

ARBITRATION PURSUANT TO APPOINTMENT BY
FEDERAL MEDIATION AND CONCILIATION SERVICE

American Federation of Government Employees, *
Council of Prison Locals (Union) *
*
and * FMCS Case No. 10-04207
*
Federal Bureau of Prisons (Agency) *
*

Barry E. Shapiro
Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to Article 32 of the Master Agreement Between the Federal Bureau of Prisons (Agency) and Council of Prison Locals, American Federation of Government Employees (Union) (Master Agreement, Joint Exhibit 1) to resolve the grievance filed by the Union protesting the Agency’s denial of the Union’s selection of Honolulu, Hawaii, as the site for national policy negotiations. The grievance was denied by the Agency and the Union invoked arbitration. From a panel of arbitrators provided by the Federal Mediation and Conciliation Service, I was selected to hear and decide the dispute.

A hearing was held on January 12 and March 17, 2011, at the Agency’s offices in Washington, DC. The Union was represented by Dwayne Person, Mid-Atlantic Regional Vice President; and the Agency by Chung-Hi H. Yoder, Esq., Supervisory Attorney. Witnesses were sworn and sequestered. Michael Meserve, Timothy DeBolt, Joey Meade, Roger Payne, Bryan Lowry, and Dwayne Person were called to testify by the Union; Joey Meade and Cristina Griffith were called by the Agency. Eight Joint Exhibits (JX-), three Union Exhibits (UX-), and four Agency Exhibits (AX-) were accepted into the record. A verbatim transcript was prepared (Tr. I- [January 12], Tr.

II- [March 17]). The Parties submitted Post-Hearing Briefs (Union PHB, Agency PHB) on June 6, 2011. The Agency submitted a Reply brief (Agency Reply) on June 17. The Union's Reply to Agency Reply Brief (Union Reply) was submitted on June 22.

FACTUAL BACKGROUND

The Parties are signatory to a Master Agreement (JX1), which became effective on March 9, 1998. It was originally to expire on March 8, 2001, but the Parties stipulated at the hearing (Tr. I-4) that it remains in effect.

The Union represents all of the Agency's employees ("employee" is defined in Chapter 71 of title 5, United States Code), except employees of the Central Office (see Master Agreement, JX1, at Article 1, Section c). According to Bryan Lowry, National President of the Union (Tr. I-211), and Roger Payne, National Secretary-Treasurer (Tr. I-188-89), all new employees are automatically part of the bargaining unit. Payne explained that when employees begin work at a newly-established location, the Union's executive council makes arrangements for conducting an election to select local officers (Tr. I-188-89). Joey Meade, the Agency's Chief of Labor Management Relations, testified that the recognition of the bargaining unit is at the national level, and that the unit covers all of the Agency's organizable employees (Tr. I-172).

The Parties have agreed to procedures for negotiating over the impact and implementation of the Agency's national policy issuances: that is, changes proposed by the Agency as a result of changes in laws or government-wide regulations. In the Parties' parlance, these are referred to as "national policy negotiations". Among other things, the Master Agreement provides that such bargaining will take place within 30 days of the Union's invocation of negotiations, "at a location that is mutually agreeable to the parties, and the Agency will pay all expenses related to the

negotiations” (JX1 at Article 3, Section e).

The record is not clear as to how frequently the Parties engaged in national policy negotiations during the first year or two of the new Master Agreement, nor how they identified and settled on “mutually agreeable” locations for these negotiations. By early 2000, however, a backlog of issues on which the Union had invoked bargaining had accumulated. Accordingly, the Parties agreed on a set of Ground Rules for National Policy Negotiations, most provisions of which were initialed on February 23, 2000 (some were initialed on February 24) (JX5). Among other things, the Parties agreed to hold national policy negotiations every 30 days (Item 1). They also agreed (at Item 5) that --

Policy negotiations will take place at alternating locations between the Bureau of Prison’s Central Office and the home institution of each Council of Prison Locals officer. Each individual Council officer may determine an alternate location within their regions. Central Office members may choose a location other than the Central Office when it is their turn to host negotiations.

The remaining provisions of the Ground Rules address such procedural matters as calling caucuses (Item 4), the order in which proposals will be discussed (Item 9), and requesting the services of the Federal Mediation and Conciliation Service (Item 14). The Parties also recognized, in Item 15, that “These ground rules are not anticipated to address every single item that may arise during the negotiations process. They may be amended by the mutual agreement of the parties.” According to witnesses for both Parties, these Ground Rules have not in fact been amended since February 2000 (Lowry, Tr. I-207; Meade Tr. I-147). It is the meaning of Item 5 of the Ground Rules -- selection of the location for negotiations -- that is at the heart of the instant dispute.

There are nine officers who constitute the Union’s Council:¹ National President; National

¹The Parties sometimes refer to the Council as the National Executive Board or E-Board.

Secretary-Treasurer; National Fair Practices Coordinator; and six regional vice presidents. In practice, according to Person, who in addition to being the Vice President for the Mid-Atlantic Region also serves as the Union's Chairperson for Policy, the selection of location for national policy negotiations actually rotates among the six regional vice presidents. Since under Item 1 of the Ground Rules the Parties engage in national policy negotiations monthly, this means that each regional vice president will have one opportunity per year to select the location.

At the time the Parties negotiated the Master Agreement and, later, the Ground Rules, there was no Agency facility in Honolulu, Hawaii. While the history of the selection of Honolulu as the site for a Federal Detention Center (FDC) and its construction is not clear in the record, it began receiving its first offenders on August 6, 2001, according to an Agency publication (AX1 at p. 3).

It was the Union's turn to select the location for national policy negotiations in June 2010. At that time, Tim DeBolt was the Union's Vice President for the Western Region, which includes Honolulu. DeBolt's home institution was the Federal Correctional Institution, Sheridan, Oregon. According to DeBolt, Person notified him that it was his turn to pick a location. DeBolt picked Honolulu and notified both Person and Michael Meserve, president of the Union's Honolulu local (Tr. I-121, I-115). Meserve, in turn, sent an e-mail about the choice of Honolulu to his local members (Tr. I-27).

On May 27, 2010, Person notified Christopher Wade, Deputy Chief, Labor-Management Relations, of the Union's selection of Honolulu for the June negotiations. Wade informed Person in early June that the Agency did not agree to the Union's selection.² Person requested the denial of the pick in writing (UX3). Kim White, replied by e-mail on June 7:

²Wade did not testify at the hearing.

As I shared with Bryan and Mike (whom I am aware sent you and other National E-Board members an e-mail about our discussion), I am unwilling to approve policy negotiations taking place at Honolulu next round for the reasons I stated to on Friday. I was told that the reasons I provided were understood and that Mike would send out an e-mail to that effect. Given that, I would have to state there presently would be no benefit in discussing further.

I am fine with your second choice. (UX3)³

On June 10, Person filed a grievance, asserting that the Agency's denial of the Union's selection of Honolulu constituted a violation of Item 5 of the negotiated Ground Rules (JX2). Joey Meade, Chief of the Agency's Labor Management Relations Branch, responded to the grievance on July 10 (JX3). He stated the following reasons for denying the Union's pick of Honolulu:

While these Ground Rules state that negotiations will take place at alternating locations within each Council officer's region, at the time that the Ground Rules were negotiated, on February 23, 2000, the Federal Detention Center (FDC) Honolulu was not open, and thus was not contemplated for policy negotiations. Also, given that travel time to FDC Honolulu would be generally time prohibitive (in that it would generally require travel beyond the scheduled workday), it clearly would not have been included in the Ground Rules as an appropriate location....

In addition, when the Council of Prison Locals requested to hold policy negotiations in Hawaii in 2008, this matter was explored. It was discovered that airfare for several airports from which Council of Prison Locals Executive Board members typically use would average approximately \$1920 per person for a flight to Honolulu, HI. As stewards of taxpayer money, it is incumbent upon us to be both responsible and accountable, especially during fiscally challenging times. And, while that responsibility includes honoring established agreements, caution must be taken when we seek to expand agreements beyond negotiated purpose.

Moreover, public perception also plays an important role as well. As you recall in 2008, ABC news reported that the Department of Justice sent 15 employees to a Hilton Village Beach resort in Hawaii, costing taxpayers \$33,500. This was part

³Mike and Bryan are not specifically identified in the e-mail but are presumable Mike Meserve, the Union's local president at FDC Honolulu, and Bryan Lowry, the Union's National President. The Union's "second choice" is not identified. Kim White did not testify at the hearing.

of a congressional report. While all the details were not released in the news report, it identified what appeared to be waste, mismanagement, and excess by a number of agencies, but specifically highlighted the expenses incurred by the Bureau of Prisons. As you may be aware, prior to the closing of the Federal Prison Camp Nellis, in Las Vegas, NV, the union requested policy negotiations at that location. Because of the appearance of holding a negotiation session there, the union's request was denied and the union chose an alternate location.⁴

In light of these considerations, Meade denied the grievance. The Union invoked arbitration on July 13 (JX4).

ISSUES

The Parties do not agree on a statement of the issues. At the hearing (Tr. I-2-3) and in its Post-Hearing Brief (Union PHB at p. 2 of 14 unnn. pp.), the Union offers the following formulation:

Did the Agency violate the Master Agreement or the Ground Rules for National Policy Negotiations when it denied the Union's pick of the Honolulu Federal Detention Center as the location for policy negotiations? If so, what shall be the remedy?

Did the Agency bargain in bad faith and commit an unfair labor practice when it refused to honor the Union's selection of FDC Honolulu? If so, what shall be the remedy?

Does the Agency's refusal to honor the Union's pick of FDC Honolulu constitute a major breach and render the agreement null and void rendering national policy negotiations back to the Master Agreement, Article 2?

The Agency formulates the issues (Tr. I-3 and Agency PHB at p. 2) as:

Did the Agency violate Article 3 of the Master Agreement when it denied the Union's request to have Honolulu, Hawaii, as the site for national policy negotiations? If so, what shall be the remedy?

I note that the Union did not identify its original grievance (JX2) as a matter involving an unfair labor practice; the only direct reference in that grievance is to Item 5 of the Ground Rules

⁴The ABC News and Congressional reports to which Meade refers are in the record as JX7 and AX4, respectively.

(JX5). Further, as the Union makes clear in the opening sentence of the Argument section of its Post-Hearing Brief (at p. 9 of 14 unnumbered pages), this case involves a simple allegation of violation of a collective bargaining agreement. As I understand this matter from a review of the entire record, the Parties simply disagree as to whether Article 3 of the Master Agreement and Item 5 of the Ground Rules for National Policy Negotiations permitted the Agency to refuse to honor the Union's selection of FDC Honolulu as the location for national policy negotiations. There is little, if any, evidence that in so refusing the Agency repudiated either of these agreements. Accordingly, I find no solid basis, and no reason, to consider this case as involving an unfair labor practice. I note that the Union's third issue, is presented in a somewhat confusing manner. It is not clear, for example, whether the Union is alleging that the Agency's action constituted a major breach (whatever that is) of Article 3 of the Master Agreement or of the Ground Rules. Further, it is not clear why such a breach would argue for application of the procedures of Article 2 of the Master Agreement, which cover Joint Labor-Management Meetings rather than national policy negotiations.

In the Agency's formulation, as presented in its Post-Hearing Brief (at page 2), the issue is "Whether the Agency violated Article 3 of the Master Agreement when it denied the Union's request to have Honolulu, Hawaii as the site for national policy negotiations?" As discussed in greater detail under POSITIONS OF THE PARTIES, the Agency believes the Ground Rules cannot be understood except as a part of the Master Agreement, and that it is Article 3 of the Master Agreement that is implicated here. I agree with the Agency that the Preamble to the Master Agreement means that the Master Agreement and the Ground Rules "together constitute a collective agreement between the Agency and the Union." I do not agree, however, that this provision of the Preamble gives essentially complete precedence to Article 3 of the Master Agreement.

Accordingly, I formulate the issues as follows:

Did the Agency violate the Ground Rules for National Policy Negotiations when it refused to honor the Union's selection of FDC Honolulu as the location for the June 2010 national policy negotiations? If so, what shall be the remedy?

POSITIONS OF THE PARTIES

Although, as noted above, the **Union** asserts that the matter in dispute here raises issues of both contract interpretation and statutory violations (bargaining in bad faith, breach of contract), its principal argument is as stated in its Post-Hearing Brief (at p. 9 of 14 un. pp.): "This is a simple contract violation."

The Union notes that Item 5 of the Ground Rules provides that national policy negotiations are to take place at locations that are chosen, on an alternating basis, by the Agency and by the members of the Union's Executive Board. The Agency, the Union notes, has not disputed that it was the Union's Western Regional Vice President's turn to pick a location and that he picked Honolulu.

The Union rejects the Agency's argument that because FDC Honolulu was not operational when the Master Agreement was signed it was not contemplated as a permissible location for national policy negotiations. The Union points to the testimony of the Local President at FDC Honolulu, Mike Meserve, that construction on the facility began in 1998 and that, based on photographs he had seen, most of the building infrastructure was complete by 2000.

The Union also takes issue with the Agency's assertion that travel costs for holding negotiations in Honolulu would be prohibitively expensive. It notes that the Agency paid for Meserve to fly from Honolulu to Washington, DC for policy negotiations, but refuses to pay to fly to Honolulu for negotiations. The Union contrasts the Agency's assertion that it would cost approximately \$1920 per person to fly from Washington to Honolulu with the evidence that Meserve

paid only \$812 for a round-trip flight between those two locations (UX1). The Union notes that the Agency has conducted training in Honolulu on how to lobby Congress; and used a resort in Palm Springs for a Gang Resistance Education and Training Program.

In summary, the Union argues: “The ground rules do not state that the Agency has to agree with the Union’s location for their policy pick. The ground rules do not cover the cost or location of on the Union’s policy pick. If the Agency wanted to have the authority to dictate the location of the Union’s pick, they could have negotiated for that to be included in the policy supplemental agreement but they did not” (Union PHB at p. 10 of 14).

As remedy,⁵ the Union asks that I order the Agency to schedule a special two weeks or two sessions of policy negotiations at FDC with dates to be selected by the Union; and any other remedy I deem appropriate to make the Union and FDC Honolulu employees whole.

The **Agency** asserts that it did not violate the Master Agreement or the Ground Rules when it refused to honor the Union’s pick of Honolulu as the site for policy negotiations. The Agency notes that Article 3, Section e, of the Master Agreement is unambiguous in requiring that national policy negotiations under Article 3 take place at a location that is “mutually agreeable” to the Parties. The Ground Rules, the Agency argues, are not a modification of the Master Agreement, but part of the Master Agreement, in accordance with the last paragraph of the Preamble to the Master Agreement. Thus, the Agency argues, the selection of a location for national policy negotiations requires mutual agreement, and without the Agency’s agreement the Union’s proposal to hold negotiations in Honolulu did not have to be accepted.

⁵I present here only those remedies requested by the Union that relate to a straightforward contract violation. As noted under ISSUES, I do not believe this case involves statutory violations and I have, therefore, disregarded requests for remedies that might be appropriate in such cases.

Even if the Ground Rules must be read independent of the Master Agreement, the Agency argues, there is undisputed testimony that the Parties had a past practice of reaching mutual agreement on the location of national policy negotiations as far back as 2002. The Agency points to the testimony of Cristina Griffith about her experience as Deputy Chief of the Labor-Management Relations Branch. Griffith testified, for example, that sometime in 2002 or 2003, the Union requested to hold national policy negotiations at the Community Corrections Office in San Antonio, Texas, and the Agency denied that location “because there is no institution there and there wasn’t space for us to...hold negotiations because spacewise there has to be space for twenty people to sit in the room” (Tr. II 93-95). She also recalled instances in which the Union had asked to go to the Metropolitan Correctional Center New York and the Metropolitan Detention Center Los Angeles, “and both instances, the wardens said that at that time, they only had conference room space in the warden’s area, and it wasn’t conducive to negotiations” (Tr. II 102-04). In none of these instances, Griffith testified, did the Union file a grievance.

The Agency also argues that Hawaii was not contemplated at the time the Ground Rules were negotiated. Therefore, the Agency asserts, “in keeping with traditional tenets of contract interpretation, the arbitration should not enforce the policy location of Hawaii because it would not reflect the parties’ intent” (Agency PHB at p. 8).

Finally, the Agency urges me to give weight to its concerns regarding cost and public perception. As a steward of taxpayer dollars, the Agency argues, it is accountable to the public.

The Agency asks that the grievance be denied.

DISCUSSION AND ANALYSIS

The first matter that must be addressed is whether Item 5 of the Ground Rules replaced,

supplanted, or otherwise effectively modified the requirement of Article 3, Section e, of the Master Agreement that national policy negotiations will take place at “a location that is mutually agreeable to the parties....” The Agency’s argument is that Article 3 of the Master Agreement is unambiguous in stating that negotiations will take place at a mutually agreeable location, and that the Ground Rules must be read in harmony with the terms of the Master Agreement in order to discern the intent of the Parties (Agency Reply at p. 2). “The ground rules are not a modification of the Master Agreement, but part of the CBA as a whole [see Preamble to the Master Agreement]....Therefore, the ground rules must be read in accord with Article 3” (Agency PHB at p. 7). Thus, under the Agency’s understanding, the requirement of Article 3, Section e, of the Master Agreement that the location for negotiations be mutually agreeable remains undisturbed. I do not agree.

It is not uncommon for parties to a comprehensive collective bargaining agreement to negotiate additional arrangements during the life of that agreement. These arrangements may address matters that were not addressed in the comprehensive document; they may give procedural effect to an otherwise unchanged policy; or they may directly modify or supersede previously agreed-upon arrangements. The basic intent of the Parties in negotiating these Ground Rules is clearly set forth in Item 1. The conduct of negotiations under the terms of Article 3, which among other things did not establish a regular schedule of negotiating sessions (in contrast to the arrangement for four-times-a-year Joint Labor Management Relations Meetings in Article 2), had led to a backlog of items. Accordingly, the Parties agreed that national policy negotiations would take place “every thirty days” (Item 1). The Parties also agreed to additional procedures for handling national policy negotiations that were not covered by Article 3 of the Master Agreement: calling for a caucus (Item 4) or requesting the services of the Federal Mediation and Conciliation Service (Item 14), for

example. While it is true that Item 5 did not expressly cite to, or state that it was amending, the terms of Article 3, Section e, of the Master Agreement, it is clear from the language of Item 5 that this was the Parties' intent.⁶ This item expressly provides for the selection of locations for national policy negotiations, a matter that is expressly covered by Article 3, Section e. In the Agency's reading, Article 3, Section e, not only remains undisturbed, it takes absolute precedence over the express provisions of Item 5 of the Ground Rules. Item 5 expressly provides that "Policy negotiation will take place at alternating locations between the Bureau of Prison's Central Office and the home institution of each Council of Prison Locals officer. Each individual Council officer may determine an alternate location within their regions...." To allow the Agency to veto the location selected by the appropriate regional vice president -- a choice made in accordance with the unambiguous terms of Item 5 -- by asserting that the choice was not "mutually agreeable" under Article 3 would render the express terms of Item 5 a nullity. (By the Agency's logic, the alternating location of national policy negotiations at the Central Office, or "a location other than the Central Office when it is [Central Office member's] turn to host negotiations", is also merely a suggestion: an initial bargaining position by the Agency, subject to the Union's agreement.)

The Agency's argument that its refusal to honor the Union's selection of FDC Honolulu was permissible because this facility had not yet become operational when the Ground Rules were agreed to is not persuasive. The bargaining unit covers all employees of the Agency (except for Central Office employees) who are eligible to be represented by a labor organization (Article 1, Section b,

⁶While Item 5 of the Ground Rules modified the effect of Article 3, Section e, of the Master Agreement, it did not rescind the latter provision. Presumably, if the Ground Rules were to be eliminated, the procedures for conducting national policy negotiations would revert to those set out in Article 3 of the Master Agreement, including the requirement that the location of such negotiations be "mutually agreeable" to the Parties. This possibility is not raised in the instant grievance. In any event, as noted earlier, the Ground Rules have remain unchanged since they were agreed to in February 2000.

of the Master Agreement). Employees at FDC Honolulu, whether they were newly hired or transferred there from other Agency locations, automatically became subject to the terms of the Master Agreement -- as well as any other agreements negotiated between the Agency and the Union, including the Ground Rules -- when their employment there commenced. If the Agency's position is correct, then none of the other provisions of the Master Agreement (or any related agreements) would apply to these employees either. The employees would not, for example, be covered by the negotiated provisions on Union Dues By Payroll Deduction (Article 8), or have access to the Grievance Procedure (Article 31). This is patently not the case.

The Agency's argument that the Parties "had a past practice of mutual agreement on the location of policy negotiations as far back as 2002" (Agency Reply at p. 2) is not persuasive. In most of the instances cited by Griffith, the Agency refused to honor the Union's selected location because of the inadequacy of space at those locations. This appears to be the type of circumstance envisioned by Item 15 of the Ground Rules: "These ground rules are not anticipated to address every single item that may arise during the negotiations process. They may be amended by the mutual agreement of the parties." Even if these handful of denials directly implicated Item 5 of the Ground Rules, it is doubtful that they are sufficient to establish an enforceable practice. Where contract language is clear -- as it is here -- a party may insist upon its enforcement notwithstanding that it may have allowed previous violations to occur without a grievance.

The Agency's concerns about the cost and public perceptions involved in holding negotiations in Hawaii are understandable. These concerns, however, involve the wisdom of making a particular choice under the agreed-upon arrangements for choosing sites for negotiations; they do not go to the legality of those choices.

The Agency violated the Ground Rules when it refused to honor the Union's selection of FDC Honolulu as the location for national policy negotiations. As remedy, I order the following: The Union shall be permitted to substitute its selection of location for national policy negotiations for one of the sessions that occur in the six months following the date of this Opinion and Award whose location, usually the Agency's Central Office in Washington, DC, would otherwise be selected by the Agency under Item 5 of the Ground Rules. To ensure adequate time for planning, the Union shall give the Agency 30 days' notice of its choice. The Union may, but is not required to, select FDC Honolulu under this remedy. In light of the current political and budgetary climate, the Union may find it advisable to use its opportunity under this remedy to choose a location other than Hawaii. The choice, however, is the Union's.

AWARD

The Agency violated the Ground Rules for National Policy Negotiations when it denied the Union's selection of FDC Honolulu as the location for the June 2010 national policy negotiations. The remedy for this violation is as described above.

June 28, 2011
Silver Spring, MD

A handwritten signature in black ink, appearing to read 'Barry E. Shapiro', with a large, sweeping flourish at the end.

Barry E. Shapiro
Arbitrator