In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MENDOTA, CALIFORNIA

And

LOCAL 1237, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 14 FSIP 48

ARBITRATOR'S OPINION AND DECISION

Local 1237, American Federation of Government Employees, AFL-CIO (Union or Local 1237), filed a request for assistance with the Federal Service Impasses Panel (Panel) to resolve a negotiations impasse under 5 U.S.C. § 7119 of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7101, *et seq.* between it and the Department of Justice, Federal Bureau of Prisons (FBOP), Federal Correctional Institution, Mendota, California (Employer or FCI Mendota).

Subsequent to an investigation of the request for assistance, which arose out of the parties' negotiations over the establishment of "Unit Management Roster Procedures" at FCI Mendota, the Panel determined that the dispute should be resolved through mediation-arbitration by telephone with the undersigned, Panel Member Edward F. Hartfield. The parties were informed that if a settlement were not reached on all issues during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, I conducted a mediation-arbitration by teleconference with the parties' representatives on August 11, 2014. During the mediation phase, the parties were unable to settle the matter voluntarily. Thus, I am required to issue a final decision resolving the parties' dispute. In reaching this decision, I have considered the entire record in this matter, including the last best offers (LBOs), closing statements, documentary evidence submitted by the parties, and post-hearing briefs.

BACKGROUND

The mission of the FBOP is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient and appropriately secure. FCI Mendota is an all-male institution comprised of three medium security housing units and an adjacent satellite camp for minimum security offenders. It currently houses 1,151 prisoners and is close to its maximum capacity of approximately 1,700. The three housing units are identified by letters A, B and C, each of which is divided into four subunits. Unit A, for example, is broken down into subunits A1, A2, A3 and A4. The Camp, on the other hand, is a

single housing unit. The day-to-day lives of inmates (e.g., their medical and psychological needs, their assignment to educational and work programs, and their social and athletic activities) are managed by a unit management team (team): a case manager, counselor and a secretary. Each housing unit (A, B and C) is staffed by three teams; an additional team is assigned to the Camp. The parties refer to the number of prisoners assigned to a team as its caseload or its work assignment (assignment). Local 1237 represents about 200 bargaining unit employees (BUEs) at FCI Mendota who are part of a nationwide consolidated unit representing more than 30,000. The parties are covered by a new 3-year Master Agreement (MA) that is due to expire on July 20, 2017.

ISSUES AT IMPASSE

The parties bargained from October 8, 2013, through March 3, 2014, over the creation of a roster committee for unit management and the establishment of procedures allowing BUEs to bid on housing unit and caseload assignments, days off and shift assignments.[1/] During this time, the Union proposed seven Memoranda of Understanding (MOUs) to which the Employer responded with three counters, and the parties received Federal Mediation and Conciliation Service (FMCS) assistance twice. Essentially, the parties are at impasse over the following issues:

1. Whether, at the end of a 1-year trial period, either party may revisit the bidding procedures to determine whether they should continue or be renegotiated (Union), or whether the Employer should have sole discretion to revisit and/or terminate them (Employer).

2. Whether unit staff should be allowed to bid on the assignments, days off and shifts offered in the Camp and each of the four subunits in housing units A, B and C, and be selected primarily on the basis of seniority, giving case managers and counselors a total of nine potential bids (Union), or whether seniority should only be used to allow staff to bid on general placement in each housing unit and the camp, restricting the number of bids to a total of four (Employer).

3. Whether, "[a]s vacancies become available," they should be filled by "the least senior staff member who is not on a training or probationary period" (Union) or whether the Employer should have the "right to make assignment adjustments for the needs of the institution" (Employer).

1/ The parties were required to bargain over unit management rosters by a grievance arbitrator in accordance with Article 18, section [f] of the MA. *American Federation of Government Employees, Local 1237 and Federal Bureau of Prisons, Federal Correctional Institution, Mendota, California*, FMCS Case No. 12-58321 (Arbitrator Landau, 2013).

POSITIONS OF THE PARTIES

1. The Employer's Position

The Employer proposes that "each Unit roster (A Unit, B Unit, C Unit, and Camp) will be prepared in accordance with the procedures outlined in Article 18, Section d. Staff may bid on shifts and days off within their assigned Unit." Although "[n]ormally staff [members] shall remain on the shift/days off," they may be reassigned in accordance with Article 18 of the MA. Staff members on a performance improvement plan (PIP) "will be exempted from bidding on a new assignment." In addition, "as vacancies become available, Management will have the right to make assignment adjustments for the needs of the institution." Preliminarily, the Employer argues that the proposals presented by the Union in the Memorandum of Understanding (MOU) it submitted at the end of FMCS mediation are

> non-negotiable and not in the jurisdiction of the FSIP. The [MA], as well as 5 USC 7106, gives Management the right to assign, the right to assign work, the right to direct, and the right to determine internal security practices. As such, the FSIP should rule it does not have jurisdiction and dismiss the matter.

In this regard, the Employer claims that Union proposals 1, 3 and 8,[2/] are non-negotiable because they "excessively interfere" with management's § 7106 rights repeated in Article 5 of the parties' MA. It cites the Federal Labor Relations Authority's (FLRA) decision in *American Federation of Government Employees, Local 3935 and United States Department of Justice, Federal Bureau of Prisons, Federal Prison Camp, Duluth, Minnesota (FPC Duluth)*, 59 FLRA 481 (2003), and contends that, by allowing a unit staff member to bid on and be selected for the work assignment of any less senior employee in his position, the Union's proposals would prevent management from: (1) "placing experienced team members together with newer employees for training

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2/ The wording proposed by the Union in each of the cited paragraphs is as follows:

> ¶1. This agreement will be in effect for a one year trial period. At the end of the trial period, the procedures may be revisited by either party to determine if the procedures will continue, or new procedures will be negotiated. If either party decides to make changes to this agreement, they will submit proposals, and negotiations will commence to create and updated agreement.
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> ¶3: Except as noted below, each Unit roster will be prepared in accordance with the recommended procedures outlined in Article 18, Section d. (The current assignments created by management to bid on at FCI Mendota are: A2, A3, A4, B2, B3, B4, C2, C3, C4, and Camp).
>
> ¶8: As vacancies become available, they will be bid on by seniority. In the event that no one wants the vacant position, the agency will fill the vacancy with the least senior staff member who's not on a training or probationary period.

purposes"; (2) "keeping unit teams together for extended periods of time to enhance inmate/staff continuity"; and (3) "retaining the ability to assign staff based on their knowledge, strengths and ability to be able to build continuity for both the staff member and the supervisor." The Employer emphasizes that the three housing units and the camp are "separate [d]epartments." Because each has its own "[d]epartment [h]ead and staff complement," proposals giving "staff the ability to cross over to different departments and managers" would also be non-negotiable.

The Employer acknowledges that the Union has provided it with MOUs from four other institutions that allow unit staff to bid on assignments in housing units other than their own but argues that, like the procedures proposed by Local 1237, those negotiated by the parties in the four institutions cited "go against Federal Law and the [MA]." Moreover, providing 4 examples out of the "115 plus [i]nstitutions nationwide" is hardly persuasive; and, in any event, the procedures other institutions negotiate with their local unions are "not precedent setting" for FCI Mendota. Nevertheless, to produce real "comparative data" for the Arbitrator, the Employer contacted "four institutions within the western region" and "verified they do not allow unit staff to bid on assignments outside their assigned department/unit."

2. The Union's Position

The LBO the Union submitted at the start of arbitration on August 11 basically reiterates the detailed procedures in its final offer to the Employer during FMCS mediation. Thus, it proposes that unit staff be allowed "to bid on assignments" once a year, and that the roster committee "consider preference requests on seniority" and "make reasonable efforts to grant such requests," meaning they will not be "arbitrarily" denied. In its view, its proposals are consistent with Article 18, Section f. of the MA, which states that "[r]oster committees outside the Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union," and recommends "that the procedures in Section d. be utilized."[3/] Despite the fact that both parties at the national level "endorsed" this language, the Employer has refused to negotiate over, much less follow, the "recommended procedures" that would allow unit employees to "submit preference requests for assignment, shift and days off, or any combination thereof" (Article 18, Section d.2.a.). Moreover, it has "failed to articulate a reason for not following" the recommendation of the MA.

3/ The Union cites *Federal Bureau of Prisons v. Federal Labor Relations Authority*, Case No. 10-1089, Slip Op. (D.C. Cir. 2011) (*Case 10-1089*), where the U.S. Court of Appeals for the District of Columbia Circuit concluded that the procedures in Article 18, Section d. were negotiated by the parties at the national level to address the impact and implementation (I&I) of all management decisions, during the life of the MA, to assign Correctional Officers to posts/assignments on a quarterly basis – regardless of whether business as usual was being conducted and all posts were included on the quarterly roster or whether, because of exigencies such as funding, a particular Warden might decide, in any given quarter, that only positions "critical" to the mission of his institution would be posted. The court concluded that the parties agreed in their MA that both situations are "covered by" the procedures contained in Article 18, Section d., as that section dictates the procedures a Warden, or his delegate, will use, whenever he "formulates a roster, assigns officers to posts, and designates officers for relief shifts" (*Case 10-1089* at 8).

In response to the Employer's argument that its proposals are non-negotiable, the Union points out that while the Agency relies "heavily" on Article 5, Section a., which is merely a recitation of the rights reserved to management in § 7106 of the Statute, "it is important to understand that "Section a. is subject to Section b. of the same article," which, in turn, reiterates the statutory rights the Union has to bargain over the I&I of management's exercise of its § 7106 rights, in this case, FCI Mendota's exercise of its right to assign work. The Union concedes that the right to assign work includes the right to determine the duties and to whom they will be assigned. However, it argues that the Employer has not provided any evidence that the duties of any given unit employee differ from those of another.

For instance, there has been no showing that "a [c]ase [m]anager assigned to a specific inmate housing unit would have different duties from a [c]ase [m]anager assigned to a different inmate caseload." Nor has the Employer shown that there is any difference in the assignments of counselors and secretaries at the camp or in any of the three teams in each housing unit. They are all responsible for the same number of inmates and the same type of male prisoner (medium security level in the FCI; minimum in the Camp). Within their position descriptions, counselors, cases managers and secretaries are seamlessly interchangeable. The Employer's routine reassignment of case managers and counselors is tacit recognition of this fact. On March 7, 2014, for instance, the Employer, without explanation, notified five counselors and one case manager they would be moved to other housing units effective March 23.

According to the President of Local 1237, he has already been reassigned numerous times in the few years he has been at Mendota. The Union provided three additional MOUs, for a total of seven, from institutions that have negotiated bidding procedures similar to those proposed by the Union for unit management in FCI Mendota. It also has provided MOUs from two other FCI Mendota departments that have negotiated procedures similar to the ones proposed by the Union herein. Based on the MA's recommendation in Section f. that parties utilize the procedures in Section d. when forming roster committees, and the fact that at least seven other institutions have done so for unit management, the Union does not think the Employer's negotiability arguments should be given serious consideration.

CONCLUSION

In reaching a decision on this case, the Arbitrator must address both the jurisdictional and substantive issues presented by the parties. Since the jurisdictional issue is the most troubling, that is, the Employer's claim that the Union's proposals are non-negotiable because they interfere with the right to assign, the right to assign work, the right to direct work, and the right to determine internal security practices, under 5 U.S.C. § 7106(a), I will address it first. The claim is troubling because at no point during the Panel's initial investigation of the Union's request for assistance did the Employer contend that the Union's proposals were nonnegotiable even though it was provided ample opportunity to do so, and the Panel itself voted to assert jurisdiction without so much as a hint of a potential negotiability claim from the Agency.

Subsequently, the Employer voluntarily collaborated in the mediation-arbitration proceeding, which included a pre-hearing conference call on August 6 and a full med-arb proceeding on August 11, during which time no mention was made of the claim of non-

negotiability. I also would note that the Employer submits its negotiability argument for the first time in its post-hearing brief while still proposing adoption of its proposals on the merits. Since FCI Mendota has been the beneficiary of at least 4 interventions by the Panel during the last 24 months, the writer cannot help but be offended by what appears to be a careless disregard for Panel resources and time. Finally, this last minute strategy has the effect of undermining the merit of the arguments raised by the Employer during the mediation-arbitration procedure.

Nevertheless, it is well-established that a party is entitled to raise a jurisdictional argument at any stage of the Panel's process – including, for the first time, in its post-hearing brief. My analysis of relevant Federal Labor Relations Authority (FLRA) case law, including the *FPC Duluth* decision relied upon by the Employer, leads me to conclude that any Unit Management roster procedure I would impose to resolve the parties' dispute in this case must provide management with the ability to require employees to possess specific knowledge, skills and abilities needed to do the work of a position, as well as certain job-related individual characteristics such as judgment, reliability, experience and length of service relative to other team members.

Any roster procedure that would prevent management from making these determinations essentially precludes it from determining whether employees are equally qualified for a position. Only in circumstances where management has already determined that employees applying for a position are equally qualified would a selection procedure based on seniority be consistent with management's right to assign work.[4/] In this regard, the record is replete with Union attempts to inject the Employer's right to determine qualifications for the jobs upon which Unit Management employees would bid into its proposed roster procedure.[5/] By doing so, the Union displayed its desire to meet the Employer's articulated interest of retaining the right to establish or determine qualifications. Despite this, the Employer exhibited no attempt to define what, if any, job-related individual characteristics would be required; made no movement off of its position that it would only accept a bidding procedure that gave employees a limited right to bid for assignment to

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4/ The Employer's final claim in its post-hearing brief -- that the efficiency of operations at FCI Mendota could be negatively impacted, thereby affecting the Agency's internal security -- I do not find credible as it is based on a bare assertion without any corroborating evidence.

5/ For example, the Union's third proposed roster procedure MOU contained a provision that the "roster committee will consider preference requests on seniority and will make reasonable efforts to grant such requests. A reasonable effort means Management will not arbitrarily deny such requests." The same proposal exempted employees with performance issues; gave management the right to make assignment adjustments for the needs of the institution and exempted probationary employees from participating in the bidding process. In its sixth proposed MOU, the Union added that "after Management determines the qualifications for the Case Manager, Counselor and Unit Secretary positions, all qualified bargaining unit employees in Unit Management will be allowed to bid on these qualified positions." In its seventh and final proposed MOU, the Union added that "[s]taff may bid on any Unit Management assignment that they have deemed as qualified to work, by management, in order of seniority, on a yearly basis."

another unit (e.g., A, B, C or the Camp), giving management the discretion to decide where, in the unit selected, the employee would be placed, and refused to even implement the 1-year trial period to which both parties agreed unless it retained sole discretion to terminate the procedures at the end of the year.

Turning to the substantive issues, I have carefully reviewed the arguments and evidence presented by the parties during the Panel's investigation and throughout the mediation-arbitration proceeding. Based on that review, I have decided to resolve the impasse by imposing a modified version of an MOU proposed by the Employer during the bargaining process (Employer 3: "Management Counter Proposal for Unit Management Roster Committee Procedures") that was included in Attachment A of its post-hearing brief. The modified MOU contains the provisions the parties mutually agreed to during the bargaining process, but failed to initial, final wording addressing the three issues at impasse in paragraphs 1, 3 and 8, and is fully consistent with FLRA case law.[6/] In my view, it balances the Employer's interest in retaining the right to determine the qualifications of the Case Manager, Counselor, and Unit Secretary positions for each position/assignment in each housing unit, and the Union's interest in permitting employees to bid on any position within FCI Mendota for which they are qualified and to have the Roster Committee consider preference requests based on seniority.

In reaching this decision, I am rejecting the Agency's assurances that very few, if any, other comparable correctional institutions have negotiated roster committee arrangements, as well as the Employer's argument, which I find not to be credible, that Units A, B, C and the Camp are separate departments with their own department heads and staff. With respect to the latter, the Employer ignores the Union's persuasive argument that FCI Mendota has itself permitted Roster Committees outside the Correctional Services department without finding that each unit affected is a separate department. Finally, given the inordinate length of time it has taken for this issue to reach closure, an 18-month trial period should provide the parties with a longer respite than 1 year before they potentially resume negotiations over this matter once again.

DECISION

Pursuant to the authority vested in me by the Federal Service Labor-Management Relations Statute and because of the failure of the parties to resolve their dispute during the course of proceedings instituted pursuant to the Panel's regulations at 5 C.F.R. § 2471.6(a)(2), I hereby order the parties to adopt the following wording:

MEMORANDUM OF AGREEMENT BETWEEN MENDOTA FCI AND AFGE, LOCAL 1237

1. This agreement will be in effect for an 18-month trial period. At the first scheduled Roster Committee meeting following the completion of the trial period, these procedures may be revisited by either Management or the Union to

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6/ See, for example, *American Federation of Government Employees, Local 1164 and Social Security Administration*, 60 FLRA 785 (2005).

determine whether they are to continue. If either Management or the Union determines that the Unit Management Roster Committee procedures were not successful during the trial period, either party may elect to re-negotiate the procedures at that time. Until such time as a subsequent procedural agreement is reached, the Unit Management Bidding Procedures outlined in this MOA will continue.

2. Except as noted below, each unit roster (*i.e.*, A Unit, B Unit, C Unit, and Camp) will be prepared in accordance with the procedures outlined in Article 18, section d. of the Master Collective Bargaining Agreement.

3. Normally, staff shall remain on the assignment/shift/days off granted. However, in accordance with the provisions of the Master Collective Bargaining Agreement, management may reassign staff.

4. For the period of this trial, unit roster committees will be formed yearly in November of each year, for the period covering April to March of the following year. The unit holiday coverage schedule will also be developed at this time. An initial bid will take place to cover the April 2015 to March 2016 rating period.

5. Management will determine and post the qualifications for the Case Manager, Counselor, and Unit Secretary positions for each position/assignment in each housing unit (*i.e.*, A1, A2, A3 and A4; B1, B2, B3 and B4; C1, C2, C3 and C4 and the Camp). These qualifications shall be posted at least 30 days in advance of the initial Roster Committee meeting to facilitate the bidding of qualified employees. Any unit staff member wishing to bid on one of the above positions will be given the opportunity to show management that the member meets the qualifications Management has established to do such work. If Management does not find the employee qualified, it will put in writing what the employee needs to improve to become qualified. This can be done after the initial rotation list is established. If the employee believes he or she meets the qualifications, the employee can file a grievance in accordance with the provisions of the Master Collective Bargaining Agreement. All qualified bargaining unit employees in Unit Management---except as noted below in Items 7 & 10--- will be allowed to bid on these qualified positions.

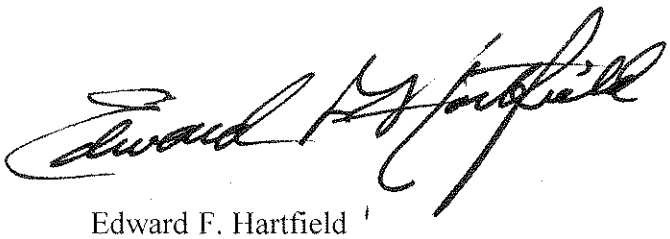
6. The Roster Committee will consider preference requests based on seniority and will make reasonable efforts to grant such requests. A reasonable effort means that Management will not arbitrarily deny such requests. Staff may bid on shifts, days off, and assignments (*i.e.*, A1, A2, A3 and A4; B1, B2, B3 and B4; C1, C2, C3 and C 4 and the Camp) on a yearly basis.

7. Staff members with performance concerns shall be exempted from bidding on a new assignment (*i.e.*, PIP letter).

8. Management may require staff to remain in their current assignment for one year prior to a Program Review.

9. As vacancies become available, Management will have the right to make assignment adjustments in accordance with the provisions of the Master Collective Bargaining Agreement.

10. Newly hired staff on probation or newly assigned to Unit Management who fall under their first year training plan would be exempted from bidding on an assignment until after they have completed their first year.



Edward F. Hartfield
Arbitrator

September 30, 2014
St. Clair Shores, Michigan