whether, based on the circumstances of the case, the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances....

Applying the foregoing to the instant dispute, BOP maintains that Correctional Service Rosters are covered by Article 18(d)(2) and that all that the Union wanted to negotiate here was previously negotiated Correctional Service Roster subject matter, as seen from the Union’s bargaining proposals and from the testimony of its witnesses. Thus, BOP had no duty to bargain over roster subject matter because Article 18(d), in effect, covers the “water-front” on all these matters.

As for the remedies sought by the Union, BOP again stresses that any bargaining order issued by the arbitrator would be inappropriate and unwarranted since it has already bargained over Correctional Services Roster procedures, currently contained in Article 18(d)(2) of the parties’ Master Agreement. As for the Union’s request for a *status quo ante* remedy, BOP states that it now lacks the manpower to return to the *status quo ante* and that any order directing such a result would be “unduly disruptive to the Agency.” As for compensating adversely affected bargaining unit employees, BOP stresses that the Union has failed to adduce any evidence in that regard and that to award such a remedy would be improper.

BOP thus asks that the Union’s grievance be denied.

### **III. The Issues**

The parties were able to agree on the issues before the arbitrator in this dispute. They are: (1) Whether the Federal Bureau of Prisons violated 5

USC 7116 or the collective bargaining agreement by refusing to bargain over the impact and implementation of the mission critical rosters. (2) If so, what is the appropriate remedy?

#### **IV. Analysis & Opinion**

I have carefully considered the entire record in this matter, including the testimony of the parties' witnesses, the post-hearing briefs filed by the parties' representatives and the numerous legal authorities they submitted or cited. While the parties have, in piecemeal, litigated certain aspects of "Mission Critical" in both arbitration and before the FLRA, in at least one ULP proceeding, the instant case apparently is the only one that involves the Union's challenge to BOP's February 2005 "Mission Critical" implementation on a nationwide basis. Thus, BOP has not raised and I see no 5 USC 7116(d) issues in this matter.

BOP's "covered by" defense is specious and was advanced simply to avoid fulfilling its clear-cut statutory and contractual impact and implementation bargaining obligations. "Covered by" does not apply, among other reasons, because, as the Union correctly points out, Article 18(d) deals exclusively with detailed negotiated procedures to fill correctional officers' posts once management decides what posts it wants to fill. It deals with procedures only, not with the impact of a nationwide change in staffing patterns launched in 2005 to save costs which affected, and continues to affect, virtually every bargaining unit employee. This case is about the reasonably foreseeable impact that BOP's decision had on bargaining unit employees—Article 18(d) has nothing to do with this.

Under established FLRA case law, BOP had a duty to bargain if the impact on bargaining unit employees from its decision to implement "Mission Critical" nationwide in February 2005 was "reasonably foreseeable" at the time of the implementation and if that impact was greater than *de minimis*. *DVA, Medical Center, Leavenworth, Kansas*, 60 FLRA 315 (2004); and *U.S Customs Service*, 29 FLRA 891 (1987) wherein the Authority held:

We conclude that the Respondent had a duty to bargain over the impact and implementation of the decision to renovate the airport because the reasonably foreseeable effects of that decision on employees' conditions of employment were substantial and were evident at the time the renovation was proposed and implemented. [Emphasis added.]

On the record evidence here, the impact on bargaining unit employees was “reasonably foreseeable” and greater than *de minimis* by a wide margin.

In that regard, this dispute does not involve an isolated decision by a prison warden to change a post on his/her quarterly roster as occurred in some of the parties’ cited legal authorities. Instead, for budgetary reasons, BOP was forced to cut costs nationwide, in part, by extracting operating efficiencies from its prisons’ staffing patterns. However it would work out, by reducing posts and utilizing non-custody personnel to guard prison inmates, savings would be realized in overtime costs and in reduced inefficiencies. The breadth and magnitude of “Mission Critical,” as implemented nationally, cannot be stressed enough. Record evidence shows that bargaining unit has approximately 25,000 employees working in approximately 108 prisons, guarding approximately 190,000 inmates. A major nationwide initiative was undertaken by management to save money; the number of correctional officers’ duty stations (posts) from which they oversee and guard some of this country’s most violent criminals were eliminated or modified. Some of these duties and responsibilities were given to non-custody personnel who, though trained, do not normally do this work. At the time of its implementation, it was “reasonably foreseeable” that the impact of changes brought about “Mission Critical” on bargaining unit employees would be substantial, significant and much greater than *de minimis*. The record contains numerous examples of the kind of significant impact that was “reasonably foreseeable” at the time “Mission Critical” was implemented. (Examples of that impact are described above in the “Union’s Position.”) Among other examples of “reasonably foreseeable” impact is the likely situation where, once prison inmates figured out that the number of correctional officers in their immediate area had been reduced, they would be more inclined to initiate attacks, gang related or otherwise, on each other or on the reduced staff. Clearly, non-custody employees pressed into custody work would make a better target for an inmate than uniformed correctional officers who themselves are always at risk.

Given the nationwide scope of “Mission Critical” and its “reasonably foreseeable” impact, BOP was legally bound to bargain with its employees’ exclusive bargaining representative over the impact and implementation of “Mission Critical.” As noted above, this was not some isolated action; it emanated from BOP’s top executives and impacted the entire bargaining unit

in significant and substantial ways, certainly to the extent that an impact and implementation bargaining obligation would be triggered. For whatever reason, BOP did not want to, and did not, fulfill its statutory or contractual bargaining obligation.

BOP's claim that it had no duty to bargain over the impact and implementation of "Mission Critical" under the FLRA's well-established "covered by" doctrine is not supported by the evidence of record in this matter or under Article 18(d). BOP refusal to bargain based on the "covered by" defense is misplaced, for several reasons. The evidence clearly establishes that BOP had determined not to bargain over "Mission Critical" even before it was announced BOP-wide and even before it had seen any Union "proposals" addressing Union concerns. This itself puts BOP in ULP territory. Assistant Director Vanyur's December 23, 2004, Memorandum For All Regional Directors in its "Next Steps" section specifically states that BOP "will not bargain over the roster." It would meet with the Union to listen to its concerns but these "meetings [would not] be negotiating sessions." At no time, did BOP ever modify or change its position on its duty to bargain. It consistently took the position that it had no duty to bargain under the "covered by" doctrine throughout the grievance procedure and in arbitration. The plain fact is that BOP had no intention of bargaining over "Mission Critical" with the Union from the very beginning.

Despite determining that it had no duty to bargain even before it had seen the Union's concerns/proposals, BOP essentially enticed the Union into submitting concerns/proposals and then promptly concluded that those concerns/proposals were all "covered by" Article 18(d), thus providing BOP with a way out of fulfilling its statutory and contractual bargaining obligations. What is troublesome here is that the Union was permitted to meet with BOP to address its concerns; the parties met in a non-negotiating format; the Union submitted, in writing, ways that its concerns could be dealt with. Since the parties were not negotiating by virtue of Agency *fiat*, but instead were meeting to discuss concerns, the claim that the Union's "proposals" were covered by Article 18(d), even if correct, misses the point. In my view, concerns raised in a non-negotiating format do not rise to the level of bargaining proposals; the parties weren't bargaining. Thus, in this context, it is difficult to see how the "covered by" doctrine would even apply. The Union had been told that there would be no negotiations; it took what BOP offered and submitted concerns; those concerns were rejected. The Union did

not necessarily submit all of the “proposals” it would have submitted had the parties entered into “real” give and take negotiations within the meaning of the Statute, but BOP ruled that out from the very beginning.

Accordingly, I find that BOP violated Article 3, Sections (c) and (d); Article 4; and Article 7, Section (b) of the parties’ Master Agreement and committed unfair labor practices in violation of 5 USC 7116(a)(1) and (5). The Union’s grievance is therefore sustained. An appropriate remedy is set forth below.

#### **IV. The Remedy**

The Union’s request for a *status quo ante* remedy does not fit the particular circumstances in this case and is denied. Not only would imposing such relief seriously disrupt agency operations but it would accomplish nothing. If BOP were ordered to return to the *status quo*, that is, to return to pre-mission critical posts staffing, it could, under its Article 18(d) prerogatives, simply post the roster it wants, to include once again all of the changes it suggested in Vanyur’s December 23, 2004, Memorandum. Local wardens would simply repost the kind of mission critical rosters they have been posting since February 2005. By operation of Article 18(d), *status quo ante* relief cannot be granted in this particular case.

I am, however, directing that BOP, upon request, once this Award becomes final and binding, enter forthwith into good faith impact and implementation negotiations with the Union over “Mission Critical Posts.” Any agreement reached by the parties in these negotiations shall be made retroactive, where applicable and appropriate, to February 2005, to include, among other things, back pay and/or leave restoration for employees who can establish that they were adversely affected by BOP’s violation of law and contract.

#### **V. The Award**

The Union’s grievance is sustained. For the reasons set forth above, BOP violated Article 3, Sections (c) and (d); Article 4; and Article 7, Section (b) of the parties’ Master Agreement and committed unfair labor practices in violation of 5 USC 7116(a)(1) and (5). The appropriate remedy is set forth

above in Section IV. Once this Award becomes final and binding, I will retain jurisdiction over it for 120 days in the event any disputes arise over its interpretation or application.

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Laurence M. Evans  
Arbitrator

March 21, 2007  
Rockville, MD