In the Matter of

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ESTILL, SOUTH CAROLINA

and

LOCAL 3976, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO

Case No. 11 FSIP 81

ARBITRATOR'S OPINION AND DECISION

On April 28, 2011, Local 3976, American Federation of Government Employees, AFL-CIO (Union) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI), Estill, South Carolina (FCI Estill or Employer).

Following investigation of the request for assistance, which concerns a dispute over the creation of a 5-4/9 compressed work schedule (CWS) for approximately 14 Facilities Department employees, the Panel determined to assert jurisdiction and directed that the dispute be resolved through mediation-arbitration with the undersigned, Panel Member Edward F. Hartfield. The parties were informed that if a settlement was not reached during mediation, I would issue a binding decision on any open issues to resolve the dispute. Consistent with the Panel's procedural determination, on September 28, 2011, I conducted a mediation-arbitration proceeding by telephone with representatives of the parties. During the mediation phase, the parties were unable to resolve their dispute, thereby causing the need for the undersigned to convene an arbitration proceeding. As previously explained to the parties, the arbitration portion of the procedure would allow the parties to present their case including the opportunity to provide any additional exhibits, evidence, and testimony. I provided the parties with one additional week in which to submit post hearing submissions. Both parties submitted materials before the October 5, 2011 deadline. The record was closed as of 5pm on October 5.

BACKGROUND

The Employer's mission is to protect public safety by ensuring that Federal offenders in its custody serve their criminal sentences in a facility that is safe, humane, cost-efficient and appropriately secure. FCI Estill is a medium security facility currently housing 1,500 male inmates. Another 300 men live in a minimum security Federal Prison Camp (FPC or Camp) that is adjacent to FCI Estill. Prisoners at the FCI are encouraged to participate in a range of

programs that have been proven to reduce recidivism and prepare them for a mainstream lifestyle and values once they are no longer in prison. The Union represents approximately 244 General Service (GS) and Wage Supervisor (WS) employees who, among other things, work as Correctional Officers, Facilities Department Supervisors, Unit Management employees, and in areas such as Education, Accounting, and Food Service. The parties are covered by a master collective bargaining agreement (MCBA) that expired on March 8, 2001; however, its provisions will remain in effect until a successor agreement is implemented.

The Facilities Department is responsible for maintaining the buildings and grounds encompassed within the FCI Estill complex. It is comprised of approximately 20 bargaining unit employees (BUEs) who report to two managers. The parties' CWS negotiations affect 14 BUEs - 13 WS and one GS employee. FCI Estill has two Electrical Worker Supervisors, two HVAC Equipment Mechanic Supervisors, six Maintenance Worker Supervisors, one Pipe Fitter, one Plumber and one Automotive Worker Supervisor. These employees are not supervisors within the meaning of § 7103 (a) (10) of the Statute. They are called supervisors, however, because they oversee the work of inmates assigned to projects within their area of mechanical expertise. Eight WS employees work at the FCI, five at the FPC. WS employees inhabit the trade specific positions, in grades WS-8 through 11. There is also one GS-7 Facilities Assistant (Secretary) who works at the FCI.[1/]

All 14 employees currently work Monday-Friday from 7 a.m. to 3:30 p.m. on a non-rotational basis. On September 14, 2010, the Union submitted a comprehensive proposal for the establishment of a 5-4/9 CWS for the five employees at the FPC and the nine at the FCI. Rather than engaging in the exchange of counters and follow-up proposals and counter-proposals, the parties worked off of the Union's initial proposal during their two face to face bargaining sessions. The first took place on December 7, 2010. The parties bargained most of the day, resolving eight issues and tabling seven others. Then they signed and dated a document titled "Facilities CWS/AWS Negotiations" that not only bound them to the agreements reached but also to a mutual understanding of the differences that remained. The parties met again on January 4, 2011. All but three issues were resolved. Again, they incorporated their agreements and disagreements in a document called "Facilities Compressed Work Schedules Negotiations."

ISSUES AT IMPASSE

The parties disagree on the following:

1/ There are seven Facilities Department BUEs that are not involved in the current CWS dispute. Five of them are Power House employees who already work a 3/4/4/3 CWS that commits employees to 12-hour rotational shifts. The remaining two are Electronics Technicians. Because they maintain and repair the Employer's alarms, cameras, radios, phones and walkie-talkies, etc., they are known also as Communications Technicians. Inmates are not allowed to assist Communication Technicians because of the sensitivity of their work. Accordingly, they are classified as GS rather than WS and are paid at the 11 level. They too work a 5-4/9 CWS which allows them to take either Monday or Friday off as their Regular Day Off (RDO).

1. Which days of the week employees will be allowed to schedule their RDOs;
2. How many employees can be on scheduled annual leave during any given calendar week; and
3. Whether employees on a 5-4/9 CWS should be required to revert to their previous 5/8 workweek during any pay period that includes a federal holiday.[2/]

1. REGULAR DAYS OFF

THE PARTIES' POSITIONS

The Union proposes that employees be allowed to take either Monday or Friday off as their RDO. The eight FCI WS employees would be evenly divided over a 2-week pay period. Using seniority to decide who gets first choice, two would be off each Monday and Friday of any given CWS pay period. The GS Facilities Assistant would be allowed to choose either Friday as his RDO. The five FPC employees would compete for the following schedule: One WS would be off on each Monday of the pay period; two would be off on the first Friday and one on the second.

The Union believes that its proposal on RDOs will maintain adequate levels of staffing at FCI Estill. The Union also believes that adding two to four additional employees (across FCI Estill) on a scheduled day off each week on either a Monday or a Friday will not jeopardize safe nor 'dangerously reduce' staffing levels.

The Employer maintains that it has no duty to bargain on this issue because proposals setting RDOs under a CWS "is clearly management's right." The Employer cites Article 5, Section b.1 of the parties' MCBA: "Section b. Nothing in this section shall preclude any agency and any labor organization from negotiating: 1. at the election of the Agency on the numbers, types, and grades of employees or positions assigned to any organization sub-division, work project, tour of duty, or the technology, methods, or means of performing work." Management also relies on Chapter 6, page 23, section 3 of the "Program Statement," 3000.02, which states: "In determining the schedules, chief executive officers have the authority to determine core hours (designated hours and days during which an employee must be present for work) based on the needs of the department/work unit" as additional basis for maintaining that they have no duty to bargain on this issue. On the merits of this issue, the Employer contends that, given the fact that FCI Estill is a prison facility, and given the nature of the work schedules already in place at other departments within the facility, the Union's proposal, if implemented, would leave staffing at dangerously low levels.

2/ During the mediation portion of the proceeding, the parties discussed two proposals which were raised by the Union but not agreed to during mediation. I have chosen not to address them in this Award. One concerned the changing of the daily shift starting and stopping times. The second was the framing of the CWS in terms of a pilot. The Panel only asserted jurisdiction over the three issues identified above and I have therefore confined my decision to those issues only.

DISCUSSION

On the issue of determining RDOs during a 5-4/9 CWS, this Arbitrator does not find any merit to the Employer's claim that it has no duty to bargain. I suspect that management is well aware of the applicable Federal Labor Relations Authority (FLRA) case law established in American Federation of Government Employees, Local 1934 and the Department of the Air Force, 3415 ABG, Lowry Air Force Base, 23 FLRA 872 (1986) (Lowry). In Lowry, the FLRA made it clear that Congress intended the use of CWS to be fully negotiable, subject only to the provisions of the Federal Employees Flexible and Compressed Work Schedules Act (the Act), 5 U.S.C. § 6120, *et seq*. Consequently, management rights provide no defense for an agency seeking to avoid negotiations over the implementation of a CWS schedule, which necessarily includes negotiations over RDOs. Moreover, Article 18, Section b. of the parties' MCBA unequivocally provides the right of facilities and their local unions to locally negotiate over CWS. Nor does the Employer's decision in this case not to allege that implementation of the Union's RDO proposal would cause an adverse agency impact under the Act insulate it from the FLRA's ruling in Lowry. Similarly, Management's final claim that its program statement, which assigns the right to determine work hours and workdays to chief executive officers, provides an additional basis for its jurisdictional position on this issue is also unavailing. It is well established that a collective bargaining agreement trumps an agency regulation where the two conflict. Finally, on the merits of this issue, data submitted by the parties on the number of employees with Fridays as an RDO is almost identical: roughly 58 out of 181. Management, however, fails to demonstrate how adding 2 or 3 employees to this number will dramatically impact the staffing or security at FCI Estill.

2. NUMBER OF EMPLOYEES ON SCHEDULED ANNUAL LEAVE

THE PARTIES' POSITIONS

The Employer currently allows four FCI Facilities employees to be on scheduled annual leave during any given 5-day workweek. Between October and November of each year, the eight WS employees and two Communications Technicians (10 altogether) compete for the weeks of their choice in the next calendar year. Recognizing that a 5-4/9 CWS will impact the number of employees available on any RDO, the Union proposes to reduce that number by one for a total of three. It has offered two options for doing so. Under Option 1, "[t]he ten (10) employees (WS and GS) would compete for three (3) authorized annual leave positions." Option 2 would separate the Communications Technicians from the Wage Supervisors for leave purposes: "The eight (8) WS pay grade employees would compete for two (2) authorized annual leave positions."

While Management joined the Union in attempting to resolve this issue in negotiations and mediation, in arbitration, management is taking the position that it has no duty to bargain on this issue because the matter is covered by the Article 19, section L (2) of the parties' MCBA, which states: "After considering the views and input of the Union, the Employer will determine the maximum number of employees that may be on scheduled annual leave during each one week period, and when scheduled annual leave may be curtailed because of training and/or other

causes, such as military leave. To the extent possible, such determination will be made and announced prior to setting up the annual leave schedule."

The Union believes that since Management voluntarily agreed to negotiate the annual leave positions as provided by 5 U.S.C. 7106 (b) (1), they in effect, waived the "covered by" argument. The Union also believes that the Agency established a past practice of allowing four or more employees to use schedule annual leave during each one week period, thereby further diluting the no duty-to-bargain claim that the Employer is asserting on this issue.

DISCUSSION

Despite the fact that the Employer would have agreed to allow at least three employees off on annual leave during each 1 week period of the year as part of an overall settlement of the parties' impasse, this Arbitrator believes that the Employer's claim that the matter is "covered by" the MCBA may have merit. While the Panel routinely initially accepts jurisdiction in cases where a "covered by" claim is asserted if, as here, there are other clearly negotiable issues in dispute, the specific FLRA decision that provides the Panel and interest arbitrators with guidance in these kinds of cases is U.S. Department of Health & Human Services, Social Security Administration, Baltimore, Maryland and AFGE, National Council of Social Security Administration Field Office Locals, Council 220, 47 FLRA 1004, 1013, 1015-19 (1993) (SSA).[3/] In light of the FLRA's guidance in SSA, and given the possibility that the covered by argument may have merit, I have little choice but to decline to assert jurisdiction on this issue in arbitration as the Employer's duty to bargain over the Union's proposal must be addressed in another forum.

While the Union's observation that Management freely elected to negotiate over the number of annual leave positions is accurate, I suspect that it is well aware that jurisdictional questions can be raised during any phase of the process. I also suspect that it is well aware that its claim of a past practice in regard to the number of individuals that the Agency has allegedly allowed to be on annual leave during any 1 week period for each of the past few years constitutes a past practice is also not a matter for the Panel to decide, but rather needs to be raised in another forum.

3/ In SSA, the FLRA adopted the "covered by" doctrine. The doctrine has two prongs. Under the first prong, if a union seeks to bargain over a matter that is expressly addressed by the terms of the parties' CBA, then an employer may properly refuse to bargain over the matter. The second prong provides that, if a matter is not expressly addressed by the terms of the parties' CBA, but is nonetheless inseparably bound up with and, thus, an aspect of a subject covered by the terms of the agreement, then an employer also may properly refuse to bargain over the matter.

3. REVERTING TO A 5/8 WORKWEEK DURING HOLIDAY WEEKS

POSITION OF THE PARTIES

On this issue, the Union opposes the Employer's proposal that employees on a 5-4/9 CWS revert to their current 5/8 schedules whenever a pay period includes a federal holiday. The Employer maintains that failure of the Facilities Department to revert to a normal 5/8 workweek schedule during a holiday week would result in a serious loss of productivity and damage the internal security of FCI Estill. It asserts that the net effect of maintaining the 5-4/9 CWS during a holiday week would be to reduce the normal 2-week period from 10 workdays to 8 workdays and that, annually this would result in a loss of 1170 work hours with an estimated cost of $37,440. The Employer argues that the mission of the Facilities Department is unique, as is the skilled trades nature of the work that these bargaining unit employees perform. While the Employer concedes that implementation of this provision would result in the Facilities Department being the only group with a CWS that reverts back to the 8-hour tour of duty during a holiday week, it asserts that it intends to address the issue in negotiations with all of the other work groups at FCI Estill.

The Union regards the Employer's claims of loss of productivity as speculative and without supporting evidence. It views the Employer's claims of inadequate staffing if a normal workweek is not adopted during a holiday week as equally speculative. It points out that if the Employer's proposal is adopted, the net effect will be to reduce the amount of time that employees will actually be on a CWS to only 13-16 weeks per year due to the parties' mutual agreement to have employees revert to a 5/8 work week during weeks of training and other specific situations. Finally, the Union also points out that bargaining unit employees in the Facilities Department would be the only ones at Estill FCI to have such a provision in their CWS agreement.

DISCUSSION

I would begin by noting that the MCBA allows the parties to negotiate this issue at the local level. Secondly, the Employer's assertions that FCI Estill would be harmed are proffered without any evidence or documentation to support them. It alleges harm but offers very little in the way of proof to support its position. The Union's claim that there are no other CWSs at FCI Estill that require the employees to revert back to a 5 day per week, 8 hour per day work schedule is not disputed by the Employer. The Employer's position that it intends to address this issue in negotiations with other work units is speculative and, again, offered without any documentation about harm caused, lost productivity, or other negative impacts suffered in other work units at FCI Estill. Similarly, the Employer does not seem to acknowledge or take into account the Union's agreement to revert back to a standard work week schedule during training, etc.

DECISION & ORDER

In reaching this decision, I have considered the entire record in this matter, including the parties' final statements of position and post-hearing submissions.

Pursuant to the authority vested in me by the Federal Service Impasses Panel under the Federal Labor Management Relations Statute, 5 U.S.C. § 7119, I hereby order the parties to resolve their dispute in this matter as follows:

1. **Regular days off:** The parties will implement the 5-4/9 CWS no later than 30 days after the date of this decision. Affected bargaining unit employees in the Facilities Department will be allowed either Mondays or Fridays as their RDO, with the employee group evenly split between the regular days off to minimize the disruption of service to FCI Estill.

2. **Number of employees allowed on annual leave**: It appears that the Employer has raised a reasonable doubt as to the negotiability of this issue based upon the possibility that it is "covered by" the parties' MCBA. Resolution of this matter must be addressed in another forum. I have declined to rule on this issue for that reason.

3. **Requirement that employees revert to 8-hour shifts during a holiday week:** The Employer's proposal will be withdrawn; no such requirement will be included in the parties 5-4/9 CWS.

Edward F. Hartfield
Arbitrator

October 21, 2011
St. Clair Shores, Michigan