ARBITRATION DECISION AND AWARD

IN THE MATTER BETWEEN:

The U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBOP), Federal Correctional Complex (FCC), Butner, North Carolina

"Agency/Employer"

and

The American Federation of Government Employees (AFGE), AFL-CIO, Council of Prison Locals 33, Local 408, and Mr. Anthony Little, President

"Union/Grievant"

Federal Mediation and Conciliation Service Case Number: 14-50738-8

Issue(s):

Is the subject grievance barred by a previously filed ULP and/or procedurally flawed and, therefore not arbitrable? If not...

Did the Agency violate the provisions of Federal law, regulations, and/or the parties' Master Agreement (MA) when it decided a memorandum of understanding (MOU) between it and Local 408 was ineffective and would no longer be honored; then, implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696; and, in so doing, skipped over bargaining unit employees represented by Local 408 when overtime was offered and assigned; thereby, adversely affecting those bargaining unit employees represented by Local 408? If so, what should the remedy be?

Date Decision Issued: May 31, 2016

APPEARANCES:

For the Agency/Employer

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For the Union/Grievant

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BEFORE: William A. Dealy, Jr., Arbitrator

WITNESSES TESTIFYING:

Called by the Agency/Employer

Mr. Jonathan Hemingway
Mr. Richard Kelly Smith

Called by the Union/Grievant

Mr. Morris Dillard
Mr. Christopher Robinson

Mr. Anthony Little
Mr. Shelli Anderson
Mr. Eric Young

Arbitration Decision and Award Sections

I. Background.

The record shows that on August 12, 2013, Mr. Anthony Little, President of American Federation of Government Employees (AFGE), Local 408, became aware that bargaining unit members represented by his local were being adversely affected by new outside hospital overtime procedures implemented by management at the Federal Correctional Complex (FCC), Butner, North Carolina. Accordingly, on August 13, 2013, Mr. Little made a written request to FCC Butner's Complex Warden, Mr. Craig Apker, in an attempt at informal resolution of the problem.[1] With no resolution, on September 11, 2013, Mr. Little filed a formal grievance on behalf of all bargaining unit members represented by Local 408.[2] The grievance claimed FCC Butner, through the action of Complex Warden Apker, violated Title 5, USC, 7116; the parties' Master Agreement, Articles six and eighteen; as well as, the Back Pay Act, 5 USC 5596 – outlined specifics regarding the alleged violations, beginning on or about August 20, 2013, and continuing since that date – and, requested a list of remedies. By letter dated September 20, 2013, the Agency, through Federal Bureau of Prison's Mid-Atlantic Regional Director, Mr. C. Eichenlaub, denied the grievance[3]; and, on September 25, 2013, AFGE, Local 408 invoked its right to arbitration.[4]

II. Procedural Matters.

By letter dated January 5, 2015, the Federal Mediation and Conciliation Service (FMCS) informed the undersigned that the parties identified above had selected him, and FMCS was appointing him, to hear and decide an overtime grievance identified as FMCS case number 14-50738-8.[5]

Following a series of email and telephonic communications; by letters dated January 23, 2015, the Arbitrator informed the parties that he accepted their appointment, outlined the basic procedures to be followed, confirmed and explained his per diem rates and charge policies, and offered three periods of time that he was available to hear the matter – April 20-24, June 1-5, and June 15-19, 2015. Through additional email communications with the parties it was agreed that the matter could probably be heard in three-days of hearings to be conducted August 4-6, 2015, at the Butner, Federal Correctional Complex, Old NC 74, Butner, North Carolina 27509. Accordingly, an administrative conference (AC) with the parties was scheduled to convene at 8:30AM, Tuesday, August 4th with the

hearing to commence immediately at the conclusion of the administrative conference. The hearing scheduling letter also requested that the parties provide the Arbitrator with a copy of the parties' collective bargaining agreement together with any amendments and/or memorandums of understanding, as well as, the grievance file. The parties were also provided an opportunity to file pre-hearing briefs, and informed when they should exchange witness lists.

At 8:30AM, Tuesday, August 4th the Arbitrator held an administrative conference with the parties to discuss, among other things, the purpose of the hearing; hearing procedures, including attendance and the handling of witnesses; the recording of the hearing; and any stipulations reached. As to the parties' collective bargaining agreement (CBA), at the beginning of the administrative conference the Arbitrator acknowledged receipt of the Union's pre-hearing submissions, including an electronic copy of an untitled, unsigned, undated forty-eight page document identified as the parties' Master Labor Agreement (MLA) [Hereafter referred to as simply the Master Agreement or MA]. Then, the parties provided a signed/dated hard copy of a document also identified as the Master Agreement (MA) between the U.S. Department of Justice (DOJ), Federal Bureau of Prisons (FBOP) and the American Federation of Government Employees (AFGE), AFL-CIO, Council of Prison Locals, executed February 6, 1998, for the period March 9, 1998, through March 8, 2001.[6] A cursory review of both documents revealed minor differences between the document provided by the Union in its pre-hearing submissions and the hard copy document provided at the administrative conference. Accordingly, the parties stipulated that the hard copy document provided was a true and official copy of the parties' MA that was in effect during the total period of time associated with the subject grievance; and, that the agreement had been properly extended since close of the initial period of effect on March 8, 2001, until the execution of the parties' current MA on May 29, 2014.[7]

Article 32 of the MA addresses arbitration, and provides in part as follows, in:

- Sections a-c, how arbitration is to be invoked and the arbitrator selected;
- Section d, that the arbitrator's fees and all expenses of the arbitration (with exceptions as noted) are to be borne equally by the parties and that the Employer is to determine the location of the hearing;
- Section e, that the hearing will be held during regular day shift hours, the grievant's witnesses and representatives will be on official time, the Union is entitled to the same number of representatives as the Agency, and the Union is entitled to have one observer;
- Section f, how and when witness lists are to be exchanged;
- Section g, that the arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty calendar days after conclusion of the hearing, unless the parties mutually agree to extend the time limit;
- Section h, that the arbitrator's award shall be binding on the parties and the arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of the agreement or published FBOP policies and regulations; and
- Section i, that a verbatim transcript of the hearing will be made when requested by either party and how the costs are to be handled.

Otherwise, the MA is silent regarding hearing procedures and the Arbitrator's powers. Accordingly, when asked if the parties were, in any way, restricting the Arbitrator's powers to determine and define the issue or issues presented in the hearing; and, through the evidence presented at hearing, to decide the matter, the Counsels for both parties said they were not restricting the Arbitrator in any way.[8] With regard to attendance at the hearing, the parties agreed that witnesses would not be allowed to be in the hearing, except when testifying; and, that each side would be permitted to have one technical assistant attend the hearing.[9] In accordance with the MA, the parties agreed and arranged for a verbatim transcript of the hearing. After discussing streamlining measures, rules of

evidence, post-hearing briefs, and when the parties could expect the written decision and award[10]; and determining that no other matters needed to be covered, the administrative conference was adjourned at 9:10AM, and the hearing on the matter convened at 9:25AM, Tuesday, August 4, 2015.

At the beginning of the hearing, the Arbitrator asked both parties to introduce themselves and their technical representatives; explained the various exhibit lists being maintained[11], and entered into the record the initial three (3) exhibits identified as Arbitrator/Joint exhibits; explained all previous communications with the parties, including any dealings with the parties during his thirty-plus years Federal service; and, asked the parties if they had any concerns or issues regarding his ability to conduct a fair and impartial hearing on the matter before him – To which both parties answered they had no objection.[12] Following opening statements the hearing then proceeded in an orderly manner.[13] A total of eight witnesses testified under oath as administered by the Arbitrator[14].

The Agency's advocate and Counsel, as well as, the Grievant's advocate and Counsel, fully and fairly represented their respective party. While the hearing record was open, and/or subsequently as requested by the Arbitrator, a total of ten (10) Arbitrator/Joint exhibits, comprising over 1,004 pages of documentation were offered and accepted into the record; six (6) Agency/Employer exhibits comprising over 730 pages of documentation offered and accepted; and thirty-eight (38) Union/Grievant exhibits comprising over 1,466 pages of documentation offered and accepted. As discussed during the administrative conference, at the close of testimony the Arbitrator requested post-hearing briefs from both sides. Both Counsels reserved their closing for their post-hearing brief. In closing both parties were asked if they felt they had the opportunity to present their case as they wanted to present it and had presented all the evidence they wanted to present; and both Counsels answered in the affirmative.[15] Following receipt of the post-hearing briefs and rebuttal briefs, the hearing record was closed at 8:00AM, Thursday, April 7, 2016.

Accordingly, the undersigned Arbitrator acknowledges the position of the parties; that the matter is properly before him in accordance with the appropriate provisions of law, regulations, and the parties' MA; that he is solely responsible to hear and determine the issues; and to render a written decision and award, in accordance with the parties' MA, FMCS policies, and State and Federal law.

To this end, the undersigned has thoroughly reviewed the evidence presented in pre-hearing submissions, through testimony[16] and exhibits offered/accepted at hearing; and, through post-hearing briefs, rebuttals, and clarifying information submitted by the parties. The Arbitrator does not feel compelled to address all of the numerous arguments and issues raised by the advocates. However, please do not interpret this to mean that the Arbitrator has not read and reread the parties' briefs, rebuttals, and citations included in the some 3,142 pages of documentation submitted as evidence; as well as, thoroughly read and studied some 682 pages of testimony presented in four days of hearings; and carefully considered all arguments by the advocates. Rather, the Arbitrator elects to address only those elements that have a significant impact on his decision-making process. The Arbitrator, as a general rule, will not comment on matters that he believes are irrelevant, superfluous, redundant, or rendered moot by his decision.

III. Statement of the Issue(s).

Article 32, Section a, of the parties' MA provides, in part;

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

A review of the subject grievance clearly shows that it was filed by Mr. Little, in his capacity as President of AFGE, Local 408, on behalf of all bargaining unit employees that his Local represents. Furthermore, the grievance plainly provides that the matter grieved involved acts or actions of the Complex Warden at the Butner FCC relating to a

change in "Overtime Hiring Procedures" being used to grant and assign overtime – Which, in the view of the Local, violated Federal law and the parties' Master Agreement; and, resulted in bargaining unit employees, represented by Local 408, being skipped over on overtime rosters and not assigned/granted overtime; therefore, being treated unfairly, inequitable, and adversely affected.[17]

In its pre-hearing brief the Union simply stated that the allegations in the grievance include unequitable distribution of overtime, violation of a Memorandum of Understanding (MOU) executed in February 2013, and violation of Article 18, Section p, of the Master Agreement.[18] Also, during the administrative conference with the parties prior to the hearing, the Arbitrator pointed out that review of pre-hearing submissions indicated that the purpose of the scheduled hearing was to determine if the employer/agency violated the provisions of the applicable CBA, it's supplements and memorandums of understanding when it failed to honor and comply with a February 2013 Federal Labor Relations Authority approved settlement agreement and memorandum of understanding between the Council of Prison Locals, Local 408, and the Butner Federal Correctional Complex regarding overtime procedures; and both parties concurred with that determination.[19] Additionally, neither party offered in pre-hearing submissions or at the administrative conference a stipulated statement of the issue or issues to be addressed at the hearing.

However, at the administrative conference the Agency did raise threshold issues regarding the arbitrability of the grievance; maintaining that the grievance was precluded by a previously filed unfair labor practice (ULP), was untimely filed, and filed with the wrong Agency official.[20]

In their post-hearing briefs, both parties offered their statement of the issues to be heard and decided. The Agency provided that the issues are:

(1) Did the Union's previously filed unfair labor practice (ULP)[21] bar the instant grievance?

(2) Was the Union's grievance untimely filed?

(3) Was the Union's grievance filed with the wrong office?

(4) Did management violate the Master Agreement, Article 18, Section p1? And, if so, what should be the remedy?

The Union provided that the issues are:

(1) Whether the grievance was untimely filed?

(2) Whether the filing of the unfair labor practice (ULP) bars Local 408 to pursue the captioned grievance?

(3) Whether the grievance was erroneously filed with the Regional Director?

(4) Whether the Agency violated Article 18 (p) of the MA when it implemented the new MOU between the Agency and Locals 405 and 3696 allowing the other Locals to receive overtime without giving first consideration to employees of Local 408?

(5) Whether the Agency violated the MA when it granted overtime to non-bargaining unit GS-12 employees?

(6) Whether the Agency owes back pay to bargaining unit employees represented by Local 408 for skipping over them when assigning overtime as a result of the MOU entered with Locals 405 and 3696? And,

(7) Whether the Agency should be ordered to pay attorney's fees under the Back Pay Act?

Since the parties failed to submit a joint stipulated statement of the issue(s) to be heard and decided, in accordance with the provisions of Article 32, Section a of the parties' agreement, the Arbitrator describes the issue(s) to be heard and decided as follows:

Is the subject grievance barred by a previously filed ULP and/or procedurally flawed and, therefore, not arbitrable? If not...

Did the Agency violate the provisions of Federal law, regulations, and/or the parties' Master Agreement (MA) when it decided a memorandum of understanding (MOU) between it and Local 408 was ineffective and would no longer be honored; then, implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696; and, in so doing, skipped over bargaining unit employees represented by Local 408 when overtime was offered and assigned; thereby, adversely affecting bargaining unit employees represented by Local 408? If so, what should the remedy be?

IV. Relevant Provisions of Federal law, regulations, and/or the parties' Master Agreement.

The Union maintains that the pertinent provisions of Federal Law are Title 5 USC 7114 and 7116(d); and 5 USC 5596 – And, the Preamble; as well as, Article 1, Sections a and b; Article 2, Section a; Article 4, Sections a and b; Article 7, Sections a, b, c, d and k; Article 9, Section a 4; Article 18, Section p 1 and 2; and, Article 31, Section d and f 1, 2, and 3 as being the relevant provisions of the Master Agreement. The Agency's brief did not cite any specific provisions of Federal law and regulations, but did specify that the following provisions of the Master Agreement were relevant – Article 1, Section a and c; Article 3, Section a; Article 5, Section a; Article 9; Article 18; Section p 1; Article 31, Section d, e, and f 1; and Article 32, Section a and h.

The Arbitrator views all applicable Federal law and regulations relevant, especially 5 USC 71 and flowing government-wide regulations. While both parties have pointed the Arbitrator to several specific provisions of the MA that each view as particularly relevant, it is interesting they agree on only four specific provisions – Article 1-Recognition, Section a; Article 9-Negotiations at the Local Level, Section a; Article 18-Hours of Work, Section p; and Article 31-Grelvance Procedures, Sections d and f 1.

The Arbitrator, however, sees the parties' Master Agreement in total – that is all provisions within the four-corners of the base document; as well as, any supplemental agreements and memorandums of understanding, as relevant. With the following parts requiring particular attention – The Preamble; Article 1-Recognition; Article 2-Joint Labor Management Relations; Article 3-Governing Regulations; Article 4-Relationship of this Agreement to Bureau Policies, Regulations and Practices; Article 5-Rights of the Employer; Article 7-Rights of the Union; Article 9-Negotiations at the Local Level; Article 18-Hours of Work; Article 31-Grievance Procedure; Article 32-Arbitration; Article 42-Effective Date and Duration of this Agreement; and Appendix A. Nevertheless, while some Arbitrators make a practice of documenting the specifics of each agreement provision they find relevant in the body of their decision/award; the undersigned will detail only those specific provisions and wording he feels are needed to support his analysis, findings, and decision; and, that detail will normally be placed in the endnotes.

V. Summary of the Parties' Position(s).

A. The Agency/Employer.

Threshold Challenges That The Subject Grievance Is Not Arbitrable.

The essence of the Agency's position, as expressed initially in the grievance decision issued September 20, 2013; during the AC and hearing; and, in post-hearing submissions, is that the subject grievance is not arbitrable. While the Agency's final decision denied the grievance because it was filed with the wrong office; during the AC, at hearing, and in post-hearing submissions, the Agency also claimed the grievance is barred because it was untimely and the Union filed an earlier Unfair Labor Practice (ULP) charge with the Federal Labor Relations Authority (FLRA) "over the same issue."

► As for the contention that the grievance is barred because the Union filed an earlier ULP, the Agency argues...

- that the Union submitted a ULP on July 25, 2013, charging that the Agency's use of a new MOU on overtime procedures was improper;
- then on September 11, 2013, filed the subject grievance; and

- that the "issue in the ULP is in direct relation to the issue in the union's written grievance and advanced in the arbitration hearing." [Emphasis added]

Citing 5 USC 7121(d) which provides that – issues which may be raised under a negotiated grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or as an unfair labor practice, but not under both procedures; the Agency points out that the Federal Court reviewed the matter of a grievance being barred due to the filing of an unfair labor practice and ruled that a grievance is barred when (1) the same issue is the subject of a grievance and of the ULP charge, (2) that issue was raised in a prior ULP charge, and (3) the decision to file the ULP charge was within the discretion of the aggrieved party.[22] Further, the Agency maintains that the FLRA has consistently held, "that an issue is raised within the meaning of section 7116(d) of the Statute at the time of the filing of the grievance or a ULP charge, even if the grievance or the ULP charge is not adjudicated on the merits."[23] Accordingly, the Agency maintains that, based on FLRA case law, the subject grievance is barred by the filing of the earlier ULP; and must be dismissed.

If, however, the Arbitrator does not find the grievance is barred by the earlier filed ULP, the Agency argues the grievance is procedurally defective because it was not filed in a timely manner.

► As for the contention that the grievance is procedurally flawed because it was not filed in a timely manner, the Agency contends that...

The parties' Master Agreement (MA), Article 31, Section e[24], allows the Arbitrator to decide the timeless of the grievance if it is raised as a threshold issue. The Agency reads this provision as making "it very clear that a party does not waive an untimeliness issue during the processing of the grievance, even if that party does not inform the other party of the untimeliness issue" and, that "the negotiated language allows the issue of timeliness to be raised at any time up to the time of a hearing before an Arbitrator." On this point, the Agency argues that the courts have said, "A knowing plaintiff has an obligation to file promptly or lose his claim"[25]; and that *Elkouri & Elkouri* provides...

> If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed...Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear meaning...Arbitrators apply the principle that parties to a contract are charged with full knowledge of its provisions and of the significance of its language...Thus, the clear meaning of language may be enforced even though the results are harsh or contrary to the original expectations of one of the parties...[and that]...Arbitrators expect the parties to pay due respect to the grievance procedure, not only by using it, but also by observing its formal requirements.[26]

Noting that the MA, Article 31, Section d, provides that "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence"; the Agency argues that since the Union was "aware of the presumed violation on July 3, 2013, that the grievance should have been filed within forty calendar days from that date. Pointing out that, the grievance form filed by the Union on September 11, 2013, provided that the violation complained of occurred on August 20, 2013[27]; and, that the Union's ULP filed with the FLRA on July 25, 2013[28], provided that the presumed Agency violation occurred on July 3, 2013 – the Agency argues that the Union was clearly aware the presumed violation occurred on July 3rd; therefore, the grievance should have been filed within forty calendar days of that date; or, on or about, August 12, 2013, some thirty days before it was actually filed.

If, however, the Arbitrator does not find the grievance was untimely filed, the Agency then argues that the grievance is procedurally defective because it was filed with the wrong office.

► As to the contention that the grievance is procedurally flawed because it was filed with the wrong office...

On this point, the Agency maintains that the subject grievance should have been filed with the Complex Warden and not with the Regional Director. Here the Agency points out that Article 31, Section f, of the MA provides, in part;

> "...when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over....[Emphasis added]"

Relying on the testimony of the Complex's Human Resources Manager[29]; the Agency contends that the issue being grieved involved the scheduling and hiring of overtime; and that such assignments are done by the Lieutenants and/or the Captains of the various institutions within the Complex – Therefore, since the Warden has disciplinary authority over the subordinate supervisors/managers at the Complex, the grievance should have been filed with the Warden.

Finally, arguing that the technical requirements for filing a grievance were negotiated by the Union; the Agency, maintains the Union should be expected to comply with the technical aspects of the negotiated procedure. The grievance was barred by the filing of a prior ULP; was untimely filed; and, filed with the wrong office; therefore, it should not be arbitrable. To support these conclusions the Agency cites eleven (11) arbitration decisions/awards involving the BOP and AFGE where the arbitrator denied the grievance for lack of procedural arbitrability.[30]

Position on the Merits of the Grievance.

The cornerstones of the Agency's position on the merits of this case are:

1. That the parties' Master Agreement is a "national collective bargaining agreement" which covers all bargaining unit employees throughout the Agency, including those at the Butner Federal Correctional Complex, regardless of any AFGE Local affiliation.

2. That the MA, in the Preamble and Article 1, Section c, clearly defines "the Union" as the Council of Prison Locals; and, identifies the Council as the exclusive representative of all bargaining unit employees, not the individual AFGE Locals.

3. That the duty to bargain resides only at the level of the exclusive representative; and, absent an agreement between the parties providing for local negotiations or other delegation of authority, there is no duty to bargain below the level of the exclusive representative.[31]

4. That various provisions in the MA (including Article 18, Section p 1, the primary provision identified in the subject grievance as having been violated) are the product of impact and implementation (I&I) bargaining at the national level by the exclusive representative; as such, the MA has established who is eligible for overtime within the Agency, regardless of location; and, in accordance with the "cover by" doctrine, management does not have to bargain over matters already contained in or covered by the MA.[32] Furthermore, citing excerpts from a previous Bureau of Prisons arbitration decisions[33], management's actions in assigning overtime are covered by the "reserved rights" doctrine.

Noting that, Article 18, Section p 1, of the parties' Master Agreement provides...

> "...*when management determines that it is necessary to pay overtime for positions/assignments normally filled by bargaining unit employees, qualified employees in the bargaining unit will receive first consideration for these assignments, which will be distributed and rotated equitably among bargaining unit employees...*"

The Agency argues that the a key problem with the subject case is that the Union, AFGE, has established three different locals at the Butner Complex; Locals 405, 408, and 3696; and, that Local 408 believes Article 18, Section p 1, of the MA limits assignment of outside hospital overtime to members of Local 408 before members of the other locals are assigned such overtime. Whereas, management believes that the provision applies to all qualified bargaining unit employees regardless of their local membership designation. Moreover, the Agency further argues that this dispute is not just between Local 408 and management, but also between Local 408 and the two other AFGE Locals at FCC Butner, Local 405 and 3696.

For the Agency, Local 408's position that – each respective local represents its own bargaining unit; and, as such, when management determines that it is necessary to pay overtime for positions/assignments normally filled by Local 408's bargaining unit employees, Local 408's bargaining unit employees should receive consideration for those assignments before other Local's BUEs – ignores the fact that all bargaining unit employees at Butner are covered by the MA; are in the same national bargaining unit; and, that bargaining unit is represented by the Council of Prison Locals.

Turning to the wording of Article 18, Section p 1, which starts off, "*When management determines that it is necessary to pay overtime for positions/assignments normally filled by the bargaining unit employees...*"; the Agency maintains that this wording does not limit the positions/assignments to one prison, or to one department, or to one local since the Master Agreement is a national collective bargaining agreement.[34] Therefore, it is argued, anytime management decides to use overtime to fill a position/assignment that normally would be filled with a bargaining unit employee, management must follow the subsequent requirements as detailed further in Section p 1.

Moving to the next portion of Article 18, Section p 1, which reads "*...qualified employees in the bargaining unit will receive first consideration for these overtime assignments....*" Then, noting that "qualified bargaining unit employees" are to receive first consideration; the Agency claims that the term "qualified" does not pertain to local union membership; but rather, to the qualifications needed to perform the specific position/assignment. For example, the Agency argues that in the subject case, the overtime in question pertained to those assignments where inmates had to be taken out of the prison facility and placed in a community hospital in order to receive appropriate medical care. Whenever, this happens, the Agency contends that, the BOP must have employees provide security and supervision over these inmates; and in order for any BOP employee to escort an inmate out of the secure confines of the prison, that employee must have received and passed specialized training, known as Basic Prisoner Transport (BPT) certification. Here, the Agency points out that any BOP employee can receive this certification, regardless of their position – A BOP teacher could have this certification, a BOP cook could have this certification, a BOP correctional officer could have this certification; anyone, from any department, could have this certification. Additionally, non-bargaining unit employees, supervisors, and managers can also attend this training and receive BPT certification.

Furthermore, management must ensure the best possible security and safety to the public, the employees, and the inmates. Noting that the work environment of a correctional facility is very different from most other employment situations, the Agency points out that, the Supreme Court has addressed this fact and found that prison administrators are entitled to more deference on the issue of internal security.[35] Also, the Agency maintains that the Federal Labor Relations Authority (FLRA or Authority) has also agreed with this judgment providing that "A Federal correctional facility has special security concerns which may not be present at other locations."[36]

Accordingly, the Agency argues, if management is going to fill an outside hospital assignment with overtime, only those employees who have the BPT certification are "qualified" to work the overtime assignment. However, based on this portion of the provision, BPT certified bargaining unit employees would receive first consideration before BPT certified non-bargaining unit employees could receive consideration.

So, according to the Agency the section which reads, "...bargaining unit employees receive first consideration" is based upon the distinction between qualified bargaining unit employees and qualified non-bargaining unit employees; not the differences in AFGE Local affiliation. If that were the case, the Agency argues, there should be some wording in the provision that identifies it must be by individual AFGE Local. However, the Agency points out that the term "Local" is nowhere to be found in Article 18, Section p 1.

Turning to the last portion of Article 18, Section p 1's wording "*...which will be distributed and rotated equitably among bargaining unit employees;*" the Agency notes that "nowhere in this language does it state this is done by individual local union designation." For the Agency, since the wording of Section p 1, does not designate by local union, or any order for that matter, it is clear that the overtime opportunities are among all bargaining unit employees; regardless of what department they work in, and regardless of individual local union designation.

According to the Agency, Article 18, Section p 1's provisions, as negotiated by the Council of Prison Locals, require that an employee be qualified for the assignment and that bargaining unit employees receive first consideration over non-bargaining unit employees. Therefore, as long as a Bureau of Prison's bargaining unit employee is qualified to work a particular overtime assignment, then he or she is allowed to be considered along with <u>all</u> other bargaining unit employees, with such assignments to be rotated equitably among <u>all</u> other bargaining unit employees. The determination of who receives first consideration (bargaining unit over non-bargaining unit) and who is eligible for bargaining unit overtime (qualified bargaining unit employees over non-qualified) is already covered by the Master Agreement; and, <u>the local institution has no duty to bargain over these aspects</u>. [Emphasis added]

Throughout its arguments on the merits of the subject grievance the Agency has alluded that the Union's position on assignment of overtime may someway infringe on management's rights under 5 USC 7106(a), noting the FLRA has held that: the decision whether or not to fill vacant positions is encompassed within an agency's right to assign

employees under Section 7106(a)(2)(A) of the Statute[37]; proposals requiring an agency to fill vacancies interferes with management's rights under Section 7106(a) of the Statute[38]; the right to assign work under 5 USC 7106(a)(2)(B) encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned[39], as well as, the right to assign overtime and to determine when the overtime will be performed[40]; and, proposals that would require management to assign overtime duty to employees when it would otherwise choose to terminate their tours of duty are nonnegotiable.[41]

The Agency also noted that the FLRA has stated an agency has the right to determine the qualification of employees assigned to jobs, and that right cannot be infringed through interpretation of a contract by an Arbitrator. On this point the Agency cites *VAMC, Togus and AFGE Local 2610,* 17 FLRA 963, 964 (1985), where FLRA reviewed an arbitration award where the arbitrator held that the agency violated the contract for equitable distribution of overtime assignments – The Arbitrator found that the agency had been detailing an employee to a job that provided some overtime and then the agency stopped the detail because the employee was not qualified to perform the work. The FLRA set the award aside stating that it is management's right to determine the necessary qualifications for the job. In another case, the FLRA stated that an Arbitrator could not compel management to fill positions with individual grievants who contended that they met the agency qualification requirements; finding that the award prevented the agency from applying its interpretation to qualification standards and thereby denied management its right to make selections in filling positions under 5 USC §7106(a)(2)(c).[42]

The Agency further cautions, that arbitrators should not substitute their judgment over management's decisions; unless it can be shown that management abused their authority. Citing *Elkouri* the Agency maintains that many arbitrators have recognized that except as restricted by the agreement the right to schedule work remains with management. According to the Agency, to conclude that management must fill outside hospital posts with employees from only one local union at FCC Butner would be an abrogation of management's rights; and that the language in Articles 5, 9 and 18 would be meaningless since the Master Agreement pertains to all bargaining unit employees in the BOP. Furthermore, the Agency argues that an arbitrator has already defined Article 18, Section p's, provision for FCC Butner – Finding that bargaining unit employees from all the local unions at FCC Butner had to be considered together in granting overtime opportunities; moreover, that decision was upheld by the FLRA.[43] Again, the Article 18, Section p., provision does not state that management must use qualified bargaining unit employees from a particular local union first.

In conclusion, the Agency argues, that the Union's previously filed ULP bars the instant grievance and, therefore should be dismissed. If not, the Union's untimely filing of the grievance and/or filing the grievance with the wrong office violates the negotiated provisions of the Master Agreement and must be dismissed. As to the merits, the Agency maintains that the Union failed to meet its burden; that the wording of the relevant Master Agreement provisions are clear and concise; furthermore, a prior Arbitration decision and FLRA ruling supports the Agency's arguments in this case – Therefore, the Agency respectfully requests that the grievance be denied.

B. The Union/Grievant.

Threshold Challenges That The Subject Grievance Is Not Arbitrable.

The Union acknowledges that the Agency's final decision on the subject grievance, denying it because it was filed with the wrong office, constituted a threshold challenge. However, the Union asked that the Arbitrator take note that the Agency's further threshold challenges – That the grievance is barred because of an earlier filed unfair labor practice, and/or was untimely were never raised during the processing of the grievance; and were not raised by the Agency until at the administrative conference with the Arbitrator. Noting that the parties' Master Agreement, in Article 31, Section e, only provides that "the arbitrator will decide timeliness if raised as a threshold issue"; and that the MA is otherwise silent on the raising of procedural, or any other, arbitrability questions, as well as, an arbitrator's authority to address such issues; the Union questioned if it should have been forewarned of such challenges.

Nevertheless, like the Agency, the Union reminds the Arbitrator that he is bound by the four corners of the parties' Master Agreement. Noting that Section 32, Section h, in part provides – "The Arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: 1. This Agreement or 2. Published Federal Bureau of Prisons policies and regulations." – The Union argues that the Agency is raising threshold issues not contemplated in the MA; that the MA only addresses threshold issues in one place and that is, as noted above, Article 31, Section e, regarding the threshold issue of "timeliness."

▶ As for the Agency's contention that the grievance is barred because the Union filed an earlier ULP, the Union argues...

- that the FLRA has found for a grievance to be barred from consideration under Section 7116(d) by an earlier-filed ULP charge;
  - the issue that is the subject matter of the grievance must be the same as the issue that is the subject matter of the ULP;
  - such issue must have been earlier raised under the ULP procedures; and
  - the selection of the ULP procedures must have been at the discretion of the aggrieved party.[44]

In determining whether a grievance and a ULP charge involve the same issue, the Union notes that FLRA examines whether the ULP charge and the grievance arose from the same set of factual circumstances and whether the legal theories advanced in support of the ULP charge and the grievance are substantially similar.[45] If the issue raised in the ULP is not the same issue addressed in the grievance, then the matter is adequately brought before an Arbitrator and the grievance is not barred by the prior filing of an ULP. Similarly, if the legal theory advanced in the ULP is not the same as that advanced in the grievance, then the grievance is not barred and the matter is properly before the Arbitrator.

The Union notes that two ULPs were filed by AFGE Local 408 prior to the filing of the subject grievance. The first, filed on May 18, 2012, concerned a MOU Local 408 maintained was agreed to and signed by its President and the Complex Warden[46] on or about March 12, 2012, addressing the issue of overtime hiring procedures and utilization of the Correctional Services Roster program in the Federal Medical Center (FMC) and Federal Correctional Institution-2 (FCI-2). While being assured the MOU was in effect, Local 408 was then informed that, as a formality, the Warden of Federal Correctional Institution-1 (FCI-1) and the Low Security Correctional Institution (LSCI); as well as, the Warden of FCI-2, would have to also sign the MOU. On the same day, March 12, 2012, the Warden of FCI-1 and the LSCI, called for all three Unions at Butner, Local 405, Local 408, and Local 3696, to begin negotiations for a "One complex computerized program." Having not received a finalized signed copy of the MOU, on March 16, 2012, at the negotiations for the one-complex computerized program, Local 408 asked that it be provided a copy of the finalized MOU for its overtime hiring procedures. At which time Local 408 was informed that the Warden of FCI-1 and the LSCI "was taking Local 408's MOU on overtime procedures off the table." After which the Local filed its ULP accusing the FCC Butner with bad faith negotiation.

Accordingly, the Union maintains that in the first ULP the Local 408 was accusing the Agency of bad faith negotiation and sought the Agency's finalization and acceptance of the MOU addressing overtime hiring procedures and utilization of the Correctional Services Roster program within the institutions it represented, FMC and FCI-2; and was based on violation of the Federal Labor Relations Statute 5 USC 7116(a)(1, 2, 4, and 8). This ULP was resolved by a Settlement Agreement signed by the Local 408 President and the FCC Warden, and approved by the FLRA February 25, 2013,[47] and final execution of the MOU negotiated and approved by Local 408 and FCC management, also on February 25, 2013, on Local 408's overtime hiring procedures and utilization of the Correctional Services Roster program within FCI-2 and the FMC.[48]

The second ULP filed by Local 408, July 25, 2013[49], concerned FCC Butner's "repudiation[50] and violation" of the FLRA approved Settlement Agreement signed February 25, 2013, and failure to honor the provisions of the MOU between Local 408 and FCC Butner finalized and executed also on February 25, 2013 – By signing a new Memorandum of Understanding concerning overtime hiring procedures and utilization of the Correctional Services Roster program with AFGE Locals 405 and 3696, which the Agency maintained superseded the MOU with Local 408 signed February 25, 2013; and, therefore, would no longer be honored.

Accordingly, the Union argues here that the ULP was accusing the Agency of repudiation and violation of the FLRA approved settlement agreement and its MOU with Local 408, finalized and executed on February 25, 2013; again based on violation of the Federal Labor Relations Statute, 5 USC 7116(a)(1, 5, 7, and 8).

While, both ULPs and the subject grievance involve the MOU negotiated between Local 408 and FCC Butner on the overtime hiring procedures and utilization of the Correctional Services Roster program within the institutions it represented, FMC and FCI-2 from October 26, 2011, to March 5, 2012, that was finalized/executed on February 25, 2013; the Union notes that neither ULP alleged a contract violation, and particularly, a violation of Article 18, Section p 1. In addition neither ULP alleged that bargaining unit employees represented by Local 408 were adversely affected and owed back pay under the Back Pay Act 5 USC 5596.

Accordingly, the Union requests that the Agency's threshold challenge that the subject grievance is barred by the Union's filing of a previous ULP be denied.

► As for the Agency's contention that the grievance is procedurally flawed because it was not filed in a timely manner, the Union contends that...

The Union offers the following timeline for key events leading up to the filing of the subject grievance... Following initiation of negotiations between Local 408 and FCC Butner management on October 26, 2011, on the issue of overtime hiring procedures and utilization of the Correctional Services Roster program for bargaining unit employees represented by Local 408 in the Federal Medical Center and FCI-2 at Butner, on March 5, 2012, agreement was reached on a new MOU... On May 18, 2012, Local 408 files the first of two ULPs... On February 25, 2013, the FLRA approved settlement agreement was reached and Local 408s MOU was fully executed and FCC management agreed to honor said MOU... On July 2, 2013, FCC Butner management signs MOU with Locals 405 and 3696... On July 3, 2013, FCC management notifies Local 408 that the February 25, 2013, MOU with Local 408 is superseded and will not be honored and that it intends to implement the new overtime procedures agreed to in the MOU with Local 405 and 3696... July 25, 2013, Local 408 files the second ULP... On August 12, 2013, Local 408 becomes aware that FCC Butner started the new overtime hiring procedures on August 11, 2013, and that Local 408's BUEs are being affected... On August 13, 2013, Local 408 attempts informal resolution... On August 15, 2013, Local 408 becomes aware that there are apparent glitches in the new overtime hiring procedures... On August 20, 2013, Local 408's BUEs are not allowed to sign up on the FCI-1 and LSCI overtime rosters... and On September 11, 2013, Local 408 files a formal grievance alleging that the Complex Warden[51] violated 5 USC 7116; the parties' Master Agreement, Article 6 and 18; as well as the Back Pay Act when he changed the way bargaining unit employees represented by AFGE Local 408 were assigned/hired for overtime from that agreed to and outlined in the MOU executed between Local 408 and FCC Butner management on February 25, 2013, to the procedures provided for and outlined by the MOU executed July 3, 2013, between FCC Butner management and AFGE Locals 405 and 3696; thereby skipping over and/or denying BUEs represented by Local 408 the opportunity to be assigned/hired for overtime.

While the Union acknowledges receiving a memorandum from the Complex Warden on July 3, 2013, that the overtime hiring procedures agreed to in the MOU between FCC Butner management and AFGE Locals 405 and 3696 would take effect on August 11, 2013 -- It was not until August 12, 2013, that Local 408 actually learned that the new procedures were being followed, and August 20, 2013, that Local 408 had knowledge that BUEs represented by Local 408 were being adversely affected by the new procedures. Accordingly, on September 11, 2013, thirty-one (31) calendar days after actual knowledge that the new overtime hiring procedures were being used and twenty-three (23) calendar days after learning that BUEs represented by Local 408 were being adversely affected that the formal grievance was filed.

Furthermore, as noted on the grievance form Local 408 views the actions initiated by the Butner Complex Warden's execution of the MOU with Locals 405 and 3696, setting new outside hiring procedures which adversely affect BUEs represented by Local 408 as a continuing violation of 5 USC 7116, the parties' Master Agreement, and the Back Pay Act, starting on August 12, 2013, through at least the date of the hearing in the subject case. As the formal grievance form clearly showed the alleged violations and resulting adverse actions were occurring daily the Union maintains the "continuing violation doctrine" applies.

Citing *Elkouri & Elkouri*[52] the Union argues that many arbitrators have held that "continuing" violations of an agreement (as opposed to a single isolated and completed transaction) give rise to "continuing" grievances in the

same sense that the act complained of may be said to be repeated from day to day, with each day treated as a new "occurrence." These arbitrators permit the filing of such grievances at any time, although any back pay would ordinarily accrue only from the date of filing

As the grievance was filed within the forty (40) calendar days of the date that Local 408 actually learned that the new hiring procedures were being applied and that BUEs represented by Local 408 were being adversely affected; Local 408 asks the Arbitrator to find the subject grievance was timely and not procedurally flawed.

► As to the Agency's contention that the grievance is procedurally flawed because it was filed with the wrong office...

The Union notes that the Agency, in its final decision on the subject grievance, at hearing, and in post-hearing submissions, argues that the subject grievance with filed with the wrong office – That is, it was filed with the Regional Director and not with the Complex Warden. Here the Agency's argument is that the Complex's Lieutenants are the BOP employees who make the assignments of overtime; and, it is their actions which have resulted in BUEs represented by Local 408 allegedly being adversely affected. Therefore, since it is the Warden who has disciplinary authority over the Lieutenants; in accordance with Article 31, Section f 1, the grievance should have been filed with the Warden.[53]

However, the Union argues that the grievance concerns actions by the FCC Butner Complex Warden not subordinate employees. While acknowledging that the Complex Lieutenants are the individuals who actually schedule and assign overtime; it was the Complex Warden who executed the MOU with Locals 405 and 3696 which established the new overtime hiring procedures; and who authorized and directed the change of procedures which the Lieutenants follow in identifying and selecting employees who will be assigned overtime. Therefore, it is the Complex Warden's actions that the Union claims violated 5 USC 7116; the parties' Master Agreement, Articles 6 and 18; as well as the Back Pay Act. Clearly, as the testimony of the Butner Human Resources Manager confirmed, the Lieutenants were simply following the orders of the Complex Warden as directed through the Institution Wardens, Associate Wardens, and Captains.[54]

Since the subject grievance concerned the direct actions of the Complex Warden and his decision – to approve the new overtime hiring procedures established with his execution of the Memorandum of Understanding with Locals 405 and 3696 on July 2, 2013; that the overtime hiring procedures established by the MOU with Local 408 would not be followed; and to direct all subordinate staff throughout the complex to follow the new overtime hiring procedures; that resulted in BUEs represented by Local 408 being skipped over for overtime assignments and adversely affected. Therefore, in accordance with Article 31, Section f 2, the Union filed the subject grievance with Regional Director.[55]

Since the subject grievance was appropriately filed with the Regional Director, the Union asks the Arbitrator to deny the Agency's threshold challenge.

Position on the Merits of the Grievance.

Before addressing the merits of the grievance, the Union spent considerable time "educating" the Arbitrator on the unique structure and characteristics of the labor-management relationship at the Butner Federal Correctional Complex.

As noted above, one of the cornerstones of the Agency's position on the merits of the grievance is that the Master Agreement clearly establishes that the AFGE, Council of Prison Locals is the exclusive representative of the a Bureau-wide bargaining unit comprised of all BOP employees as defined in 5 USC §7103.[56] Therefore, the AFGE Locals, such as Local 408, do not represent employees in their own bargaining unit.

Acknowledging that the Council of Prison Locals is the exclusive representative of the Bureau-wide bargaining unit; Local 408 strongly maintains that it as well as all the other AFGE Locals at the various BOP institutions/facilities, does in fact represent its own identifiable group of bargaining unit employees. Furthermore, according to the Union, BOP management has a history of recognizing the autonomy of the Locals, such as Local 408, as the representative of a distinct group of BUEs. In fact; at the time of the hearing on the subject grievance there were three AFGE Locals representing their own distinct group of employees at the Butner Complex, Local 405 representing some 282 or approximately twenty-four percent of the BUEs, 408 representing some 662 or

approximately fifty-six percent of the BUEs, and 3696 represented some 240 or approximately twenty percent of the BUEs at Butner.

Through testimony and presentation of exhibits the Union then explained the structure and documented the history of the Locals and their relationship with the Council. As presented, the highlights of Butner's development and the establishment of AFGE Locals and their respective representational role are -- In 1994 Butner facility consisted of two institutions, the Federal Correctional Institution, a medium security facility, (designated as FCI-1) and the Federal Prison Camp. At that time there was only one AFGE Local, Local 3696, representing Butner employees. In September 1995 a new facility was activated, the Low Security Correctional Institution (designated as LSCI) and a second AFGE Local, Local 405, was established to represent employees assigned to the LSCI and the Camp. In 2000 the Federal Medical Center was activated. With the opening of the FMC, Butner now was comprised of four institutions, FCI-1, the LSCI, the FMC, and the Federal Prison Camp. However, even though Butner now consisted of four institutions there was still only two AFGE Locals at Butner, Local 3696 and Local 405. Then in December 2000 AFGE Local 408 was activated. With the activation of Local 408 staff in the four institutions at Butner were represented by three Locals -- Local 3696 represented BUEs in FCI-1, Local 405 represented BUEs in the LSCI and the Camp, and Local 408 represented BUEs in the FMC. In 2006 a second medium security Federal Correctional Institution was opened (designated FCI-2).

With the activation of FCI-2 Butner became a Complex; and, decided to consolidate departments. This consolidation required the Locals to figure out how they were going to be configured. The three Local presidents split up the department functions and institutions.

Accordingly, as of 2012 BUEs in the four institutions at Butner were represented as follows[57] -- Local 405's institutional coverage was the LSCI; Local 408's institutional coverage was the FMC and FCI-2; Local 3696's institutional coverage was FCI-1; and Central Office/Re-entry Raleigh CCM activities were represented by Local 3546. While each Local was still identified by its organizational coverage, with the consolidation of departments each respective Local also represented employees assigned to/working in specific operational divisions or functional areas[58] which might change by institution. Therefore, while Local 405 was recognized as representing BUEs in the LSCI, it only represented employees assigned to the following divisional/functional activities - Recreation/Education, UNICOR, Laundry, Food Services, Warehouse, Trust Fund, and R & D within all four institutions, as well as, Correctional Services and Case managers/Counselors/Secretaries in the LSCI; Local 408 was recognized as representing BUEs in the FMC and FCI-2, it only represented employees assigned to the following divisional/functional activities -- Correctional Services in FMC and FCI-2, Medical in all four institutions, Case managers/Counselors/Secretaries in FMC and FCI-2, Psychiatry Services in all four institutions, and Psychology Services in FMC, FCI-2 and LSCI; Local 3696 was recognized as representing BUEs in FCI-1, it only represented employees assigned to the following divisional/functional activities -- Facilities, Safety, and Religious Services in all four institutions, as well as, Correctional Services, Case managers/Counselors/Secretaries, and Psychology Services in FCI-1; and Local 3546 representing Central Office/Re-Entry/Raleigh CCM in all four institutions.

While, AFGE and the Council of Prison Locals are the recognized exclusive representative of all BUEs in the Bureau, functionally that duty relates only to the negotiation of the Master Agreement and handling Bureau wide multi-institution issues and grievances. Starting with the Preamble the MA envisions representation and negotiation at the institutional/facility level through AFGE Locals[59]. For example, Article 2 dealing with "Joint Labor Management Relations" provides in Section f that "The parties at the national level endorse the concept of regular labor management meetings at the local level...The actual procedures for local labor management meetings will be negotiated locally." [Emphasis added] Article 3 dealing with "Governing Regulations" provides in Section a 1, "...local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level..." and at Section d 5, "...when locally-proposed policy issuances are made, the local Union President will be notified...and the manner in which local negotiations are conducted will parallel this article." [Emphasis added] And, Article 18, Section p, begins with "Specific procedures regarding overtime assignments may be negotiated locally." [Emphasis added] In fact, the term "local negotiation and/or local negotiations" is mentioned some eleven times in the MA; the term "Local President and/or Local Union President" is mentioned some fourteen times; and the term "Local supplemental agreement(s)" is mentioned some five times. Ground rules for local negotiation of supplemental agreements are even presented as an appendix to the MA.

The Union then explained how overtime was assigned and distributed up until the execution of the new procedures by the Complex Warden in 2013[60]. As of 2000, and up to 2013, each institution had its own overtime procedures

negotiated by the Local representing BUEs in that institution, in accordance with Article 18, Section p; i.e. by Local 3696 for FCI-1, Local 405 for LSCI, and Local 408 for FMC and FCI-2. Since each Local represented BUEs within a specific institution, its BUEs were given first consideration when posting overtime within that institution or involving inmates from that institution. While each Local negotiated its own procedure, either with a formal MOU or some other policy issuance, Local 408's first formal MOU addressing overtime hiring procedures and utilization of the Correctional Services Roster program was executed on November 4, 2010[61], for FMC and FCI-2 BUEs. And, in 2011 the first multi-local MOU was executed between Butner and Locals 3696, 405 and 408 pertaining to the handling of treatment at the FMC and outside hospital coverage of inmates unable to receive medical treatment at his assigned institution, FCI-1 and LSCI[62]. These negotiated procedures were understood and respected by the Agency.

Accordingly, the Union argues that these negotiated procedures established a pattern of behavior that became a condition of employment; that is a "past-practice" had been established[63]. While a matter can qualify as a condition of employment and become an established condition of employment either through bargaining or through practice[64]; the Union submits the negotiated and established procedures followed by each AFGE Local at Butner became an established pattern of behavior and condition of employment that complied with the MA, Article 18, Section p; and, the change in overtime hiring procedures directed by the Complex Warden violated the past practices of the parties at Butner FCC.

The Union further points out that all times prior to 2013, the three primary Locals at Butner, Local 405, 408, and 3696; had negotiated their own/independent MOU with Butner management for the distribution of overtime. Further, throughout all these years the Agency recognized the first consideration mandate contained in Article 18, Section p, in regards to assignment of overtime to all BUEs who signed up for overtime available for the departments and institutions represented by each respective Local – Where Local 408 represented the BUEs they received first consideration... If the Local 408 list was exhausted and there was additional need of employees, you proceeded to the sign-up sheets for BUEs represented by the other Locals...After the BUEs were exhausted, if a need continued then you turned to the sign-up sheets for non-bargaining unit employees.

According to the Union, in October 2011, as a result of a controversy that had arisen regarding outside medical overtime, the three Locals sent management a joint proposal which adhered to the provisions of Article 18, Section p, with respect to the first consideration issue. The Agency then made a counter proposal changing all MOU's and establishing one consolidated roster program for overtime procedures. This counter proposal was rejected by the three locals; and, Local 408's proposed MOU was agreed to and signed by Local 408's President and management's representative in March 2012. When the Union requested the copy of the agreement signed by both parties, the Agency said there was no agreement. As a result, Local 408 filed its first ULP in May 2012. Testimony and documentary evidence, clearly showed that after the ULP was filed, from May 2012 through February 2013, Local 408 and management engaged an intensive negotiation which included approximately ninety meetings and even the intervention of a mediator, without success.

With the assistance of the FLRA a Settlement Agreement was entered ending the ULP and requiring the parties to execute the Local 408 MOU, which was completed during the period February 25-29, 2013, and was effective immediately. The FLRA approved Settlement Agreement also required that the Agency post a "Notice to Employees" in which Butner management acknowledged its "duty to bargain in good faith with Local 408...[and would]...execute and honor the Memorandum of Understanding on Overtime Hiring Procedures and Utilization of Correctional Services Roster Program with AFGE, Local 408." Furthermore, the executed MOU provided that "[t]his MOU supersedes all previous MOU's dealing with Overtime signed by the Agency and Local 408. Any new negotiations concerning the procedures for overtime will review the procedures listed here and be incorporated for negotiations in the new negotiations. ..Should any issues/concerns arise as a result of this MOU, the Agency and Local 0408 agree to discuss them within seven (7) working days of notifications of the issue or concern."

With regard to the ULP settlement requirements, the Union points out that Butner management did post the required notices and emailed copies of the notice to all BUEs represented by Local 408. However, the Union maintains that by March 15, 2013, that is, within eighteen (18) days of the execution of the agreement with the FLRA, the Agency continued its efforts to get a complex-wide overtime procedure/roster accepted; and on May 1, 2013, Local 408's President received an email regarding a meeting for the discussion of complex overtime.

Here the Union points out, that during the hearing, the Agency representative argued that the February 2013 MOU provided for continuation of negotiations and, therefore, the Agency was entitled, and Local 408 was obligated, to negotiate with management. However, the Union contends that this argument is not supported by the process that

led the parties to the February 2013 agreement and the literal meaning and the obvious intentions of the parties when they entered into that settlement agreement and MOU.

It is the Union's belief that the Agency's actions clearly show that management never had the intention of complying with the February 23, 2013, agreement. Prior to the February 2013 agreement, the Agency's position was that it intended to implement a complex wide overtime procedure. Local 408 fiercely opposed the Agency's stance. It was in this scenario that the Agency entered into the agreement. However, as the activities that took place afterwards show, the Agency's conduct and execution of the agreement before the FLRA was a farce.

The Union argues that once the ULP was resolved and FLRA was no longer involved, the Agency felt free to ignore its newly executed MOU with Local 408. Clearly, the Agency's actions from March 2013 make a mockery of the process and efforts of FLRA and Local 408 to resolve the ULP. The Agency's actions are clear evidence that it had no intention of complying with the February 2013 Settlement Agreement and the MOU executed through FLRA's assistance. With Local 408's refusal to engage in new negotiations, Butner management decided to push through the complex wide agreement with the other two Locals. That action clearly demonstrates bad faith negotiation on the part of the Agency with the FLRA and Local 408 in settling the ULP and executing the February 2013 MOU with Local 408.

Here the Union points to 5 USC 7114, which provides in part:

> "...The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation – to approach the negotiations with a sincere resolve to reach a collective bargaining agreement..."

On this point the Union maintains that the FLRA has said "In determining whether a party has fulfilled its bargaining responsibility, the totality of the circumstances in a case must be considered."[65] In other words, the Authority generally shuns the application of per se rules to identify bad faith acts during the bargaining process; instead, it looks at the evidence as a whole to evaluate whether a party has complied with the mandate of Section 7114(b) to (among other things) "approach the negotiations with a sincere resolve to reach a collective bargaining agreement...." In so doing, the Authority looks at the parties' actions to determine whether a party "has attempted to evade or frustrate the bargaining responsibility" outlined in Section 7114(b).[66]

As for the Agency's negotiations with the other two Locals for a complex wide overtime procedure/roster; Local 408's President was told by both the former Complex Warden and FCI-2's Warden that the Agency could not enter into a complex wide overtime procedure/roster unless all three Locals' Presidents agreed and signed off on the agreement. Therefore, considering the facts of this case it is obvious that Butner management negotiated the joint MOU with Locals 3696 and 405 in bad faith knowing that the lack of agreement by all three Locals, the complex wide overtime procedure/roster would violate Article 18 (p).

For the Union there is little doubt that the Agency's actions subsequent to the execution of the FLRA approved settlement agreement and MOU with Local 408 to foreclose on its promises and proceed with the execution of an agreement with only two of the three AFGE Locals at Butner and activate a complex-wide overtime procedure and roster violated Article 18 (p) and caused BUEs represented by Local 408 to be skipped over and denied first consideration in the assignment of overtime, thereby suffering an alteration of their overtime benefits.

Here the Union asks the Arbitrator to fully consider the testimony of Local 408's Chief Steward[67] and documentary evidence[68] presented regarding the Union's review of data from overtime sign-up lists prior to and after the combined roster was implemented and the overtime hiring to determine the effect on BUEs represented by Local 408. That review looked at a sampling of overtime assigned/worked during eleven (11) pay periods from August 2013 through June 2015 and; the Union believes clearly found many instances where BUEs represented by Local 408 were skipped in the assignment of overtime. The skipping over was shown to have occurred on numerous occasions and in various scenarios. Accordingly, the Union argues that its review and the resulting documentation entered into evidence clearly show, where all BUEs were included in a single sign-up sheet:

1. Every time that a BUE not represented by Local 408 was assigned/worked overtime within institutions/department/posts represented by Local 408, a BUE represented by Local 408 had been skipped over.

2. Whenever a non-bargaining unit employee was assigned/worked overtime in an institution/department/post represented by Local 408, a BUE represented by Local 408 had been skipped over. And,

3. Where employees who were graded GS-12 and above, who should NEVER be allowed to work overtime...Every time any employee graded GS-12 and above worked overtime, not only BUEs represented by Local 408, but BUEs represented by Locals 3696 and 405 were skipped over.

The Union also submitted evidence that "List Exempt Overtime Logs;" which it claims were supposed to be used to make overtime assignments only in emergency circumstances, have been abused. Here the Union's review found instances where employees were assigned/worked overtime continuously over short periods of time through the use of the "List Exempt;" which, the Union claims would be almost impossible.

In order to quantify the estimated amount of overtime pay BUEs represented by Local 408 were denied by being skipped over; the Union's study used the salary for grade GS-08, step 6, as the average pay of a BUE represented by Local 408.

Admitting that its review was not a "professional study;" and, that there might be errors, the Union points out that their review clearly showed:

1. During the August – October 2013 period BUEs represented by Local 408 were skipped over for an estimated 6,154 hours of overtime; at an estimated hourly rate of $40.04 that amounts to approximately $246,406.00 in missed overtime pay.

2. In November 2013 BUEs represented by Local 408 were skipped over for an estimated 4,594 hours, at the estimated hourly rate of $40.04 that amounted to some $183,943.00 in missed overtime pay.

3. In December 2013 BUEs represented by Local 408 were skipped over for an estimated 2,064 hours, losing some $82,643.00 in overtime pay.

4. In January 2014 BUEs represented by Local 408 were skipped over for an estimated 1,720 hours, losing some $68,869.00 in overtime pay.

5. In July 2014 BUEs represented by Local 408 were skipped over for an estimated 5,184 hours, losing some $207,567.00 in overtime pay.

6. And, in June 2015 BUEs represented by Local 408 were skipped over for an estimated 2,672 hours, losing some $106,987.00 in overtime pay.

In total the Union argues that its limited review of overtime rosters between the period August 2013 and June 2015 found BUEs represented by Local 408 were skipped over and lost out of an estimated 22,388 hours of overtime; and, were therefore, deprived of an estimated $896,415.00 of overtime pay

In summary, the Union argues that its limited review shows that the Agency's actions resulted in BUEs represented by Local 408 being skipped over in the assignment/hiring of overtime during the period August 2013 through June 2015 in violation of the parties' MA, Article 18, Section p; thereby, being adversely affected through unjustified and unwarranted personnel actions that resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the BUEs represented by Local 408 in violation of the Back Pay Act.[69]

Here the Union points out that the Back Pay Act provides in part that an employee "is entitled, on correction of the personnel action, to receive, for the period for which the personnel action was in effect –

- an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

- reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed...."

Furthermore, the Union points out that the FLRA has ruled[70] that the threshold requirement for entitlement of attorney's fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Once such a finding is made, the BPA further requires that an award of attorney's fees be:

- in conjunction with an award of back pay to the grievant on correction of the personnel action;
- reasonable and related to the personnel action; and
- in accordance with the standards established under 5 U.S.C. sec 7701(g) which pertain to attorney fee awards issued by the Merit Systems Protection Board.

Furthermore, the Union also points out that the FLRA has ruled that the threshold requirement for an award of attorney's fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Once such a finding is made, fees may be awarded in accordance with the standards established in 5 USC 7701(g).[71]

To obtain fees, a party must prevail in the arbitration.[72] To qualify as a prevailing party, an individual must have received an enforceable judgment or settlement which directly benefited him or her. For example, an arbitrator's reduction of a suspension to a reprimand qualified the grievant as the prevailing party.[73] Also, an individual may be a prevailing party when he or she prevails on one theory of the case but fails under another theory.[74]

Accordingly, the Union asks the Arbitrator to find in its favor and uphold the subject grievance. If the Arbitrator decides in the Union's favor and issues an Award where Local 408 prevails, then the Union is entitled to attorney's fees if it complies with the criteria of 5 USC 7701 (g).

VI. Discussion, Analysis, and Findings.

In order to properly address the primary questions and issues raised in this grievance, it is necessary to have a clear understanding of the events and actions taken by the parties in response to those events leading up to August 11, 2013, and AFGE Local 408's submission of the grievance that is the subject of this arbitration. And, a brief recap of the development of the Butner FCC will help us focus on those events and actions.

The Federal Bureau of Prisons operates several different types of facilities, including individual Correctional Institutions, Detention Centers, Prison Camps, Transfer Centers, Medical Centers, Penitentiaries, and Metropolitan Correctional Centers; as well as, fourteen Federal Correctional Centers (FCC), one of which is the Butner FCC in North Carolina. As was explained through the testimony of Local 408's previous and current President, as supported through documentary evidence submitted and accepted...

- In 1994 Butner consisted of two facilities, the Federal Correctional Institution known locally as FCI-1 and a Federal Prison Camp; and had one AFGE Local, number 3696, representing the facilities bargaining unit employees (BUEs). In September 1995 a new facility was activated at Butner, the Low Security Correctional Institution known locally as LSCI or Low; and a second AFGE Local, number 405, was added to represent BUEs in the new facility.
- On February 6, 1998, a new Master Agreement between the Federal Bureau of Prisons (the Agency) and the American Federation of Government Employees (AFGE), AFL-CIO, Council of Prison Locals – 33 (the Union) is the exclusive representative of the nationwide consolidated bargaining unit; while AFGE Locals function as the Union's agent and affiliate for the purpose of representing bargaining unit employees at the institution/facility level.[75]
- In year 2000 the Federal Medical Center, known as FMC, was activated. With this new facility Butner now had four institutions – the FCI-1, the Camp, LSCI and the FMC; and, in

December AFGE activated the third Butner Local, number 408, to represent BUEs in the FMC.

- In 2006, a second medium security Federal Correctional Institution was opened at Butner, known as FCI-2. Accordingly, BUEs were represented as follows -- Local 405's institutional coverage was the LSCI; Local 408's institutional coverage was the FMC and FCI-2; Local 3696's institutional coverage was FCI-1.

- With the activation of FCI-2 Butner became a Complex; and, management decided to consolidate departments. This consolidation required the three AFGE Locals to figure out how they were going to be configured. The three Local presidents split up the department functions and institutions -- While each Local was still identified generally by it organizational coverage, with the consolidation of departments each respective Local also represented employees assigned to/working in specific operational divisional or functional areas, which might change by institution[76]...

    - While, Local 405 was recognized as representing BUEs in the LSCI, it now represented employees assigned to the following divisional/functional activities - Recreation/Education, UNICOR, Laundry, Food Services, Warehouse, Trust Fund, and R & D within all four institutions, as well as, Correctional Services and Case managers/Counselors/Secretaries in the LSCI;

    - Local 408 was recognized as representing BUEs in the FMC and FCI-2, it now represented employees assigned to the following divisional/functional activities – Correctional Services in FMC and FCI-2, Medical in all four institutions, Case managers/Counselors/Secretaries in FMC and FCI-2, Psychiatry Services in all four institutions, and Psychology Services in FMC, FCI-2 and LSCI; and

    - Local 3696 was recognized as representing BUEs in FCI-1, it now represented employees assigned to the following divisional/functional activities – Facilities, Safety, and Religious Services in all four institutions, as well as, Correctional Services, Case managers/Counselors/Secretaries, and Psychology Services in FCI-1.

- As for overtime procedures... From year 2000, in accordance with Article 18, Section p, each institution had its own overtime procedures negotiated by the Local representing BUEs in that institution[77]...

    - For FCI-1, Local 3696 had its own procedure with BUEs represented by Local 3696 given first consideration when posting overtime within that institution;

    - For LSCI, Local 405 had its own procedure with BUEs represented by Local 405 given first consideration when posting overtime within that institution;

    - For FMC and FCI-2, Local 408 had its own procedure with BUEs represented by Local 408 given first consideration when posting overtime in those institutions.

    - Since each Local represented BUEs within a specific institution, its BUEs were given first consideration when posting overtime within that institution or involving inmates from that institution.

- On January 12, 2009, AFGE Local 405 filed a formal grievance concerning a change of policy/past practice relating to the qualifications of BUEs for overtime... Specifically, a new

policy that BUEs may not consider themselves as qualified for overtime if the available overtime shift overlaps their regular shift.[78]

- On or about April 19, 2010, a Settlement Agreement was executed between Local 405 and Butner FCC relating to payment for overtime.[79]

- On September 17, 2010, Local 405 files a second formal grievance concerning a change or policy/past practice relating to elimination of allowing BUEs to work overtime that conflicts and/or overlaps with their primary shift.[80]

- Local 408's first formal MOU addressing overtime hiring procedures and utilization of the Correctional Services Roster program was executed on November 4, 2010, for FMC and FCI-2 BUEs.[81]

- August 10, 2011, proposal made by three Locals 405, 408, and 3696 which the Unions maintain complied with MA, Article 18, Section p1, to ensure that each Local received overtime on the inmates requiring medical/outside medical from the institutions that they represent.[82]

- During the period October 26, 2011, through March 5, 2012, Local 408 is in negotiations with Butner FCC on the issue of overtime hiring procedures and utilization of the correctional services roster program. Agreement was reached and Local 408 President and the FCC Complex Warden signed a MOU.

- March 12, 2012, LSCI and FCI-1 Warden calls Locals 405, 408 and 3696 to start negotiations on a MOU for a One Complex Computerized Overtime Program.[83]

- May 2, 2012, Locals meet with management to continue negotiation on overtime proposal...Local 408 was told the Wardens of LSCI/FCI-1 would sign the Local 408 MOU.

- On March 16, 2012, during the negotiations meeting on the One Complex Computerized Overtime Program Local 408 was told Warden of LSCI/FCI-1 would not sign the Local 408 MOU and was "taking it off the table."

- On March 18, 2012, Local 408 files the first ULP.[84]

- On May 17 and June 2, 2012, meetings continued with management and three Locals on the One Complex overtime procedures.

- July 23, 2012, management and three Locals decide to request mediation.

- October 11, 2012, mediation held no agreement reached.

- February 25, 2013, with assistance of FLRA, Settlement Agreement reached between Local 408 and Butner FCC and Local 408's MOU on hospital overtime procedures signed/executed.[85]

- On March 15, 2013, Local 408 received email from Butner management providing that the Agency wanted to reopen negotiations on One Complex Overtime.

- On April 12, 2013, Local 408 receives email from Butner management that Agency wanted to reschedule One Complex overtime negotiations to April 22, 2013.

- On May 1, 2013, Local 408 receives email from Butner management that Agency wanted to reschedule One Complex overtime negotiations to May 6, 2013.

- On June 18, 2013, Local 408 sends email to Butner management providing that Local 408 already has a MOU.[86]
- On July, 2, 2013, Butner management signs three-party MOU with Locals 405 and 3696 on One Complex overtime procedures.[87]
- On July 3, 2013, Warden replies to Local 408's June 18 email notifying Local 408 that the February 25, 2013; MOU agreed upon with FLRA approval was ineffective and invalid.
- On July 25, 2013, Local 408 files the second ULP for repudiation of agreement.[88]
- On August 11, 2013, FCC Butner began new Complex-wide Hospital Overtime Hiring Procedures.
- On August 13, 2013, Local 408 attempts informal resolution process.[89]
- On August 15, 2013, FCC management identifies problem with new Complex-wide program.[90]
- On September 11, 2013, Local 408 files subject formal grievance.[91]
- On September 20, 2013, Agency provides final response to Local 408's formal grievance.[92]
- On September 25, 2013, Local 408 notifies Agency of intent to arbitrate.[93]
- On January 10, 2014, the FLRA responded to/closed Local 408's second ULP, number WA-CA-13-0636.[94]
- Between August 28, 2013, and July 8, 2015, Local 408 has raised the issue of the outside hospital overtime procedures/Correctional Services Roster Program and/or skipped overtime issue up at the FCC LMR meetings over eighteen times and each time it has either been tabled or not fully addressed.[95]
- On April 15, 2014, FCC Butner management separated the FMC and FCI-2 rosters which for two weeks infringed on Local 408's right to sign up for overtime; no one from the FMC could sign up on the FCI-2 roster and FCI-2 staff could not sign up on the FMC roster.
- On May 19, 2014, the FLRA decision on grievance filed by Local 405 on January 9, 2012, concerning a change of policy/past practice relating to the qualifications of BUEs for overtime... Specifically, a new policy that BUEs may not consider themselves as qualified for overtime if the available overtime shift overlaps their regular shift.[96]

Both the Agency and the Union, in their post-hearing briefs, remind the Arbitrator that Article 32, Section h, of their MA provides, in part, "The Arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: (1) this Agreement; or (2) published Federal Bureau of Prisons policies and regulations" – Then proceed to ask him to accept something that is not clearly addressed in the parties' MA. The Agency, asks consideration and acceptance of threshold issues that the Union maintains are never mentioned in the MA. And, the Union asks consideration and acceptance of its claim that timeliness of the grievance should be accepted because it was a continual violation, while the Agency points out that the MA makes no mention of continuing violations.

This Arbitrator is well aware of the guidance provided in Elkouri & Elkouri, that he is confined to interpretation and application of the parties' agreement; does not sit to dispense his own brand of industrial justice; but, may of course look for guidance from many sources, as long as, his decision and award draws its essence from the parties' agreement.[97]

What is meant by wording in a contract inevitably depends on its context...A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph, the paragraph when it becomes

part of a large section of text...Where the whole can be read to give significance to each part, that reading is preferred....[98] It is a fundamental principle of contract interpretation that a collective bargaining agreement is not to be dissected; instead, the whole and every part must be considered in the determination of the meaning of any of the integral parts....[99] Nevertheless, the ultimate responsibility of this, or any Arbitrator in the interpretative process, is to rely on his background, experience, expertise in the labor-management process, giving due regard to the relationship of the parties and their presentations so as to provide as practical and realistic an interpretation as possible under the given agreement.[100]

A. Regarding the Agency's threshold challenges...

As, explained above, the issue to be decided first is:

> *Is the subject grievance barred by a previously filed ULP and/or procedurally flawed and, therefore, not arbitrable? If, not*

Citing *AFGE, Local 1411 v. FLRA, 960 F.2d. 176 (1992)*, which held that a grievance is barred by 5 USC §7116(d) when (1) the same issue is the subject of the grievance and of the ULP charge, (2) that issue was raised in a prior ULP charge, and (3) the decision to file the ULP charge was within the discretion of the aggrieved party; and, citing *International Association of Machinists and Aerospace Workers, Lodge 39 and U.S. Department of the Navy, Naval Aviation Depot, Norfolk, VA 44 FLRA 1291 (1992)*, which held that an issue is raised within the meaning of section 7116(d) of the Statute at the time of the filing of the grievance or a ULP charge, even if the grievance or ULP charge is not adjudicated on the merits; as, its first threshold questions, the Agency argues that the subject grievance is barred because "the Union initially filed an unfair labor practice over the same issue." According to the Agency...

- "On July 25, 2013, the Union submitted a ULP charge against the agency which claimed that the agency's use of a new MOU on overtime procedures was improper;
- the issue in the ULP is in direct relation to the issue in the union's written grievance and advanced in the arbitration hearing; and
- the grievance was filed on September 11, 2013, some two months after the ULP was filed." [Emphasis added] Therefore,
- based on FLRA case law, the grievance is barred by the initial ULP charge and must be dismissed.

In response, citing DHHS and AFGE, Local 1668 56 FLRA 83 (2000), the Union points out, in determining whether a grievance and a ULP charge involves the same issue, the Authority examines whether the ULP charge and the grievance arose from the same set of factual circumstances and whether the legal theories advanced in support of the ULP charge and the grievance are substantially similar. Then, citing other FLRA rulings that the issue is not precluded by Section 7116(d) where the legal theories involved in the grievance and the ULP charge are not the same; the Union argues that neither the ULP filed by Local 408 on May 18, 2012, nor the ULP filed on July 25, 2013, alleged a contract violation. Therefore, since both ULPs filed by Local 408 alleged statutory violations, while the subject grievance alleged a contract violation, the ULPs and grievance involved different legal theories and are not barred.

The record shows that from October 26, 2011, to March 5, 2012, Local 408 and FCC management were involved in negotiations relating to the issue of overtime hiring procedures and utilization of the Correctional Services Roster program; and, on March 5, 2012, after reaching agreement Local 408's President and the FCC Butner Complex Warden signed a MOU. Subsequently, the Warden of one of the institutions within the Complex called for all three Locals at FCC Butner, Local 3696, 405, and 408, to begin negotiations on a complex-wide computerized overtime hiring program. Having been assured by the Complex Warden that all the other institution Wardens would sign Local 408's MOU, and that the MOU was in effect, Local 408 reluctantly participated in the complex-wide negotiations. Then, after questioning why the other institution Wardens had not signed Local 408's MOU, Local 408's President was told that one of the institution Wardens decided to "take Local 408's MOU off the table." With this action by FCC management, Local 408 filed the first ULP, charge number WA-CA-12-0513, on May 18, 2012, alleging that the Agency violated 5 USC §7116(a)(1, 2, 4, and 8) and was bargaining in bad faith.

The record shows that the circumstances leading to the second ULP charge, number WA-CA-13-0636, filed on July 25, 2013, were – After the filing of the first ULP, Local 408 and FCC Butner management had, with the encouragement and approval of FLRA, on February 25, 2013, executed a Settlement Agreement, as well as, the previously negotiated and partially executed MOU that was the basis for the first ULP, and FLRA dismissed the charge. Then within a few months, the same institution Warden who had, prior to the first ULP tabled Local 408's MOU and refused to sign off on it, again called for negotiations on a complex-wide overtime hiring program. Local 408 refused to participate in the reconvened negotiations for a complex-wide overtime hiring program because it had just executed its own MOU with FCC management on February 25, 2013. On July 2, 2013, FCC management (the Complex/FMC Warden and Wardens of FCI-1, FCI-2, and the LSCI) executed a new MOU for a complex-wide overtime hiring procedures and utilization of the Correctional Services Roster program with the two other Locals, numbers 405 and 3696.[101] That same day, Local 408 was told that it's MOU, the one just executed on February 25, 2013, as part of the FLRA approved Settlement Agreement whereby the first ULP was dismissed, was superseded and would no longer be honored. These actions by FCC management predicated the second ULP alleging that the Agency violated 5 USC §7116(a)(1, 5, 7, and 8); the parties' Master Agreement, Articles 6 and 18; as well as, the Back Pay Act, 5 USC §5596 – When it repudiated the Settlement Agreement and told Local 408 it's FLRA approved MOU would no longer be honored; signed the new MOU on a complex-wide overtime hiring program with Locals 3696 and 405; changed the way bargaining unit employees represented by Local 408 received overtime, causing bargaining unit employees represented by Local 408 to be skipped over on the overtime sign up lists, and not being allowed to sign up on some rosters.

On January 10, 2014, the FLRA responded to/closed Local 408's second ULP finding that:

- whether the Agency repudiated the Settlement Agreement it approved on February 25, 2013, depended on whether the Agency repudiated the underlying March 2012 MOU;
- the Agency's conduct regarding the March 2012 MOU did not amount to repudiation, because the alleged breach of the March 2012 MOU was not clear and patent...[explaining];
- the March 2012 MOU provided, among other things, that "any new negotiations concerning the procedures for overtime will review the procedures listed here and be incorporated for negotiation in the new negotiations..."[and];
- this language is capable of more than one interpretation...[and];
- questions of interpretation are for an arbitrator, not the FLRA...[but noting];
- a reasonable interpretation, though not necessarily the only reasonable interpretation, is that the March 2012 MOU contemplated further negotiations about overtime procedures. [and]
- the Agency did subsequently initiate bargaining on new overtime procedures, resulting in a complex-wide agreement...[and, any];
- interpretation of the complex-wide agreement, and its relationship to the March 2012 MOU, are matters for an arbitrator...[accordingly];
- under these circumstances, FLRA's Washington Regional Director determined that the Agency's conduct did not clearly and patently breach the March 2012 MOU, and dismissed the charge.

While, both the ULPs and the subject grievance clearly relate to the issue of overtime hiring procedures and the utilization of the Correctional Services Roster program; as well as, the Local 408 MOU negotiated during the period October 26, 2011, to March 5, 2012, and partially executed in March 2012 – the Arbitrator have determined that the factual circumstances, issues, and legal theories of the ULP(s) and grievance differ significantly.

As for the factual circumstances and issues...

The factual circumstance, issue or issues in the two ULP's and the subject grievance, as clarified by the Arbitrator's examination of the total record were, and/or are:

- In the first ULP, charge number WA-CA-12-0513, which was filed against the Agency and FCC management as a whole, the issue was that FCC management showed bad faith in its bargaining with Local 408; and, the circumstances leading to the complaint were, when it refused to fully execute Local 408's MOU on overtime hiring procedures and utilization of the Correctional Services Roster program after agreement had been reached and the Complex Warden had signed off on the MOU, assured Local 408 that its MOU was in effect, then allowed one of the institution Wardens to singularly decide to take Local 408's MOU off the table and refuse to sign off on it.

- In the second ULP, charge number WA-CA-13-0636, also filed against the Agency and FCC management as a whole, the issue was that FCC management repudiated the Settlement Agreement; and, the circumstances leading to the complaint were, when it told Local 408 it's FLRA approved MOU would no longer be honored; signed the new MOU on a complex-wide overtime hiring program with Locals 3696 and 405; and, changed the way bargaining unit employees represented by Local 408 received overtime, causing bargaining unit employees represented by Local 408 to be skipped over on the overtime sign up lists, and not being allowed to sign up on some rosters.

- And, in the subject grievance, filed specifically against the Complex Warden, the issues are that the Complex Warden violated Local 408's overtime hiring procedures and the utilization of the Correctional Services Roster program; and the circumstances leading to the grievance were, when he directed that the new complex-wide overtime hiring procedures and the utilization of the Correctional Services Roster program, provided for in the MOU executed on July 2, 2013, with only two of the three AFGE Locals at FCC Butner, was to go operational on August 11, 2013; thereby, causing bargaining unit employees represented by Local 408 to be skipped over on the overtime sign up lists, and not being allowed to sign up on some rosters.

The legal theories advanced in the two ULP's and the subject grievance, as clarified by the Arbitrator's examination of the total record were, and/or are:

- In the first ULP, that the Agency, through the actions of FCC management as a whole, showed bad faith in its bargaining with Local 408; thereby, violating specific statutory provisions, 5 USC §7116(a)(1, 2, 4, and 8).

- In the second ULP, that the Agency, through the actions of FCC management as a whole, repudiated and violated the FLRA approved Settlement Agreement and MOU executed by FCC management and Local 408; thereby, violating specific statutory provisions, 5 USC §7116(a)(1, 5, 7, and 8).

- And, in the subject grievance, that the Complex Warden violated a contract, the parties' Master Agreement, including Sections 6 and 18, when he directed a new overtime hiring procedure to go operational; which caused bargaining unit employees represented by Local 408 to suffer an adverse action in violation of government-wide Federal procedures; as well as, a different statute, the Back Pay Act, 5 USC 5596.

While a superficial reading of the two ULPs and the subject grievance might lead one to conclude all three actions rose from the same set of circumstances, involved the same issues, and legal theories; the Arbitrator has determined that his more thorough examination of all the factors and parties' actions prior to each complaint shows otherwise.

As to the Agency's threshold argument that the subject grievance is barred by 5 USC §7116(d), the Arbitrator finds the:

1. **factual circumstances giving rise to each of the two ULPs and the subject grievance are notably different;**

2. principal issue(s) raised in each of the two ULPs and the subject grievance are notably different; and

3. legal theories advanced in each of the two ULPs and the subject grievance are markedly different.[102] Therefore, the

4. subject grievance is not barred by 5 USC §7116(d).

Next the Agency argues that the subject grievance is procedurally defective because it was not filed in a timely manner. Pointing out that the parties' Master Agreement, Article 31, Section d, clearly provides that..."Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence..." [Emphasis added]; the Agency argues "Since the Union had awareness of an alleged violation occurring on July 3, 2013, then they had 40 days to file their grievance, which would have expired on August 12, 2013. However, they did not file their grievance until September 11, 2013, or 30 days late."

Here, the Agency writes that the courts have held that "A knowing plaintiff has an obligation to file promptly or lose his claim..."[103] and that *Elkouri & Elkouri* provides, among other things, "If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed...[that] Arbitrators apply the principle that parties to a contract with full knowledge of its provisions and the significance of its language...expect the parties to pay due respect to the grievance procedures, not only by using it, but also by observing its formal requirements." To further support its argument, the Agency, cites eleven arbitration decisions/awards involving the BOP and application of its MA.[104]

The Union, however, maintains that the July 3, 2013, memorandum from Complex Warden Apker, only gave notice of his intent to implement the new overtime procedures on August 11, 2013. Therefore, the Union had to wait to see; first if the new procedures were actually implemented, then to identify the impact their implementation had on BUE's represented by Local 408. The Union filed the subject grievance on September 11, 2013, thirty-two (32) calendar days after the new policies were scheduled to be implemented. However, as Local 408's President testified, the Union received notification on August 15, 2013, that the implementation of the new procedures was not working properly.[105] Therefore, it wasn't until later in the month of August when the new system was sufficiently operational, that the Union became fully aware of the new procedure's impact on its BUEs. As already noted, the subject grievance was filed on September 11, 2013, thirty-two (32) calendar days after the new policies were scheduled to be implemented, and well within the forty calendar days prescribed in Article 31 (d) of the MA. However, the Union contends, since the impact of the change in procedures on BUEs was not fully appreciated until late in August, it could have waited until later in September to file the grievance and still have been timely.

Furthermore, the grievance, as filed, clearly provides that "[B]argaining unit staff are being skipped on the overtime sign up list daily" and on "8/20/13 Local 408 Bargaining Unit Staff were not allowed to sign up on the FCI-1/Low overtime roster." Therefore, the Union maintains there is a continuing nature to the violation because "every day since August 12, 2013, the Agency has been violating the MA and depriving BUEs represented by Local 408 of first consideration." Moreover, on the grievance form, the Union specifically provided that the violation was taking place daily. Thus, according to the Union, since the violations are repeated continuously, and still occurring as of the date of its post-hearing brief, then it follows that it is a continuing violation.

Finally, the Union notes that the Agency, in its reply to the subject grievance, failed to argue that the grievance was untimely filed. In fact, the Union claims the timeliness issue was not raised, even as a threshold issue, until the administrative conference. Moreover, the Union also points out that the Arbitrator afforded the parties the opportunity to file pre-hearing briefs; and, while the Union took advantage of this offer, the Agency failed to submit any pre-hearing brief or other documentation raising any threshold issues, much less the issue of timeless.

Accordingly, the Union argues that the Agency's threshold issue regarding the alleged untimeliness of the grievance should be dismissed.

While the Agency's arguments on timeliness highlights, the first part of Article 31, Section d, the Arbitrator believes that it is the wording later in Section d, that needs to be considered, specifically,

> "... If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control." [Emphasis added]

The Agency's argument that the forty calendar-day period during which the Union should have filed its grievance commenced on July 3, 2013, because the Union "became aware of an alleged violation" on that date totally ignores the reason and essence of the communication received by the Union on that date. The Complex Warden's July 3, 2013, memorandum was sent to Local 408's President to:

- remind him that:
  - "a meeting was held on July 1, 2013, in which Local 408 was invited but declined to attend"; and,
- inform him that:
  - during the July 1st meeting the [attending] "parties discussed the agency's counter proposal for Complex overtime procedures and came to an agreement on a Memorandum of Understanding that [the parties thought was] in line with the Master Agreement";
  - the "agreement was prepared and signed by Local 405 and Local 3696";
  - he was "encouraged to [also] sign [the agreement]';
  - the "agreement [would] take effect August 11, 2013"; and
  - the "February Memorandum of Understanding [executed by FCC Butner and Local 408, with FLRA approval, was] ineffective and [would] no longer be honored."

The Union's counter argument that the grievable matter of concern –

- was not FCC Butner management's decision to push forward for an agreement on a complex-wide overtime hiring procedure, or its resulting approval of an agreement and execution of a new MOU with only two of the three AFGE Locals being a party; but,
- was the Complex Warden's declaration that the FCC MOU with Local 408 was ineffective and would no longer be honored, coupled with his decision and direction that the new MOU and the complex-wide overtime procedures that MOU established would go operational on August 11, 2013; and that the Union wanted to wait to see what impact the Complex Warden's decision and direction that the new complex-wide overtime procedures would go into effect on August 11, 2013, would have on BUEs represented by Local 408.

As to the Agency's threshold argument that the subject grievance is procedurally deficient because it was not filed in a timely manner, the Arbitrator finds that the:

5. date the grievable action occurred was August 11, 2013, the date the Complex Warden set for the MOU executed with Local 405 and Local 3696 and its new complex-wide overtime hiring procedures would go into effect; therefore, the Union had to file the subject grievance within forty calendar-days from August 11, 2013;

6. subject grievance was filed in a timely manner, in accordance with the parties' MA, Article 31, Section d; and therefore,

7. Agency's threshold argument that the grievance was untimely is without merit.

The Agency's third and last threshold challenge is that the subject grievance was filed with the wrong office. Here again the Agency points out that the MA, Article 31, Section f 1, specifically provides:

> "...when filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over...."

Here the Agency focuses on that part of the grievance regarding BUEs represented by the Union having been skipped over when assigning overtime and/or not allowed to sign-up on overtime sign-up sheets. Then, citing testimony from the Complex Human Resources Manager that the Complex Warden is the Chief Executive Officer of FCC Butner; that the scheduling and hiring of overtime is done by the Complexes' Lieutenants and Captains; and, that the Complex Warden has disciplinary authority over the subordinate managers at FCC Butner, which includes the Lieutenants and Captains -- The Agency argues -- Since the Lieutenants and Captains are the ones assigning overtime, any complaint that BUEs represented by Local 408 were skipped over in the assignment of overtime and/or not allowed to sign-up on overtime sign-up sheets, must have been filed with the Complex Warden since it pertains to the actions of individuals for which he as the Chief Executive Officer of the institution/facility has disciplinary authority over subordinate managers at FCC Butner, which includes the Lieutenants and Captains.

The Union points out that Article 31, Section f 2, provides, in part:

> "...when filing a grievance against the Chief Executive Officer of an institution/facility...the grievance will be filed with the appropriate Regional Director."

Accordingly, the Union argues that the subject grievance was filed against the Complex Warden for the decisions and actions he made and took that resulted in:

- the MOU executed by FCC Butner and Local 408 with the approval of the FLRA being ignored and not honored;
- a new MOU executed with only two of the three AFGE Locals at Butner used as the mechanism to have a complex-wide overtime hiring procedure established and activated; and
- BUEs represented by Local 408 being adversely affected by being skipped over in the assignment of overtime and/or denied the opportunity to sign up on overtime sign-up sheets.

Finally, as previously mentioned, the Arbitrator appreciates the emphasis the Agency, and to a lesser degree the Union, has placed in its arguments on all the threshold questions regarding the wording of the parties' agreement, including the declaration in Article 32, Section h, that "the arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of...this Agreement...." The Arbitrator has also noted the Agency's portrayal of the arbitrable guidance found in *Elkouri & Elkouri*. However, it must be remembered that, that learned text also advises that the "language of mathematics is precise. The English language is not. Even when the greatest care is employed, ambiguity of meaning can result." "'[T]he Arbitrator, as the parties' designated "reader" of the contract, "is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement."' Therefore, it is important to remember that "'...the "overarching principle of contract interpretation" requires ascertainment of meaning in light of "all the relevant circumstances surrounding the transaction...."'[106]

As to the Agency's threshold argument that the subject grievance is procedurally deficient because it was filed with the wrong office, the Arbitrator finds that the:

8. Union filed the subject grievance against the FCC Butner Complex Warden for decisions and actions he personally made;

9. grievance was filed properly and in accordance with the provisions of the parties' MA, Article 31, Section f 2, with the appropriate Regional Director; and, therefore,

10. Agency's argument that the grievance was filed with the wrong office is without merit.

Before, moving to the merits of the subject grievance, the Arbitrator notes that the parties' pleas at hearing, as well as, in post-hearing submittals included arguments which may not have been mentioned in the summaries of their positions and narratives discussed above. Nevertheless, the Arbitrator has fully considered all the paramount arguments made. If a particular nuance or slant of a parties' argument has not been mentioned in either the summary of the parties' position or narrative presented above it is because the Arbitrator did not find the point persuasive or that his finding made it moot.

B. Regarding the merits of the subject grievance.

As discussed, analyzed and explained above, the Agency's threshold challenges have been found to have no merit; therefore, the Arbitrator now turns to the merits of the subject grievance. Now, the issue to be resolved is:

> *Did the Agency violate the provisions of Federal law, regulations, and/or the parties' Master Agreement (MA) when it decided a memorandum of understanding (MOU) between it and Local 408 was ineffective and would no longer be honored; then, implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696; and, in so doing, skipped over bargaining unit employees represented by Local 408 when overtime was offered and assigned; thereby, adversely affecting bargaining unit employees represented by Local 408? If so, what should the remedy be?*

As the Agency points out, the Union brought forth the allegations in the subject grievance, so the burden of persuasion is on them. However, the burden of producing evidence in rebuttal is on the Agency.[107] Both parties' position on the merits of this case are summarized and presented above and need not be re-stated here. It is sufficient to note only that...

Local 408 strongly argues that:

- it represents a specific identifiable group of BUEs, just like the other Union Locals;
- the Agency has historically recognized this Local Union representation of institutional/facility staff;
- for years each Local negotiated and administered its own MOU on overtime hiring procedures, which were seen as in compliance with Article 18, Section p 1;
- the procedures by which the BUEs represented by Local 408 are to receive overtime assignments were spelled out in the MOU it signed with FCC Butner management, with the approval of FLRA, on February 25, 2013;[108] and
- the actions by the Complex Warden on August 11, 2013, to establish a complex-wide overtime hiring procedure through execution of the new MOU with only two of the three Locals at Butner, set aside and not honor Local 408's MOU, and order the use of the newly established procedures have caused BUEs to be adversely effected and suffer monetary lost by being skipped over in the assignment of overtime.

The Agency, just as strongly disagrees, arguing that:

- all bargaining unit employees at FCC Butner are covered by the parties' Master Agreement;
- the Master Agreement identifies the Union and exclusive representative as the Council of Prison Locals;
- the duty to bargain resides only at the level of the exclusive representative;

- the sole dispute in the case comes down to the provisions of Article 18, Section p 1; and

- the term "employees in the bargaining unit," as used in Section p 1, refers to "all bargaining unit employees not those represented by a particular local."

With regard to the arguments that: the Union, Local 408, does or doesn't represent a specific group of bargaining unit employees; the duty to bargain resides only at the level of the exclusive representative; and whether or not the Agency has historically recognized and accepted the Local Union role and applicability of singularly negotiated MOUs –

A review of the key provisions of the parties' agreement[109] clearly shows that:

- AFGE and the Council of Prison Locals are the recognized exclusive representative of all BUEs in the Bureau. However, the record shows, and careful reading of the MA reveals, that functionally the Council's duty relates only to the negotiation of the Master Agreement and handling Bureau-wide and multi-institution issues and grievances. And,

- Starting with the Preamble, the MA envisions, directs and/or allows representation and negotiation at the institutional/facility level through AFGE Locals[110]. As is noted above – Article 2 of the MA, dealing with "Joint Labor Management Relations" provides in Section f that "The parties at the national level endorse the concept of regular labor management meetings at the local level...[and that]...The actual procedures for local labor management meetings will be negotiated locally." In Article 3, dealing with "Governing Regulations" the MA provides in Section a 1, "...local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level"...[and] in Section d 5, "...when locally-proposed policy issuances are made, the local Union President will be notified...and the manner in which local negotiations are conducted will parallel this article." And, Article 18, Section p, begins with "Specific procedures regarding overtime assignments may be negotiated locally." In fact, the term "local negotiation and/or local negotiations" is mentioned some eleven times in the MA; the term "Local President and/or Local Union President" is mentioned some fourteen times; and the term "Local supplemental agreement(s)" is mentioned some five times. Ground rules for local negotiation of supplemental agreements are even presented as an appendix to the MA. And,

- Article 9 of the MA, which is titled "Negotiations at the Local Level" shows the parties' fully anticipated and planned for AFGE Locals and institutional/facility management to negotiate and execute binding contracts. While some of the MA's provisions providing for Local negotiation are permissive, that is provide that the subject may be negotiated; several provisions are not permissive, and require negotiation of the matter at the local/institutional level, i.e., Article 2, Section f, which provides "The actual procedures for local labor management meetings will be negotiated locally." Furthermore, the MA provides for two different types of local agreements, the memorandum of understanding (MOU) and local supplementary agreements (LSAs); and in Article 9 fully describes the procedures for negotiating and executing LSAs. LSAs can be initially negotiated only during a specific period after the execution of the MA. They can address multiple provisions and/or issues; in fact, the MA allows Local parties to include any matter in the LSA which does not specifically conflict with Article 9 and the MA. And, the MA provides that only one LSA may be negotiated at each institution/facility. However, LSAs are not binding on the Union unless ratified by the Local's membership. LSAs expire upon the same date as the Master Agreement and, if the MA's life is extended beyond the scheduled expiration date for any reason, local supplemental agreements are also extended. MOUs, on the other hand, do not have to be executed in the same detailed manner as LSAs; can be negotiated and executed at any time during the life of the MA and do not have to be ratified by the Local's membership (but as a matter of course, usually are brought up to the Local's membership); usually address one particular matter or issue; but, otherwise are considered similar to LSAs. With mutual agreement of the parties, both LSAs and MOUs can be amended or modified in the

same manner as the MA. MOUs, like LSAs expire when the supporting Master Agreement expires. And,

- The Master Agreement clearly provides that "This Agreement and such supplementary agreements and memorandums of understanding by both parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union."

As to the role and characterization of Local 408 -- While neither the Agency nor the Union, at hearing or in submittals, clearly and distinctly described and characterized the Union's full recognition; the Arbitrator, therefore, characterizes and understands that recognition as – The American Federation of Government Employees, AFL-CIO, Council of Prison Locals (normally referred to simply as AFGE), is the exclusive representative of a nationwide consolidated bargaining unit of employees of the Federal Bureau of Prisons and the American Federation of Government Employees, AFL-CIO, Council of Prison Locals, Local 408 (or any other of the BOP Locals, normally referred to simply as the Union) is an agent and affiliate of AFGE for the purpose of representing bargaining unit employees at the institutional/facility level, i.e., Butner FCC.[11]

Accordingly, based on the preponderance of the evidence, the Arbitrator finds that:

11. the Agency's argument that Local 408 does not "represent" a specific group of bargaining unit employees is without merit. The parties' MA clearly establishes a specific role for the AFGE Locals operating as the Union's agent and affiliate responsible for representing a specific group of BUEs, that is the employees within the institution/facility, the Local is charged with representing. The MA also, provides in Article 7, Section k, that "[T]he Union and the Employer recognize the role of the Union at the local level."

Here the Arbitrator notes the Agency's contention that "a key problem with the subject case is that the Union, AFGE, has established three different locals at the Butner Complex...." It is the Arbitrator's opinion that the parties, when they negotiated the Master Agreement(s), clearly understood that the Locals, as an agent and affiliate of AFGE for the purpose of representing bargaining unit employees at the institutional/facility level, play an important role in the over-all labor-management relationship. This relationship, as provided for in the MA, also clearly is centered on the AFGE Local representing BUEs "within the individual institution/facility." The problem isn't that AFGE established three different Locals at Butner – each Local historically has an "institutional relationship and responsibility" (e.g., Local 408's responsibility for representation of BUEs in the FMC and FCI-2; Local 3696's responsibility for BUEs in FCI-1, and Local 405's responsibility for LSCI). The problem is the development and establishment of the Complex structure. With the development of the Complex is the historic institutional/facility relationship still with the individual institutions/facilities that make up a Complex or is it now only with the Complex. While the Locals at Butner sought to address the centralization of departments/functions those actions did not address the over-arching issue of the establishment of the Complex itself.

12. the Agency's argument that the duty to bargain resides only at the level of the exclusive representative is without merit. While, the Arbitrator acknowledges the Agency cited and included the caveat "absent an agreement between the parties providing for local negotiations or other delegation of authority" in its brief; still the argument stressed the negative and de-emphasized the caveat. It was clear to the Arbitrator that the Agency wanted a ruling negating local bargaining. However, the parties' MA clearly and unequivocally provides for, and in some cases requires, institutional/facility or local bargaining.

13. the parties' Master Agreement clearly recognizes and accepts the Local Union role and applicability of singularly negotiated MOUs. Furthermore, Butner FCC management and the three AFGE Locals representing BUEs, working in specific Butner institutions, Local 3696 representing FCI-1, Local 405 representing the LSCI, and Local 408 representing FCI-2 and the FMC, have a history of negotiating, executing, and operating in accordance with singularly negotiated MOUs, including those accepted as complying with the requirements of Article 18, Section p, providing overtime hiring procedures calling for "first consideration of Local BUEs";

and, that this more than fifteen year history of mutual acceptance and use of such MOUs constitutes an established pattern of behavior involving a "condition of employment" qualifying as a past-practice.[112]

As to the provisions of Article 18, Section p...

The record shows that, at Butner, management has over the years recognized and accepted the role of the AFGE Locals, 3696, 405, and 408 as labor-management partners, negotiating various MOUs, including MOUs addressing overtime hiring procedures within the individual institutions represented by each Local. This history of years of operating within Locally negotiated, singularly applicable MOU's providing unique overtime hiring procedures for the institution or institutions where each individual Local represented a specific group of BUEs (i.e., the MOU negotiated in 2010 between Local 408 and FCC Butner providing overtime hiring procedures for FCI-2 and FMC; and similar MOUs with Local 405 and 3696 providing for overtime hiring procedures for BUEs they represented within FCI-1 and LSCI); all seen and accepted as being in compliance with Article 18, Section p 1; clearly establish a past-practice of such behavior, which cannot know be disclaimed.[113]

Accordingly, based on the preponderance of the evidence, the Arbitrator finds that:

14. the Agency's argument that "employees in the bargaining unit," as used in Section p 1, refers to "all bargaining unit employees not those represented by a particular local;" is without merit. The record shows that Article 18, Section p, begins with the phrase "Specific procedures regarding overtime assignments may be negotiated locally;" and that, historically, Butner management has accepted and operated within the confines of Locally negotiated MOUs providing for overtime hiring procedures applicable to each separate institution for BUEs represented by each individual Local, all having been seen and understood as complying with the provisions of Article 18, Section p; including the understanding that the individual Local represented a specific group of BUEs and their MOU provided for "first consideration of that group of BUEs for overtime assignments within the institution or involving inmates in the institution represented by that Local." Management cannot now claim the term bargaining unit employees as used in Section p applies to all bargaining unit employees not to a singular group of BUEs employed in an individual institution represented by an individual Local.

Here the Arbitrator notes the Agency's position that "an arbitrator has already defined Article 18, Section p's provision for FCC Butner." To support its position the Agency cites two specific cases – Federal Bureau of Prisons and AFGE, Local 33, FMCS Case No. 06-01919 decided September 6, 2008, by Arbitrator Christopher Honeyman and DOJ, FBOP, FCC Butner and AFGE, Local 405, FMCS Case No. 11-51176 decided July 23, 2012, by Arbitrator J. Wood, AFGE, Council of Prison Locals, Local 405 and U.S. DOJ, FBOP, FCC Butner 67 FLRA 108 (2014). Here the Agency misreads both cited decisions. Honeyman did not address the question of whether the term "bargaining unit employee" as used in Article 18, Section p 1, means all BUEs throughout the Bureau of BUEs as represented by an AFGE Local at the institutional/facility level; it addressed the applicability of 5 CFR 551.432 and the proper pay for employees on temporary duty, including der diem pay, finding against the Agency. As for Arbitrator Wood's decision, while she did have to concern herself with the provision of Article 18, Section p1, her findings, again did not address the question of whether the term "bargaining unit employee" as used in Article 18, Section p 1, means all BUEs throughout the Bureau of BUEs as represented by an AFGE Local at the institutional/facility level; her decision was centered on disparate treatment of BUEs and those represented by Local 405 being singled out and treated differently than BUEs represented by Locals 3696 and 408. Again she found against the Agency finding that it did not assign and rotate overtime among qualified employees in the bargaining unit in an equitable manner and ordered back pay. Furthermore, as the FLRA noted, the Agency never argued to the Arbitrator that the equitable-distribution provision requires equitable distribution of overtime across only a given local's jurisdiction, even though it elicited testimony during the hearing that appears to have been intended to support this very argument.

Turning to the first part of the issue in question -- *Did the Agency violate the provisions of Federal law, regulations, and/or the parties' Master Agreement (MA) when it decided a memorandum of understanding (MOU)*

between it and Local 408 was ineffective and would no longer be honored; then, implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696?

The record shows that during the period October 26, 2011, through March 5, 2012, AFGE Local 408 and FCC management conducted negotiations on the issue of overtime hiring procedures and utilization of the Correctional Services Roster program for BUEs represented by Local 408 in FCI-2 and the FMC. Agreement was reached and on March 5, 2012, Local 408's President and the FCC Complex Warden signed the "Local specific" MOU. Subsequently, institutional level management called for negotiations on a complex-wide overtime hiring procedure and, along with Locals 3696 and 405, Local 408 participated in these negotiations – During which the same institutional level manager(s) refused to sign the Local 408 MOU and announced it was "taken off the table"; which resulted in Local 408 filing a ULP. Then, on February 25, 2013, with the assistance, involvement, and approval of the FLRA, FCC Butner management and Local 408 executed the March 5, 2012, MOU, together with a settlement agreement and FLRA dismissed the ULP. Shortly thereafter, the same institutional level manager who initially called for negotiations on a complex-wide overtime hiring procedure, tabled and refused to sign Local 408's MOU prior to the February 25, 2013, settlement agreement; again called for negotiations on a complex-wide overtime hiring procedure. This time Local 408 refused to participate in the negotiations on the complex-wide overtime hiring procedure; and on July 3, 2013, the Complex Warden notified Local 408 that the MOU executed on February 25, 2013, with the approval of FLRA, was ineffective, invalid, and would no longer be honored. The Complex Warden also informed Local 408 that a MOU had been signed with Locals 3696 and 405 on a complex-wide overtime hiring procedure which would go into effect August 11, 2013. Shortly, thereafter, on July 25, 2013, Local 408 filed a second ULP alleging that FCC management repudiated and violated the FLRA Settlement Agreement.

The Agency claims the actions by FCC management regarding the MOU executed with Local 408 on February 25, 2013, allowed for further negotiations on the overtime hiring procedures and with Local 408's refusal to participate in the further negotiations, management therefore, was justified in no longer honoring the MOU and entering into the new MOU with Locals 3696 and 405.

Without further comment on FLRA actions and decisions relating to either of the two ULP's filed by Local 408, since I have already addressed the two ULPs and found they did not bar the subject grievance – The Arbitrator does not agree with the Agency's defense.

Based on the Arbitrator's reading of the parties' MA, the Local 408 MOU was negotiated and accepted by the Butner Complex Warden on March 5, 2012; as to whether or not that agreement was required to be accepted and signed by the individual institution Wardens is questionable; nevertheless, the agreement was ultimately fully executed on February 25, 2013. Under the provisions of the parties MA that MOU became part of the "collective agreement between the Agency and the Union;" and, could only be modified or amended by mutual consent of the parties, much less be found ineffective, invalid, and disregarded by FCC management.

As to the Agency's contention that the February 25, 2013, MOU allowed for new negotiations concerning the procedures for overtime, therefore, management was within its right to proceed as it did, and the Local 408 waived its rights by refusing to participate in the new negotiations; again the Arbitrator disagrees.

Again, without commenting on FLRA's reading of the March 2012 MOU, other than noting that Authority found the "language [to be] capable of more than one interpretation;" and, that "Questions of interpretation are for an arbitrator...;" we will now look at the provisions of the March 2012 MOU. Clearly interpretation of the wording in the March 2012 MOU must be based on knowledge of the provisions of the parties' MA; and, an understanding of the history of FCC Butner and its negotiation, execution, and administration of MOU's covering overtime hiring procedures with its three AFGE Locals. Without addressing any other provisions of the March 2012 MOU, other than noting that it is a Local and institutional specific agreement; let's consider what the parties are providing in the section titled "Effects on Other MOUs." That section provides:

> "This MOU supersedes all previous MOU's with dealing with Overtime signed by the Agency and Local 408. Any new negotiations concerning the procedure for overtime will review the procedures listed here and be incorporated for negotiation in the new negotiations. Should any issues/concerns arise as a result of this MOU, the Agency and Local 0408 agree to discuss them within seven (7) working days of notification of the issue or concern." [Wording corrected]

This provision can only be interpreted to be addressing matters involving the parties signing the MOU, that is, FCC management and Local 408. It supersedes only MOUs "dealing with Overtime" previously executed by the signing parties, FCC management and Local 408. This provision has absolutely no impact on anything involving parties other than FCC management and Local 408. The phrase "Any new negotiations concerning the procedures for overtime..." concerns only actions involving FCC management and Local 408 – Therefore, since Local 408's representational responsibility is limited to matters concerning BUEs it represents, those working in FCI-2 and FMC, the phrase can only be addressing new negotiations between FCC management and Local 408 "concerning the procedures for overtime for BUEs and in institutions where Local 408 has representational responsibility." Should FCC management and Local 408, therefore, open new negotiations concerning procedures for overtime in FCI-2 and/or FMC, or any new institution where Local 408 has assumed representational responsibility; the procedures outlined in the March 2012 MOU are to be reviewed and incorporated into the negotiations for any new agreement being negotiated by FCC management and Local 408. This provision, in no way, is an invitation to negotiate; nor is it mandating that anyone (other than those who are signature to the 2012 MOU) review the overtime procedures outlined in the March 2012 MOU and incorporate those procedures into the negotiation for any other new overtime procedures that involve any other parties or any other institutions. Therefore, the cited provision was not an invitation to open new negotiations on overtime procedures. Especially since the requirements of the MA mandate that parties to an executed MOU (or LSA) must mutually agree to reopen negotiations on, or amend, the provisions of the executed agreement. Furthermore, the cited provision clearly requires that any questions/concerns that arise regarding the MOU (again those must be issues/concerns by/of the signature parties) be discussed.

As to that part of the Agency's argument that Local 408, by refusing to participate in the re-opened complex-wide overtime procedure negotiations, waived any rights – The Arbitrator notes that Local 408 and FCC Butner had already negotiated overtime hiring procedures and the use of the Correctional Services Roster program and memorialized their agreement in the MOU signed initially by the then Complex Warden on March 5, 2012, then fully executed on February 25, 2013. Just as the "covered by doctrine" can shield management from having to negotiate matters already agreed to and covered by a formal agreement, so does the doctrine shield the Union from having to renegotiate matters previously agreed to and covered by a formal agreement. Here, Local 408 had a properly executed MOU, which under the provisions of the parties' MA was part of the "collective agreement" between the Agency and the Union; and without mutual agreement, matters covered by that MOU could not be reopened or amended.[114] The Union did not give its consent to reopen the matter.

Accordingly, based on the preponderance of the evidence, the Arbitrator finds that:

> **15. the Agency (through the actions of the FCC Butner Complex Warden, as well as, one or more institutional level Wardens at Butner) violated the provisions of the parties' Master Agreement (MA) when it decided the memorandum of understanding (MOU) between it and Local 408 [identified herein as the March 2012 MOU or MOU executed between FCC management and Local 408 on February 25, 2013] was ineffective and would no longer be honored.** As to whether the Agency violated Federal law and/or regulations, that part of the questions will be addressed below.

As to the whether or not the Agency violated Federal law, regulations, and/or the parties' Master Agreement (MA) when it implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696.

The question of whether or not the Agency/FCC Butner management can execute and participate in an agreement between more than one party (AFGE Local) is not before this Arbitrator. Therefore, he renders no opinion or judgement regarding the legality of the Memorandum of Understanding executed July 1 and 2, 2013, between FCC management and Locals 405 and 3696. However, the Arbitrator does observe the following:

- The cited MOU is not in the format observed in other MOUs that are a matter of record in this case. For example the heading of the MOU executed by FCC management and Local 408 on overtime hiring procedures for FCI-2/FMC in 2010 and in 2013 had a heading which clearly provided that the parties were the "Council of Prison Locals, Local 408 (Union) and the Federal Correctional Complex, Butner, NC (Agency) and clearly identified the subject of the MOU.

- The cited three-party MOU, while providing in paragraph number 1 that "Each institution will maintain their current roster program" proceeds to change the provisions of those institutional singular/Local specific MOU established programs. Here the parties' MA provides that local agreements can only be reopened, modified, amended with the mutual consent of the originating parties.

- Finally, the record shows if there is to be a multi-party agreement at the institutional/facility level which involves AFGE Locals that have institutional specific representational responsibilities, that all of the Locals within that structure must agree on such a multi-party agreement; further, the MA appears to provide that such agreements will not be binding on the Union unless ratified by the membership.

Accordingly, based on the preponderance of the evidence, the Arbitrator finds that:

16. the Agency [through the actions of the FCC Butner Complex Warden, as well as, one or more institutional level Wardens at Butner] violated the provisions of the parties' Master Agreement (MA) when it implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696.

Now turning to the last part of the issue – "and, in so doing, skipped over bargaining unit employees represented by Local 408 when overtime was offered and assigned; thereby, adversely affecting bargaining unit employees represented by Local 408."

As outlined and discussed above, the Union reviewed data from overtime sign-up lists, prior to and after the combined roster was implemented and the overtime hiring procedure changed, to determine the effect on BUEs represented by Local 408. That review looked at a sampling of overtime assigned/worked during eleven (11) pay periods from August 2013 through June 2015. The review found many instances where BUEs represented by Local 408 were skipped in the assignment of overtime; some of which occurred on numerous occasions and in various scenarios. Specifically, the review noted that:

- Every time that a BUE not represented by Local 408 was assigned/worked overtime within institutions/departments/posts represented by Local 408, a BUE represented by Local 408 had been skipped over.

- Whenever a non-bargaining unit employee was assigned/worked overtime in an institution/department/post represented by Local 408, a BUE represented by Local 408 had been skipped over. And,

- Where employees who were graded GS-12 and above, who should not have been allowed to work overtime, worked overtime; not only BUEs represented by Local 408, but BUEs represented by Locals 3696 and 405 were skipped over.

The Union also submitted evidence that every time "List Exempt Overtime Logs" were used to make overtime assignments, which it claims should be only in emergency circumstances, there was some abuse. For example, the Union found instances where employees were assigned/worked overtime continuously over short periods of time through the use of the "List Exempt" provision, which the Union claims would be almost impossible.

In order to quantify the estimated amount of overtime pay BUEs represented by Local 408 were denied by being skipped over; the Union's study used the salary for grade GS-08, step 6, as the average pay of a BUE represented by Local 408. Admitting that its review was not a "professional study;" and, that there might be errors, the Union points out that their review clearly showed:

- During the August – October 2013 period BUEs represented by Local 408 were skipped over for an estimated 6,154 hours of overtime; at an estimated hourly rate of $40.04 that amounts to approximately $246,406.00 in missed overtime pay.

- In November 2013 BUEs represented by Local 408 were skipped over for an estimated 4,594 hours, at the estimated hourly rate of $40.04 that amounted to some $183,943.00 in missed overtime pay.

- In December 2013 BUEs represented by Local 408 were skipped over for an estimated 2,064 hours, losing some $82,643.00 in overtime pay.

- In January 2014 BUEs represented by Local 408 were skipped over for an estimated 1,720 hours, losing some $68,869.00 in overtime pay.

- In July 2014 BUEs represented by Local 408 were skipped over for an estimated 5,184 hours, losing some $207,567.00 in overtime pay.

- And, in June 2015 BUEs represented by Local 408 were skipped over for an estimated 2,672 hours, losing some $106,987.00 in overtime pay.

In total the Union argues that its limited review of overtime rosters between the period August 2013 and June 2015 found BUEs, represented by Local 408, were skipped over and lost out on an estimated 22,388 hours of overtime; and, were therefore, deprived of an estimated $896,415.00 of overtime pay.

It should be noted that the Agency, while raising questions during Local 408's Chief Steward and President's testimony on the Union's review process and findings, presented no counter testimony and offered no comments on the review and its findings through its post-hearing brief.

Accordingly, based on the preponderance of the evidence, the Arbitrator finds that:

17. the preponderance of the evidence presented by the Union clearly shows that BUEs represented by Local 408, were skipped over in the assignment/hiring of overtime during the period August 2013 through June 2015 when FCC Butner was operating under the new overtime hiring procedures established through its MOU with Locals 3696 and 405 as directed by the Complex Warden. And,

18. this action constituted a violation of the parties' Master Agreement.

As to whether or not the actions of the Agency [through and by the actions of the FCC Butner Complex Warden] constituted an unjustified and unwarranted personnel action – The Arbitrator notes that the FLRA has ruled that a violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action.[115]

Accordingly, based on the preponderance of the evidence, the Arbitrator finds that:

19. the actions of the Agency [through and by the direction of the FCC Butner Complex Warden] found above to have violated the provisions of the parties' Master Agreement, constitute an unjustified and unwarranted personnel action against the bargaining unit employees represented by Local 408. And,

20. the actions of the Agency [through and by the direction of the FCC Butner Complex Warden] resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the affected BUEs represented by Local 408 in violation of the Back Pay Act.[116]

Having found the actions of the Agency [through and by the direction of the FCC Butner Complex Warden] constituted a violation of the Back Pay Act, **based on the preponderance of the evidence, the Arbitrator further finds that:**

21. the Agency [through the actions of the FCC Butner Complex Warden, as well as, one or more institutional level Wardens at Butner] violated Federal law and/or regulations.

Here, the Arbitrator notes that, while the evidence presented by the Union clearly shows, in a persuasive manner, that a number of BUEs represented by Local 408 were skipped over in the assignment of overtime, losing out on

an estimated 22,388 hours of overtime and an estimated $896,415.00 of overtime pay during the period August 2013 through June 2015; the exact number of BUEs affected, the exact amount of overtime lost, and the exact amount of individual loss has not yet been determined.

Accordingly, the Arbitrator notes that:

- the Back Pay Act provides in part that an employee "is entitled, on correction of the personnel action, to receive, for the period for which the personnel action was in effect –
    - an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
    - reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed...."
- the FLRA has ruled[117] that the threshold requirement for entitlement of attorney's fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Once such a finding is made, the BPA further requires that an award of attorney's fees be:
    - in conjunction with an award of back pay to the grievant on correction of the personnel action;
    - reasonable and related to the personnel action; and
    - in accordance with the standards established under 5 USC 7701(g) which pertain to attorney-fee awards issued by the Merit Systems Protection Board.
- the FLRA has also ruled that the threshold requirement for an award of attorney's fees under the BPA is a finding that the grievant was affected by an unjustified or unwarranted personnel action, which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. Once such a finding is made, fees may be awarded in accordance with the standards established in 5 USC 7701(g).[118] And,
- in order to obtain fees, a party must prevail in the arbitration.[119] And,
    - to qualify as a prevailing party, an individual must have received "an enforceable judgment or settlement" which directly benefited him or her. For example, an arbitrator's reduction of a suspension to a reprimand qualified the grievant as the prevailing party.[120] Also,
    - an individual may be a prevailing party when he or she prevails on one theory of the case but fails under another theory.[121]

Accordingly, the Arbitrator acknowledges that the Union has asked for attorney's fees;

In view of the findings identified and discussed above it is the Arbitrator's conclusion that it is unnecessary to address any of the other lesser arguments raised by the Agency and Union because they were irrelevant, superfluous, redundant, rendered moot, and of no persuasive value.

Based on the preponderance of the evidence, the Arbitrator additionally finds:

As noted and explained above, the parties' Master Agreement clearly provides for local level negotiations of matters as specifically addressed in various articles and sections. Additionally, the MA specifically provides in Article 9, Section a, that only one supplemental agreement (LSA) may be negotiated at each institution/facility.

Since the MA has very specific provisions regarding the number of LSAs that can be negotiated, the time period when LSAs can be negotiated; as well as, the review, approval, modification, and duration of LSAs – Based on the testimony of the President of the Council of Prison Locals[122], that MOUs are considered to be basically the same as LSAs; the Arbitrator concludes that MOUs, while not having to go through the same review and approval process as LSAs, not being limited in numbers like LSAs, or not being limited as to when they can be negotiated like LSAs; nevertheless must be amended/modified in the same manner as LSAs; and, like LSAs expire on the same date as the Master Agreement, unless extended in the same manner as LSAs.[123]

Accordingly, just as the Arbitrator has found that the Local 408, March 2012 MOU, executed on February 25, 2013, and the three-party MOU executed by the FCC Butner and AFGE Locals 3696 and 405 on July 1 and 2, 2013, were negotiated and executed in accordance with the parties' MA and "constituted part of the collective agreement between the Agency and the Union;" the Arbitrator based on the record as provided by the parties finds that:

> **22. both the Local 408, March 2012 MOU, executed on February 25, 2013, and the three-party MOU executed by the FCC Butner and AFGE Locals 3696 and 405 on July 1 and 2, 2013, were not extended and/or renegotiated with the consent of all parties in accordance with provisions of the MA when the Master Agreement expired on or about May 24, 2014, and the current Master Agreement became effective, therefore, both MOUs expired on the date the previous MA expired.**

That being the case, if FCC Butner management continued to apply the provisions of the three-party MOU relating to overtime hiring procedures past the expiration of the old MA, into the period covered by the new MA, and beyond, without properly extending the MOU and/or renegotiating under the provisions of the new MA; **then the Arbitrator finds**:

> **23. such action is in violation of the parties' Master Agreement [since the applicable provisions of both the old and the new Master Agreements are basically the same] and, if BUEs represented by Local 408 continued to be skipped over in overtime assignments, the actions of FCC management have caused that continued adverse action on each of the effected BUEs.**

Finally, the Arbitrator takes special note regarding findings 17 through 20 as provided above and acknowledges that while the preponderance of the evidence presented by Local 408 clearly and sufficiently shows that BUEs represented by Local 408 were:

- skipped over in the assignment/hiring of overtime during the period August 2013 through June 2015 when FCC Butner was operating under the new overtime hiring procedures established through its MOU with Locals 3696 and 405 as directed by the Complex Warden; which
- constituted a violation of the parties' Master Agreement; and was
- an unjustified and unwarranted personnel action against the bargaining unit employees represented by Local 408; which
- resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the affected BUEs represented by Local 408 in violation of the Back Pay Act.

While the evidence presented by Local 408 through testimony and documentation met the Union's burden of proof sufficiently to allow the findings as presented and explained above; the evidence presented was not sufficient to establish the individual identity of each BUE affected by name, position/job classification (title, series, and grade/step), with the exact amount of overtime hours they should have been assigned and were not; as well as the individual identity of each employee who actually was assigned and worked the overtime [name, position/job classification (title, series, and grade/step)]. See required action below.

VII. Decision and Award.

As provided in Elkouri an arbitrator may issue an interim award without the agreement of the parties;[124] and retain jurisdiction so that their award is properly carried out and disagreements about the award can be resolved.[125]

Accordingly, the following interim decision and award addresses the threshold issues raised and the merits of the subject case and serves as the Arbitrator's final and binding decision, in accordance with the provisions of the parties' Master Agreement, Article 32, Section h, regarding these matters; and may not be reconsidered by this Arbitrator as it would be improper because it is beyond the scope of the arbitrator's limited retention of jurisdiction. The Arbitrator retains jurisdiction for an unspecified period of time during which the parties are to gather and present evidence of the full extent to which bargaining unit employees represented by Local 408 have been harmed and total amount of damages, costs, and fees to be assessed.

As the issues to be answered by this decision were:

> *Is the subject grievance barred by a previously filed ULP and/or procedurally flawed and, therefore, not arbitrable? If not...*
>
> *Did the Agency violate the provisions of Federal law, regulations, and/or the parties' Master Agreement (MA) when it decided a memorandum of understanding (MOU) between it and Local 408 was ineffective and would no longer be honored; then, implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696; and, in so doing, skipped over bargaining unit employees represented by Local 408 when overtime was offered and assigned; thereby, adversely affecting bargaining unit employees represented by Local 408? If so, what should the remedy be?*

Based on the Arbitrator's finding as discussed above, it is the Arbitrator's decision that:

The subject grievance, identified as FLRA Case number 14-50738-8, filed by AFGE Local 408, by and through the actions of its President Anthony Little, on September 11, 2013, was properly filed in accordance with the provisions of the parties' Master Agreement, as provided for in Article 31. Therefore -

The answer to the first part of the issue statement -- *Is the subject grievance barred by a previously filed ULP and/or procedurally flawed and, therefore, not arbitrable?* -- **is No; the subject grievance is NOT barred by a previously filed ULP and/or procedurally flawed, therefore, it IS ARBITRABLE.**

The answer to the second part of the issue statement -- *Did the Agency violate the provisions of Federal law, regulations, and/or the parties' Master Agreement (MA) when it decided a memorandum of understanding (MOU) between it and Local 408 was ineffective and would no longer be honored; then, implemented overtime hiring procedures based on a different MOU with Locals 405 and 3696; and, in so doing, skipped over bargaining unit employees represented by Local 408 when overtime was offered and assigned; thereby, adversely affecting bargaining unit employees represented by Local 408?* -- **is YES; the Agency [through the actions of the FCC Butner Complex Warden] did violate the provisions of Federal law and regulations, as related to the Back Pay Act, 5 USC §5596, and the parties' Master Agreement.**

The subject grievance is sustained.

The answer to the final part of the issue statement -- *If so, what should the remedy be?* **is, the Agency is ordered to:**

- immediately upon receipt of this decision/award stop the use of the overtime hiring procedures and utilization of the Correctional Services Roster program established by, and described in, the three-party Memorandum of Understanding (MOU) executed on July 1 and 2, 2013, by FCC Butner and AFGE Locals 3696 and 405; and
- reinstate use of the institutional specific overtime hiring procedures and utilization of the Correctional Services Roster program established by, and described in, the Memorandum of Understanding (MOU) initially executed between FCC Butner and AFGE Local 408 by

signature of Complex Warden Sarah Revalls on or about March 5, 2012, and fully executed by FCC Butner and AFGE Local 408, with FLRA approval on February 25, 2013.[126]

Additionally, within thirty (30) calendar days from receipt of this decision and award, the parties are ordered to formally report to the Arbitrator and provide him a written plan of action they will follow to:

- review the process used by Local 408 to review overtime assigned/hired during the period August 2013 through June 2015 to determine which BUEs represented by it had been skipped/passed over/not hired for overtime, that established the data presented at hearing as evidence in its case to provide the Arbitrator with an estimated total amount of overtime missed by the BUEs it represented and approximation of the pay, allowances, benefits, or differentials lost by the affected BUEs; and

- conduct a full and thorough review of the official overtime assignment/hiring records, including time and leave and/or other official attendance and pay records for the period August 11, 2013, up to the date the Agency takes the action directed above so as to provide the following information/data at hearing before the Arbitrator:

  - the full name and classification (title, series and grade/step) of every BUE represented by Local 408 and identified through the review directed by this order to have been skipped over, not allowed to sign-up for, and/or in any other way not to have been assigned/hired for any type of overtime to which the employee was and/or should have been entitled to for the period beginning August 11, 2013, up to the date the Agency takes the action directed above;

  - the total amount of overtime deprived for each identified and named BUE, shown per month/year/ and grand total for the period in question, together with the total dollar amount of pay, allowances, benefits, or differentials lost per month/year/ and grand total for the period in question;

  - the full name and classification (title, series and grade/step) of the employee who actually was assigned/worked the overtime [For example][127]; and

- the projected amount of time the parties will need to complete the review, data gathering, and assembly of the information to be reported to the Arbitrator;

- the estimated number of days the parties will need to report the information to the Arbitrator and present their respective case regarding the findings and for/against damages, costs, etc., as allowed by the Back Pay Act; and

- offering three dates/periods when the hearing could be held.

The FINDINGS and INTERIM DECISION as presented above are made pursuant to Article 32 of the parties' Master Agreement; and mailed, per Section g, to the address as provided by each parties' representative/counsel at the hearing. Therefore, in accordance with Article 32, Section d, of said agreement the parties are directed to pay the fees and costs of the undersigned Arbitrator as presented in his invoice as mailed under separate cover.

So Ordered and Respectfully Submitted,

William A. Dealy, Jr.
Arbitrator (FMCS #3823

Date: May 31, 2016.

End Notes

[1] Arbitrator/Joint exhibit A/J-7...Testimony of Mr. Little, Transcript Vol. I, pgs.184-185.

[2] A/J-4...Testimony of Mr. Hemingway, Vol. 1, pgs. 45-49...Grievance filed – U.S. Department of Justice, Federal Bureau of Prisons form BP-S176.037 dtd May 1994 Formal Grievance Form showed: 1. the grievant(s) as Local 408, FCC Butner; 2. the duty station as FMC/FCI-2, Butner BOP; 3. the representative of the grievant(s) as Anthony Little, President, Local 408; 4. the informal resolution attempted with Labor Management Relation Chairs, AW Manuel Coll and AW Jennifer Saad (Delegated Representatives of Warden Apker and Warden Dunbar); 5. the Federal Prison System Directive, Executive Order, Statute violation as Title 5 USC 7116, the Master Agreement, Articles 6 and 18, and the Back Pay Act; 6. In what way were each of the [identified directives, orders, statutes, etc.] violated...[the following statement was provided]..."On 8/20/13, Complex Warden Apker violated Local 408's Overtime Hiring Procedure by changing the way Local 408 receives overtime. Local 408'sMOU states all Local 408 Bargaining Unit Staff will be granted/assigned overtime according to their order on the Correctional Services Roster Program. When overtime is assigned or refused, Local 408 bargaining staff name will rotate to the bottom of the overtime list. If no contact is made to the first staff member, a NO CONTACT (NC) will be noted and move to the next staff member's name. If overtime assignment is canceled for whatever reason by Management, assign staff's name will be reinstated to the original place on the list prior to the canceled assignment. Bargaining Unit Staff are being skipped on the overtime sign up list daily. (i.e.) Bargaining Unit Staff can sign up on two overtime list, so if one member signs up on the FMC/FCI2 roster and get overtime they would go to the bottom of the list. That same member can sign up for overtime on the FCI 1/Low roster and get overtime the next day so someone is getting skipped. On 8/20/13 Local 408 Bargaining Unit Staff were not allowed to sign up on the FCI 1/Low overtime roster. Prior to Management changing Local 408 Overtime Hiring Procedures, overtime distribution for Local 408 was fair and equitable. This adverse action has affected all Local 408 Bargaining Unit Staff."; 7. the date(s) of the violation(s) were shown as Aug. 20, 2013 and continuously; 8. the requested remedy was shown as..."All attorney, legal fees and expenses incurred in the processing of this grievance will be reimbursed by the agency. That a cease and desist orders are issues against the Agency from further action of this nature. The grievant will suffer no reprisal, harassment, or intimidation, as a result of filing this grievance. That suitable compensations are granted and any other remedy the arbitrator deems appropriate to make the employee whole."; 9. the person with whom filed was shown as Ike Eichenlaub; 10. the title shown as MXR Regional Director; 11. a signature of the recipient of the grievance was shown; 12. The date signed was shown as 9/11/13...

[3] A/J-5...Testimony of Mr. Little, Transcript Vol. I, pgs. 188-189.

[4] A/J-8...Memorandum on AFGE, Local 408 letterhead of Michael Sharp, Chief Steward; dtd September 25, 2013, to Mr. Hemingway, HRM; subject, Intent to Arbitrate; with restatement of the directives, orders, laws, contract provisions violated and full statement of the issue as provided on the formal grievance form. On October 31, 2013, FMCS provided the local parties the list of seven arbitrators with their bios; on December 5, 2013, the local parties selected Arbitrator Dr. Edward Johnson; on December 9, 2013, FCC Butner notified Arbitrator Johnson that the parties had selected him to hear the subject case; on January 23, 20114 Agency Representative Joe Powers was assigned the case; On February 28, 2014, the Union notified the Agency that it had retained legal counsel, Ms. Lillam Mendoza, Mr. Powers and Ms. Mendoza agreed to hearing dates for August and September 2014; on May 14, 2014, new Agency Representative, Mr. Michael Markiewicz, notified Arbitrator Johnson that the case had been reassigned due to Mr. Powers leaving the Agency; on May 27, 2014, the Union and Agency representatives agreed to hearing dates of December 3, 4, 10 and 11, 2014; on December 8, 2014, Arbitrator Johnson called the Union and Agency representatives and canceled hearing dates due to his wife's medical condition...Arbitrator indicated that due to uncertainty of the current situation he would understand if another Arbitrator was selected by the parties...The Local parties went through the process of requesting a new roster of arbitrators from FMCS and subsequently, striking and selecting the undersigned Arbitrator (Arbitrator William A. Dealy, Jr.).

[5] The undersigned's initial contact with the parties was through an email from the Union's Counsel, Ms. Lillam Mendoza dated January 2, 2015 providing that she was representing AFGE, Local 408 in "the Butner Overtime case" and suggesting several periods of time as hearing dates. Following a series of email communications with the parties and FMCS; the undersigned received the January 5, 2015 assignment letter. The FMCS identified initial contacts as: 1. Mr. Stephen R. Jones, HRM at FCC Butner, P.O. Box 1000, Butner, NC 27509 for the agency; and 2. Mr. Anthony D. Little, Chief Steward, AFGE Local 408, at 3212 Vallejo Trail, Raleigh, NC 27610 for the union.

[6] The 100 page document, executed on February 6, 1998, comprised of a preamble with 42 Articles, two appendices, and index and signature page, and, as provided in Article 42 was effective upon completion of the Union ratification and Agency head review, for a period of three (3) years [March 9, 1998 – March 8, 2001] which could be extended in one (1) year increments by mutual consent of the parties. Written notice was to be given by either party to the other not less than sixty (60) days but not more than ninety (90) days prior to the expiration date that it desired to amend the Agreement. If neither party desired to renegotiate the Agreement, the parties were required to execute new signatures and date.

[7] This was important since Article 42 of the hard copy agreement provided "If neither party desired to renegotiate the Agreement, the parties were required to execute new signatures and date." And, no documentation was provided that the MLA had been properly extended as provided in Article 42. That is, no documentation was provided that the agreement had been extended in one-year increments from March 8, 2001 with new signature and date pages. The parties current Master Agreement was executed on May 29, 2014, also for a period of three (3) years [July 21, 2-14 – July 20, 2017] and can be extended in one (1) year increments by mutual consent of the parties; unless written notice is given by either party to the other not less than sixty (60) days but not more than ninety (90) days prior to the expiration date that it desired to amend the Agreement. If neither party desires to renegotiate the Agreement, the parties are again required to execute new signatures and date. This agreement also comprises of a preamble with 42 Articles, two appendices, and index and signature page. A limited review of the current agreement against the agreement in effect at the initiation of the subject grievance found several key provisions have been updated/changed, including Articles 1, 2, 3, 6, 9, 11, 18, and 31. Where such changes appear to affect the findings of this arbitration decision/award the Arbitrator will take note and comment on if appropriate.

[8] Arbitrator's record of the administrative conference...

Arbitrator:	Article 32, Section h. of the parties' MLA provides in part, that the Arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of the agreement or publish Federal Bureau of Prisons policies and regulations. Accordingly are the parties placing any other restrictions on my power to hear and decide this matter? Ms. Mendoza?
Ms. Mendoza:	No sir.
Arbitrator:	Mr. Markiewicz?

Mr. Markiewicz: No.

[9] The Union's technical representative was identified as Ms. Cheryl Daniel; and the Agency's technical representative was identified as Ms. Ollie Harris.

[10] Arbitrator's record of the administrative conference...

Arbitrator: In regard to issuance of the decision, I note Article 32, Section g, of the MLA provides that the Arbitrator is to render his decision within 30 days of the completion of the hearing unless otherwise agreed to by the parties. My calendar is fairly full and I would like to ask the parties to consider giving me the full 60 days that FMCS allows in its procedures. Do the parties have any problems with this?
Ms. Mendoza: No.
Mr. Markiewicz: As long as you need.
Arbitrator: Okay, So it will be sixty days after the close of the hearing.

[11] As explained at the administrative conference, three exhibit lists were being maintained - (1) the Arbitrator/Joint Exhibit list which would record all documentary evidence identified as joint exhibits and all documentary evidence requested by the Arbitrator; (2) the Agency/Employer List recording all documentary evidence offered by and accepted from the Agency; and (3) the Union/Grievant List recording all documentary evidence offered by and accepted from the Grievant.

[12] Transcript Vol. I, pg 15-16...

Arbitrator: With the exception of the contacts and correspondence just identified, as well as professional activities that occurred during my 30-plus years of Federal service involving the subject Agency and Union, to my knowledge, I have had no previous contact or relationship with any of the specific parties to this proceeding. Do the parties have any concerns or issues regarding my ability to conduct a fair and impartial hearing in the matter before us? Ms. Mendoza?
Ms. Mendoza: No, sir.
Arbitrator: Mr. Markiewicz?
Mr. Markiewicz: No, sir.

[13] The hearing was conducted in two sessions, the first session during the period August 4-6, 2015, during which the parties' addressed threshold issues; after which, the Union presented the majority of its case in chief. However, on the third day of hearings the Agency's counsel came to the hearing feeling ill and by mid-day determined he would not be able to continue. After discussions with the Counsels and review of calendars, it was determined to adjourn and reconvene the hearing on November 16, 2015. Said hearing was reconvened at 8:40AM, November 16, 2015. On this day the Union completed its case in chief and the Agency presented its case. The hearing was completed and adjourned at 1:50PM, Wednesday, November 18, 2015.

[14] Bryant Court Reporting Services, Inc., recorded the proceedings and provided both electronic and hard copy versions of the transcript to the parties and Arbitrator. 682 pages of transcripts.

[15] Transcript Vol. IV pg 145-146...

Arbitrator: Initially I asked, and both parties said that they had no problems with my ability to hear and render a decision in this case. I also asked, after acknowledging the provisions of the Mater Agreement, relative to Arbitrator powers, as to whether the parties were placing any additional restrictions on me. Both parties said they were not. Having said all that, Ms. Mendoza, on behalf of the Union, do you feel you've had a fair and appropriate opportunity to present the evidence that you want to present for this case?
Ms. Mendoza: Yes, sir.
Arbitrator: Mr. Markiewicz, on behalf of the Agency, do you feel you've had the opportunity to present your case as you wanted to present it?
Mr. Markiewicz: Yes, sir.

[16] With regard to the documentary evidence presented, and particularly the witness testimony presented at hearing, the Arbitrator has sought to impress upon the parties that a primary goal of his management of the hearing is to provide the parties the maximum opportunity to provide the evidence it feels necessary to adequately present its case. As to witnesses the Arbitrator is particularly cognizant of the need to assess the veracity of witnesses by paying particular attention to the demeanor of the witness, the character of the testimony, and any self-interest of the witness.

[17] See endnote 2 above.

[18] It should be noted that in the Arbitrator's appointment acceptance letter both parties were afforded the opportunity to file pre-haring briefs and only the Union submitted said brief by the deadline for such submissions.

[19] Arbitrator's record of the administrative conference...

Arbitrator: Based on the information provided me it appears that the purpose of the scheduled hearing is to determine if the employer/agency violated the provisions of the applicable CBA, it's supplements and memorandums of understanding when it failed to honor and comply with a February 2013 Federal Labor Relations Authority approved settlement agreement and memorandum of understanding between the Council of Prisons Local 408 and the Butner Federal Correctional Complex regarding overtime procedures. Is this everyone's understanding of the reason we are here? Ms. Mendoza?
Ms. Mendoza: Yes sir.
Arbitrator: Mr. Markiewicz?
Mr. Markiewicz: Yes.

[19] Arbitrator's record of the administrative conference...

Arbitrator: Additionally, prehearing submissions were: (1) a copy of the US Dept. of Justice, Federal Bureau of Prisons, formal grievance form, BP-S178.017 completed by Mr. Anthony Little, President of AFGE Local 408 on Sept 11, 2013, and a memorandum from C. Eikenlaub, Regional

Director, Mid Atlantic Regional Office, US Dept. of Justice, Federal Bureau of Prisons to Mr. Anthony Little, President, AFGE Local 408, dated Sept. 20, 2013, Subject: Formal Grievance, which provided in part: "because you filed your grievance with the regional director it is inappropriately filed". Accordingly, are there any arbitrability or other threshold issues that need to be addressed? Ms. Mendoza?

Ms. Mendoza: If the agency is going to reiterate the regional director's allegation that the grievance was inappropriately filed then we will request authorization to challenge that directly.

Arbitrator: Mr. Markiewicz are you, is there an arbitrability matter?

Mr. Markiewicz: There are a few arbitrability matters. That will be one of them. Whether the grievance was filed to the right office. The other will be whether the grievance was filed timely under the provisions of the CBA. And the other would be whether the grievance was barred by an unfair labor practice that was filed out first by the Union over the same issue.

Arbitrator: So the answer is yes, there's arbitrability questions. As I read the document as provided in the Union's prehearing submissions and identified in the parties' CBA neither Article 31, Grievance Procedures, nor Article 32, Arbitration, address issues of arbitrability. Normally issues of procedural arbitrability are addressed by the arbitrator. However the parties may also jointly authorize an arbitrator to decide substantive arbitrability questions. Have the parties discussed this matter and made any decisions on how they want to proceed?

Ms. Mendoza: No we are just learning today that the Agency's going to raise arbitrability issues.

Arbitrator: So it hasn't been discussed?

Ms. Mendoza: No sir.

Arbitrator: Okay. With the hearing scheduled I'm inclined to proceed to hearing and have the parties first argue the arbitrability issues/questions and then proceed with the merits of the case. Or we can hold a separate hearing. And have the hearing on arbitrability matters first, be briefed, write decisions, and then come back and do the whole thing again on hearing. I'm inclined to do the first. Have you argue your arbitrability questions first whatever time that takes, since the Agency is raising the arbitrability questions they would argue first, followed by the Union. And then we would proceed on to the merits of the case. What do you want to do, Ms. Mendoza?

Ms. Mendoza: Yes, usually the way we do it, we do the arbitrability first and then we continue with the merits of the case. Bearing in mind that this case was initially scheduled for last December and the hearing had to be cancelled due to the Arbitrator's wife medical condition. So yes the Union is ready to proceed on with the case and argue the issues the Agency presents.

Mr. Markiewicz: We can do the first, since we're all here.

[21] The record shows that AFGE Local 408 filed two related Unfair Labor Practice charges with the Federal Labor Relations Authority against management at FCC Butner prior to filing the subject grievance; case number WA-CA-12-0513 filed April 18, 2012; and case number WA-CA-13-0638 filed July 25, 2013.

WA-CA-12-0513 charged that the Agency violated 5 USC 7116(a) sections 1, 2, 4, and 8 in that...

> On October 28, 2011, Local 408 and the Agency entered into negotiations on the issue of overtime hiring procedures and utilization of the correctional services roster program. On Monday, March 5, 2012, Local 408 and the Agency came to an agreement. Local 408 President Morris Dillard and the Agency Complex Warden Sara Revells signed the memorandum of understanding; however, Local 408 e-board [Executive Board] members were told that as a formality Warden Johns and Warden Dunbar would have to sign the MOU as well". Local 408 was assured by the Agency that the MOU was in effect. On March 12, 2012, Warden Johns called for Locals 405, 408 and 3696 to start negotiations on a MOU for a one complex computerized overtime program. Local 408 became very concerned because on February 28, 2012, Warden Johns addressed AFGE Locals 405, 408, and 3696 during emotional Intelligence Training in which most Union Officials were present. Warden Johns used this forum to threaten and intimidate us for our prior EEO activity and union representation. He told us when we go over his head it only provokes him and we may end up hurting the people we represent. He said involving his boss only makes him dig in his heels and become more committed to his position. He said he is the Warden and he can do what he wants. Local 408 was told on Monday, March 12, 2012, by Associate Warden Raul Campos, Jr., that he delivered Local 408's MOU to Warden Johns and Johns assured him he would sign the MOU and then Johns said he would take the MOU to Warden [Dunbar] in person for her signature. On Friday, March 16, 2012, at the negotiations for the Butner Complex Computerized Overtime Program, Local 408 insisted that the Agency provide 408 with the signed MOU concerning overtime hiring procedures for Local 408. AW Raul Campos, Jr., called for a caucus, three hours later AW Campos came back and said he had talked to Warden Tracy Johns and Warden Johns is taking Local 408 MOU on overtime hiring procedures off the table. When Local 408 asked why? AW Campos said he don't have an answer why, it just is. 408 then asked what does Warden Johns not agree with, AW Campos replied he just took it off the table. The Agency allowed Warden Johns to negotiate in bad faith by entering into and continue negotiations with no intention of reaching an agreement with the Union. This has caused a huge chilling effect and is intended to intimidate our Union Officials...Requested Remedy....
>
> ["Note: At the time the Butner, Federal Correctional Complex was comprised of four separate institutions, Federal Correctional Institution-1 (FDI-1), Federal Correctional Institution-2 (FCI-2), the Low Security Correctional Institution (LSCI) and the Federal Medical Center (FMC). The complex is headed by the Complex Warden, while each separate institution is headed by a subordinate Warden. As of the dates of the subject MOU, Warden Revells was both the Complex Warden an the FMC Warden, Warden Johns was the Warden for FCI-1 and the LSCI, and Warden Dunbar was the Warden for FCI-2.]

WA-CA-13-0638 charged that the Agency violated 5 USC 7116(a) sections 1, 5, 7, and 8 in that...

> On February 25, 2013, hereafter referred to as the Agency, and the Council of Prison Locals, Local 408, hereafter referred to as the Union, entered into a Settlement Agreement for the Federal Labor Relations Authority case number WA-CA-12-0513. This was a Memorandum of Understanding on Overtime Hiring Procedures and Utilization of Correctional Services Roster Program for Local 408. On July 3, 2013, the Agency repudiated and violated this Settlement Agreement, by signing a new MEMORANDUM OF Understanding concerning Overtime Hiring Procedures and Utilization of Correctional Services Roster Program with AFGE Local 3696 and 405. The Agency states that this new Memorandum of Understanding supersedes the Settlement Agreement dated February 25, 2013 for Local 408. The Agency sent President Anthony Little a memorandum from Complex Warden Craig Apker and FCI-2 Warden Angela Dunbar stating they will no longer honor the Memorandum of Understanding on Overtime Procedures and they encouraged President Little to sign the new MOU. The Union feels that is repudiation and is violating the agreement between management and the Union which caused a huge chilling effect on the Union...Requested Remedy....

[22] American Federation of Government Employees, ALF-CIO, Local 1411 vs. Federal Labor Relations Authority, 960 F.2d 176 (1992).

[23] International Association of Machinists and Aerospace Workers, Lodge 39 and U.S. Department of the Navy, Naval Aviation Depot, Norfolk, Virginia, 44 FLRA 1291 (1992)

[24] Article 31, Section e, provides..." If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue."

[25] Sabree vs. United Brotherhood of Carpenters and Joiners, Local No. 33, 921 F.2d 396, 402, 405 (1990)

[26] As the preface to both the sixth and seventh edition of *Elkouri & Elkouri, How Arbitration Works* provides, *"How Arbitration Works"* has, since its inception, been acclaimed and accepted as the most comprehensive, definitive, and authoritative treatise on labor arbitration. Accordingly, guidance from this famed work is often cited in briefs, arbitration decisions and awards, and other forms of judicial and administrative decisions. However, usually citations are more precise and specific than applied here. Nevertheless, the Arbitrator takes note of the Agency's reference.

[27] Citing Arbitrator/Joint Exhibit 4.

[28] Case number WA-CA-13-0636.

[29] Testimony of Mr. Jonathan Hemingway, Butner FCC HRM, Transcript Vol. I, pages 40-42.

[30] Equitable distribution of overtime, threshold determination of arbitrability, motion to dismiss granted as grievance was untimely filed. AFGE Local 1242 and USP Atwater. FMCS 06-50931 (2006) (Arbitrator Fincher); Equitable distribution of workloads, threshold determination of arbitrability, untimely filed and grievance denied. FCC Coleman and AFGE Local 506, FMCS 06-54258 (2007) (Arbitrator Overstreet); Merit promotion, threshold determination of arbitrability, untimely filed and grievance denied. FTC Oklahoma City and AFGE Local 171, FMCS 08-57010 (2009) (Arbitrator Nicholas); Assignment of temporary duties, threshold determination of arbitrability, untimely filed and grievance denied. FCI La Tuna and AFGE Local 0083, FMCS 08-56151 (2010) (Arbitrator Hughes); Violation of Article 20 of the parties Master Agreement, threshold determination of arbitrability, notice of intent to arbitrate deficient, grievance denied. FCI Estill and Anthony Carter, FMCS 10-55189 (2011) (Arbitrator Oberdank); Disciplinary action, threshold determination of arbitrability, failure in invoking arbitration and grievance denied. FCC Yazoo City and AFGE Local 1013, FMCS 11-5218581 (2011) (Arbitrator Bendixsen); Disciplinary action, threshold determination of arbitrability, failure to properly invoke arbitration and grievance denied. FCI Elkton and AFGE Local 607, FMCS 10-55306 (2012) (Arbitrator Orlando, Jr.); Violation of Article 6 of parties Master Agreement and application of time limits in Back Pay Act, threshold determination of arbitrability, no unjustified or unwarranted personnel action, no violation of the Back Pay Act, untimely filed and grievance denied. USP Atwater and AFGE Local 1242, FMCS 14-52758-A (2014) (Arbitrator Bridgewater); Violation of Article 28 of the parties Master Agreement, failure to properly pay annual clothing allowance, threshold determination of arbitrability, failure to file with proper office and grievance denied. FCC Coleman and AFGE Local 506, FMCS 14-57918 (2015) (Arbitrator Bendixsen); Violation of the parties Master Agreement and memorandum of understanding to stop vacating posts to reduce overtime, threshold determination of arbitrability, failure to properly invoke arbitration and grievance denied. FCI Estill and AFGE Local 3976, FMCS 13-02285 (2015) (Arbitrator Bendixsen); and, Violation of parties Master Agreement, local agreement and settlement agreement, threshold determination of arbitrability, failure to properly invoke arbitration and grievance denied. AFGE Local 3979 and FCI Sheridan, FMCS 14-50342 (2016) (Arbitrator Allen).

[31] Citing Dep't of the Air Force, Ogden Air Logistics Ctr., Hill Air Force Base, Utah, 39 FLRA 1409, 1417 (1991); US. Food & Drug Admin, Northeast & Mid-Atlantic Regions, 53 FLRA 1269, 1273-74 (1998); Dep't of Defense Dependents Schools, 12 FLRA 52, 53 (1983).

[32] The "covered by" doctrine is based on the idea that a party should not have to bargain over matters already contained in or covered by an existing agreement...See Bureau of Prisons v. Federal Labor Relations Authority, 654 F.3d 91 (2011); AFGE, Local 225, 56 FLRA 688, 689 (2000).

[33] Here the Agency cites provisions found in Elkouri & Elkouri relating to the subject of management rights cited by Arbitrator Chang in his decision/award on a previous BOP/AFGE grievance that went to arbitration; AFGE, Local 1218 and FDC Honolulu issued January 7, 2015, by Arbitrator Lou Chang.

[34] Here the Agency cites another previous BOP/AFGE grievance the went to arbitration FMCS Case #08-01919 AFGE Council of Prison Locals 33 and Federal Bureau of Prisons, issued September 6, 2008 by Arbitrator Christopher Honeyman, providing in part that BOP bargaining unit employees from other institutions who went to another institution were paid overtime while at the temporary duty location.

[35] Citing Bell v. Wolfish, 141 U.S. 520, 16 547 (1979) and Rhodes v. Chapman, 452 U.S. 337 (1981).

[36] Citing AFGE, AFLCIO, Local 683 and Department of Justice, Federal Correctional Institution Sandstone, Minnesota, 30 FLRA 497, 500-01 (1987).

[37] Citing International Plate Printers, Die Stampers, and Engravers Union of North America, AFL-CIO, Local 2 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 25 FLRA 113, 144-46 (1987) (Provision 35).

[38] Citing American Federation of Government Employees, Local 1923 and U.S. Department of Health and Human Services, Health Care Financing Administration, Baltimore, Maryland, 44 FLRA 1405, 1465-68 (1992) (Proposal17).

[39] Citing National Education Association, Overseas Education Association, Laurel Bay Teachers Association and US. Department of Defense, Department of Defense Domestic Schools, Laurel Bay Dependents Schools, Laurel Bay, South Carolina, 51 FLRA 733, 739 (1996).

[40] Citing American Federation of Government Employees, Local 3157 and US. Department of Agriculture, Federal Grain Inspection Service, 44 FLRA 1570, 1586 (1992).

[41] Citing National Association of Agriculture Employees and US. Department of Agriculture Animal and Plant Health Inspector, Service Plant Protection and Quarantine, 51 FLRA 843 (1996), review denied, National Association of Agriculture Employees v. FLRA, No. 96-1106 (D.C. Cir. Dec. 20, 1996); American Federation a/Government Employees, AFL-CIO, Local1625 and Department of the Navy, Naval Air Station, Oceana, Virginia, 30 FLRA 1105 (1988).

[42] Citing DODDS, Pac. Region and Overseas Educ. Ass 'n, 31 FLRA 305, 312-13 (1988).

[43] The cited case was initiated by a grievance filed by AFGE Local 405 on January 12, 2009, and involved actions by management to end a past practice. Following negotiations and mediation by eh parties, on April 19, 2010, a settlement agreement was signed by the parties. Subsequently, on September 17, 2010, a second grievance was filed because the Agency implemented a change regarding the same established past practice and affecting the same AFGE Local, number 405. This grievance proceeded to arbitration and was heard and decided by Arbitrator Barbara J. Wood – FMCS Case #11-51176 issued July 23, 2012 (Cited in the subject case at hearing and in Agency's post-hearing exhibit 23); exceptions foiled – 67 FLRA 108, AFGE, Local 405 vs. U.S. DOJ, BOP, FCC Butner decision May 19, 2014.

[44] Citing U.S. Department of Veterans Affairs, Medical Center, North Chicago, Illinois and American Federation of Government Employees, Local 2107, 52 FLRA 387, 392 (1996).

[45] Citing Department of Health and Human Services and AFGE Local 1668 (July 2000) 56 FLRA 83.

[46] As of 2012 the Federal Correctional Complex at Butner, NC, was comprised of four institutions designated as – Federal Correctional Institution One (FCI-1), Federal Correctional Institution Two (FCI-2), the Low Security Correctional Institution (LSCI), and the Federal Medical Center (FMC). The Complex was headed by a Warden, who at the time was Warden Sarah Revells, and each institution was headed by a subordinate Warden – While the Complex Warden, Warden Revells served also as the Warden of the Federal Medical Center; Warned Tracy Johns was the designated Warden for FCI-1 and the LSCI; and Warden Angela Dunbar was the designated Warden for FCI-2. Also, as of 2012 there were four AFGE Locals within the Complex – Local 405's institution coverage was generally the LSCI; Local 408's institutional coverage generally was the FMC and FCI-2; Local 3696's institutional coverage was generally FCI-1; and Local 3546 represented Central Office/Re-entry Raleigh CCM activities.. This is because, each Local also represented employees assigned to/working in specific operational division or function responsibility, which might change by institution – Local 405 represented employees assigned to the following divisional/functional activities - Recreation/Education, UNICOR, Laundry, Food Services, Warehouse, Trust Fund, and R & D within all four institutions, as well as Correctional Services and Case Managers/Counselors/Secretaries (in LSCI); Local 408 represented employees assigned to the following divisional/functional activities – Correctional Services (in FMC and FCI-2), Medical (in all four institutions), Case Managers/Counselors/Secretaries (in FMC and FCI-2) Psychiatry Services (in all four institutions), and Phycology Services (in FMC, FCI-2 and LSCI); Local 3696 represented employees assigned to the following divisional/functional activities – Facilities, Safety, and Religious Services in all four institutions, as well as, Correctional Services, Case Managers/Counselors/Secretaries, and Psychology Services (in FCI-1); and Local 3546 represented Central Office/Re-Entry/Raleigh CCM (in all four institutions).

[It should be noted that the Arbitrator was provided a documented explaining who the Complex Warden and the individual institutional Wardens were at various points of time associated with the subject grievance and there were difference between the two summaries due to vacant Warden positions and uncertainty as to who was acting at any given point in time...However, the consensus is that Sarah Revells served as the Complex and FMC Warden from 2009 through 2012 and that Craig Apker served as Complex and FMC Warden from 2013 through 2014 and Kenneth Atkinson was the Complex and FMC Warden as of the date of the hearing in the subject case.]

[47] Arbitrator/Joint Exhibit, A/J-3.

[48] It should be noted that the Memorandum of Understanding addressed by the FLRA approved Settlement Agreement of February 25, 2013, and signed by Local 408 and FCC officials the same day was identified as being between the Council of Prison Locals, Local 408 (as the Union) and the Federal Correctional Complex, Butner, NC (as the Agency).

[49] Agency/Employer Exhibit, E-1.

[50] The term "repudiation" is defined in Black's Law Dictionary as rejection; disclaimer; renunciation. The rejection or refusal of an offered or available right or privilege, or of a duty or relation...Repudiation of a contract means refusal to perform duty or obligation owed to other party. Such consists in such words or actions by contracting party as indicated that he is not going to perform his contract in the future.

[51] Warden Craig Apker

[52] Citing *Elkouri & Elkouri, How Arbitration Works*, 6th Ed. At pages 218-219.

[53] Article 31, Section f 1, provides "when filing a grievance, the grievance will be filed with the Chief Executive Officer of an institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over...."

[54] Testimony of Mr. Jonathan Hemingway, Butner FCC HRM, Transcript Vol. I, pages 43-57.

[55] Article 31, Section f 2, provides "when filing a grievance against the Chief Executive Officer of an institution/facility, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director..."

[56] 5 USC §7103 (a)(2) defines "employee" to mean an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority; but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

[57] Union Exhibit, U-5.

[58] Union Exhibit, U-6.

[59] Arbitrator/Joint Exhibit, A/J-2.

[60] Testimony by Mr. Morris Dillard, Past President, AFGE, Local 408, Vol. 1, pgs. 71-91.

[61] Union Exhibit, U-2.

[62] Union Exhibit, U-3.

[63] Citing Customs Service, 18 FLRA, 85 FLRR 1-1146.

[64] Citing Letterkenny Army Depot, 34 FLRA 606, 90 FLRR 1-1126.

[65] Citing U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 36 FLRA 524, 531 (1990)("Wright-Patterson")

[66] Citing Division of Military and Naval Affairs, State of New York, 7 FLRA 321, 338 (1981); and U.S Department of Justice, Executive Office for Immigration Review and AFGE Local 286, 61 FLRA page 468 (2005).

[67] Testimony of Mr. Shelli Anderson, Transcript Vol. III, pgs. 33-98.

[68] Union Exhibits, U-15-19 and 30-33.

[69] 5 USC 5596

[70] Citing AFGE Local 5690 and Bureau of Prisons 69 FLRA 21 (2015) Exhibit 23 of the Unions post-hearing brief.

[71] Citing Defense Finance and Accounting Service, 104 LRP 45548, 60 FLRA 281 (2004). Exhibit 24 of the Union's post-hearing brief.

[72] The concept of prevailing party status was explained in Department of the Navy, Norfolk Naval Shipyard, 90 FLRR 1-1148, 34 FLRA 725 (1990), [Exhibit 25, Union's post-hearing brief] where the FLRA, borrowing language from the U.S. Court of Appeals, Federal Circuit said that determining who prevails is essentially "a totaling up of who won and who lost."

[73] Citing General Services Administration, 105 LRP 31780, 61 FLRA 68 (2005). Exhibit 26, Union's post-hearing brief.

[74] Citing Denver VA Medical Center, 94 FLRR 1-1145, 49 FLRA 1403 (1994). Exhibit 27, Union's post-hearing brief.

[75] While no clear delineation or explanation of this local agent/affiliate relationship was provided by the parties, either in testimony or through documentation; the Arbitrator has chosen to follow and apply the AFGE organizational and representational relationship as identified and used in FLRA case materials as explained/used by the FLRA Office of Administrative Law Judges...For example see under findings in U.S. Department of Justice, Bureau of Prisons, U.S. Medical Center for Federal Prisoners, Springfield, Missouri and American Federation of Government Employees, AFL-CIO, Local 1612, Case No. DE-CA-80741 dated August 19, 1999.

[76] Union Exhibit, U-6 and 7.

[77] Testimony of Mr. Morris Dillard, Vol. I, pgs 71-93.

[78] Grievance filed by Local 405 on January 12, 2009, by VP Local 405 William Boseman; violation of Federal Prison Directive, Executive Order, Statute, HR Manual, Master Agreement, Back Pay Act...On December 4, 2008, Local 405 became aware of a memorandum from Acting AW of UNICOR, Rogers. The memorandum stated that the Bargaining unit employees in UNICOR may not consider themselves as qualified employees if the available overtime shift overlaps their regular UNICOR shift. The Union requested to bargain over this due to the fact that it is a current and standing past practice done in all other departments. His memorandum also violates Title 5 USC, Master Agreement NS THE Human Resources Manual. The Master Agreement states that, "all employees shall be treated the same in all aspects of personnel management." The Union met with A. Beeler, Complex Warden, at FCC Butner to try to informally resolve this issue. Warden Beeler informed his managers via email that this is a past practice and that it didn't violate any pay regulation Union President Julius Pyles and Union Vice President William Boseman talked with Acting Warden Moon, who is over UNICOR, but he refused to bargain and/or resend the memorandum sent out by Acting AW Rogers. This violation has had an adverse effect on bargaining unit employees. This is a direct violation of the Master Agreement Article 18 Sec. P...Dates of violation December 04, 2008 and continuous...See Arbitrator Barbara J. Woods' Decision/Award dtd July 23, 2012 and 67 FLRA 108.

[79] Settlement Agreement executed April 19023, 2010, between Local 405 and Butner FCC, FMCS Case Number 090310-54587-3 relating to overtime...This settlement agreement is identified in Arbitrator Barbara Woods decision/award issued July 23, 2012 as relating to the grievance filed by Local 405 on January 12, 2009.

[80] Filed by Local 405 VP William Boseman for violation of Back Pay Act, 5 USC §5596(b)(1)(A). Program Statement 3000.03, Master Agreement Article 6, Section b2 and 6, FLSA...On August 15, 2010 the agency implemented a change regarding the established past practice of staff being allowed to work overtime that conflicts and/or overlaps with their primary shift...This change was implemented without negotiating with Local 405, the sole and exclusive representative of its bargaining unit...This change was only applicable to bargaining unit members of Local 405 and not bargaining unit members throughout the entire complex at Butner...It involves excluding or restricting members of one group from opportunities that are available to another group which is in violation of the CBA...See Arbitrator Barbara J. Woods' Decision/Award dtd July 23, 2012 and 67 FLRA 108 AFGE, Council of Prison Locals, Local 405 and USDOJ, FBOP, FCC Butner dtd May 19, 2014.

[81] Union Exhibit, U-2...Memorandum of Understanding, Council of Prisons, Local 408 and FCC Butner, Overtime Hiring Procedures, Utilization of Correctional Services Roster Program, FCI-2and FMC, executed November 4, 2010, for Agency Sara Revell, Complex/FMC Warden; D.R. Stevens, Warden FCI-2 and Tracy Johns, Warden FCI-1/LSCI; for Union Morris Dillard, President,

[82] Union Exhibit, U-3...Memorandum of Understanding, AFGE, Council of Prisons Local 33, Locals 3696, 405, and 408 and FCC Butner, pertaining to inmates assigned to FCI-1 and LSCI and transfer for medical to FMC and outside Hospital Coverage, executed December 13, 2011, for FCC Butner, Tracy Johns, Warden FCI/LSCI, for Unions officers from each Local.

[83] Union Exhibit, U-9 and 10.

[84] Union Exhibit, U-14...ULP filed by Local 408 charging Complex Warden and management with bad faith bargaining and no intentions of reaching agreement with Union on Local 408's MOU.

[85] Arbitrator/Joint Exhibit, A/J-3...Closure of FLRA ULP Case Number WA-CA-12-0513...Settlement Agreement provided -- The undersigned Agency and the undersigned Charging Party in settlement of the above matter, and subject to the approval of the Regional Director on behalf of the Federal Labor Relations Authority, HEREBY AGREE AS FOLLOWS: ACTION TO BE TAKEN: The Agency agrees to execute and honor the Parties' Memorandum of Understanding on Overtime Hiring Procedures and Utilization of Correctional Services Roster Program. POSTING OF NOTICE: The Agency will post copies of the Notice to All Employees, attached hereto and made a part hereof, in conspicuous places at the Bureau of Prisons -- Federal Correctional Complex Butner, North Carolina where employees represented by AFGE, Local 408 work, including all bulletin boards and other places where notices to employees are customarily posted, for a period of at least thirty (30) days from the date of posting. The Notice, when posted will be signed by Craig Apker, Complex Warden. ELECTRIC POSTING OF NOTICE: The Agency will email a copy of the Notice to All Employees to employees represented by AFGE, Local 408 within thirty days of execution of the Agreement. COMPLIANCE WITH NOTICE: The Agency will comply with all the terms and provisions of the Notice. REFUSAL TO ISSUE COMPLAINT: In the event the Charging Party fails or refuses to become a party to the Agreement, and if the Regional Director concludes that it will effectuate the policies of the Statute, she shall decline to issue a Complaint herein and this Agreement shall be between the Agency and the undersigned Regional Director. A review of such action may be obtained pursuant to Section 2433.11© and (d) of the Authority's Regulations. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of an appeal. Approval of this Agreement by the Regional Director shall constitute a withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in the case. PERFORMANCE: Performance by the Agency of the terms and provisions of the Agreement shall commence immediately after the Agreement is approved by the Regional Director or in the event the Charging Party does not enter into the Agreement, performance shall commence immediately upon receipt by the Agency of advice that no appeal has been filed or that the General Counsel has sustained the Regional Director. NOTIFICATION OF COMPLIANCE: The Agency will notify the Regional Director in writing what steps the Agency has taken to comply herewith. Such notification shall be made within fifteen (15)days, and again after sixty (60) days, from the ate of the approval of this Agreement, or in the event the Charging Party does not enter into this Agreement, after the receipt of notice that no appeal has been filed or that the General Counsel has sustained the Regional Director. COMPLIANCE WITH SETTLEMENT AGREEMENT: Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case. Signed/executed February 25, 2012 by Craig Apker, Complex Warden; Anthony Little, President Local 408; and Barbara Kraft, Regional Director Washington Regional Office, FLRA...Memorandum of Understanding (MOU) Between Council of Prison Locals, Local 408 and Federal Correctional Complex, Butner NC...Subject: Overtime Hiring Procedures, Utilization of Correctional Services Roster Program...FCI-2/FMC will utilize the latest version of the Correctional Services Roster Program with overtime capabilities...Signed and executed February 25, 2012, For the Agency...Craig Apker, Complex Warden; Angela P. Dunbar, Warden FCI-2; Tracy Johns, Warden FCI-1 & LSCI; Anthony Little, President, Local 408.

[86] Union Exhibit, U-11.

[87] Union Exhibit, U-12.

[88] Agency Exhibit, A/E-1...ULP Charge Number WA-CA-13-0636 filed by AFGE Local 408, Anthony Little, President against FCC Butner, Craig Apker, Complex Warden...Violation of 5 USC 7116(a)(1, 5, 7, & 8) references previous ULP and FLRA approved settlement agreement and execution of MOU...On July 3, 2013, Agency repudiated and violated settlement agreement by signing new MOU concerning Outside Hiring Practices and Utilization of Correctional Services Roster Program with AFGE Locals 3696 and 405...supersedes settlement agreement and MOU with 408.

[89] Arbitrator/Joint, Exhibit, A/J-7.

[90] Union Exhibit, U-16.

[91] Arbitrator/Joint, Exhibit, A/J-4.

[92] Arbitrator/Joint, Exhibit, A/J-5.

[93] Arbitrator/Joint Exhibit, A/J-8.

[94] Agency/Employer Exhibit, A/E-1...FLRA letter to Anthony Little, President, AFGE Local 408, from Barbara Kraft, Regional Director, Washington Regional Office, FLRA, subject USDOJ, FBOP, FCC Butner and AFGE Local 408 ULP...The charge as clarified by the investigation alleges that the Agency repudiated the settlement agreement in case number WA-CA-12-0513, thereby violating section 7116(a)(1) and

(5)...The Settlement Agreement required the Agency to "execute and honor" the Memorandum on Overtime Hiring Procedures and Utilization of Correctional Services Roster Program that the Agency and Local 408 negotiated March 2012...whether the Agency repudiated the Settlement Agreement depends on whether it repudiated the underlying March 12 MOU...I find that the Agency's conduct here did not amount to repudiation, because the alleged breach on the March 2012 MOU was not clear and patent...The March 2012 MOU provides, among other things, that "any new negotiations concerning the procedures for overtime will review the procedures listed here and be incorporated for negotiation in the new negotiations...This language is capable of more than one interpretation...Questions of interpretation are for an arbitrator, not the FLRA...A reasonable interpretation, though not necessarily the only reasonable interpretation, is that the March 2012 MOU contemplated further negotiations about overtime procedures. The Agency did subsequently initiate bargaining on new overtime procedures, resulting in a complex-wide agreement...Interpretation of the complex-wide agreement, and its relationship to the March 2012 MOU, are matters for an arbitrator...Under these circumstances, I have determined that the Agency's conduct did not clearly and patently breach the March 2012 MOU, and I am dismissing the charge for this reason."

[95] Union Exhibit, U-13...Copies of FCC Butner LMR Meeting minutes for LMR meetings during the period August 28, 2013 through July 8, 2015.

[96] Union Exhibit, U-7...See Endnote 77 above...Also, Agency referenced decision by Arbitrator Barbara Wood issued July 12, 2012, in its post-hearing brief, exhibit 23.

[97] Elkouri & Elkouri, 7th Edition 9-19, paraphrasing the Court in Steelworkers vs. Enterprise Wheel.

[98] *Id.* At 9-34.

[99] Air Force, Oklahoma City, ALC, Tinker AFB and AFGE Local 196, ARBIHS04450 (Quinn, 1990) per Hadley, Guide to Federal Sector Labor Arbitration 5-148.

[100] *Id.* At 9-20, paraphrasing Garrett, Contract Interpretations.

[101] Union Exhibit, U-12.

[102] See U.S. Department of Labor, Washington, D.C. and American Federation of Government Employees, Local 12, 59 FLRA 21 (2003) where the Authority held that a ULP charge alleging a statutory violation does not bar, under §7116(d), a subsequent grievance alleging a contract violation; and that the Authority has drawn a clear distinction between legal theories supporting allegations of statutory violations and allegations of contract violations, finding that the theories are not substantially similar for the purposes of §7116(d). See also, AFGE, Local 2096 and U.S. Department of the Air Force, 20th Space Control Squadron Detachment 1, Dahlgren Naval Support Facility, VA 67 FLRA 8 (2012); IAMASW and Navy, Naval Aviation Depot, Norfolk, VA 44 FLRA 109 (1992); U.S Nuclear Regulatory Commission and NTEU 67 FLRA 121 (2014); U.S. Department of Justice, Federal Bureau of Prisons, Metropolitan Correctional Center, New York, New York and AFGE, Council of Prison Locals #33, Local 3148 67 FLRA 117 (2014); and U.S. Department of Justice, Federal Bureau of Prisons and AFGE, Local 3935 68 FLRA 125 (2015). Further, while both the two ULPs and the subject grievance alleged violation of Federal statutes, the Arbitrator finds the legal theory and duties under 5 USC 7116 are not the same as those under 5 USC 5596.

[103] Citing Sabree v. United Brotherhood of Carpenters and Joiners, Local No. 33, 921 F.2d 396, 402, 405 (1990).

[104] Cites and provides copies as attachments to post-hearing brief: at E-6, *AFGE Local1242 and USP Atwater,* FMCS 06-50931 (2006) (Arbitrator Fincher providing strict application of the subject agreement); at E-7, *FCC Coleman and AFGE Local 506,* FMCS 06-54258.(2007) (Arbitrator Overstreet upholding untimely filing); at E-8, *FTC Oklahoma City and AFGE Local1 71,* FMCS 08-57010 (2009) (Arbitrator Nicholas upholding untimely filing); at E-9, *FCI La Tuna and AFGE Local 0083,* FMCS 08-56151 (2010) (Arbitrator Hughes upholding untimely filing); at E-10, *FCI Estill and Anthony Carter;* FMCS 10-55189 (2011) (Arbitrator Oberdank upholds timely filing based on continuing violation, grievance denied for untimely and specific notification of intend to arbitrate); at E-11, *FCC Yazoo City and AFGE Local1013,* FMCS 11-5218581 (2011) (Arbitrator Bendixsen discussing previous BOP arbitration decisions finding a continuing violation, but in subject case upholding untimely filing); at E-12, *FCI Elkton and AFGE Local607,* FMCS 10-55306-8 (2012) (Arbitrator Orlando, Jr.); *USP Atwater and AFGE Local1242,* FMCS 14-52758-A(2014) (Arbitrator Bridgewater upholding failure to invoke arbitration correctly); at E-13, *FCC Coleman and AFGE Local 506,* FMCS 14-57918-3 (2015)(Arbitrator Bendixsen discussion on Back Pay Act, continuing violation and upholds that BPA not applicable therefore untimely filing); and at E-14, *FCI Estill and AFGE Local 3976,* FMCS 13-02285 (2015) (Arbitrator Bendixsen); *AFGE Local 3979 and FCI Sheridan,* FMCS 14-50342-6 (2016) (Arbitrator Allen up holding filing at wrong level).

[105] Union Exhibit, U-16, emails from Joyce Stone, subject glitch in the system.

[106] *Elkouri & Elkouri,* 7th Edition, at 9-13, 9-16, and 9-21.

[107] *Id.* At 8-102-103.

[108] Arbitrator/Join Exhibit, A/J-3 AFGE Local 408's FLRA approved MOU signed /effective February 25, 2013...

MEMORANDUM OF UNDERSTANDING (MOU)
BETWEEN

COUNCIL OF PRISONS LOCALS, LOCAL 408 (UNION)
FEDERAL CORRECTIONAL COMPLEX, BUTNER, NC (AGENCY)

SUBJECT: Overtime Hiring Procedures
Utilization of Correctional Services Roster Program

FCI-2/FMC will utilize the latest version of the Correctional Services Roster Program, with overtime capabilities.

FMC Bargaining Unit staff will be allowed to sign up for overtime for the entire quarter when the final roster is posted three (3) weeks prior to the beginning of each quarter. The computerized sign-up list will not differentiate between Correctional Services staff and Non-Correctional Services staff and will all be referred to as Correctional Workers for the purpose of this MOU.

The following Sign-up Categories are available: "Institutional", "Outside Hospital", "Med Trips/Airlifts", or All" to be considered for any overtime available.

ASSIGING "REGULAR" OVERTIME:
Staff will be granted/assigned overtime according to their order on the Correctional Services Roster Program. When overtime is assigned or refused, staff's name will rotate to the bottom of the overtime list. If no contact is made to the first staff member, a "No Contact (NC)" will be noted and move on to the next staff member's name. Staff members who are "No Contact (NC)" will maintain the original place on the list. If overtime assignment is canceled for whatever reason, assigned staff's name will be reinstated to their original place on the list prior to the canceled assignment.

When overtime is vacated by a staff member after assignment (staff member cancels or requests sick leave and does not work the assigned post), that staff member should be noted as "Refused" on the Program Roster and the staff's name shall be rotated to the bottom of the list by the time of Refusal/Cancellation (i.e. staff requested sick leave at 10:05 a.m., (Current Date) or Evening Watch. Staff's name will be rotated to the bottom of the list at 10:05 a.m. (Current Date).

Upon being notified a staff member requesting sick leave of assigned overtime, the Correctional Services Roster Program Administrators (usually the Lieutenants (LT) will make the aforementioned notation on the Correctional Services Roster Program and reassign the vacated overtime post at the earliest possible opportunity.

ASSIGNING 'MANDATORY' OVERTIME;

Correctional Services Roster Program Administrators (LTs) will utilize the Computerized Mandatory List when assigning staff Mandatory Overtime. Staff who have not been relieved within 15 minutes of the end of their shift will be credited for a Mandatory Overtime on the Computerized Mandatory List with the exception of Variable Shift Posts (i.e. Medical Escort and Visiting Room), which may be given a :Continuance of Shift" if their current duties will extend past their current Daily assignment/Shift without utilizing the Computerized Mandatory List for assignment. However, affected staff will be credited for a Mandatory Overtime on the Computerized Mandatory List.

NOTE: "Mandatory" Overtime and "Regular" Overtime are not the same. Staff that are placed on "Mandatory" Overtime will be rotated to the bottom of the Computerized Mandatory List, however, the staff's place on the Correctional Services Roster Program List is unaffected (staff will remain in the same order on the sign up list as they were prior to being mandated). "Mandatory" Overtime will be assigned to prior shift Correctional Officers. (i.e. Morning Watch assigned to Day Watch; Day Watch to Evening Watch, etc.)

NOTE: Staff will ordinarily not be assigned "Mandatory" overtime the day prior to Scheduled Leave or Day Off, unless there is an institution emergency requiring all staff to remain on post or at the institution, or all other options have been exhausted.

EMERGENCY MEDICAL TRIPS AND "LIST EXEMPT" PROCEDURES:

In the event of Emergency Medical Trips going out late in the shift and there is not adequate time to assign overtime using the above established procedures. Lieutenants may utilize the "ALL CALL" to assign staff to the Emergency Trip the first subsequent eight (8) hour shift utilizing "List Exempt" procedures. Staff assigned under "List Exempt" will rotate to the bottom of the overtime list. After the first eight (8) hour shift, the Roster Program will be utilized to fill following shifts (i.e., Emergency Trip departs at 3:30 p.m.; E/W may be filled "List Exempt". M/W must be filled utilizing the Roster Program).

Any Overtime that will exceed sixteen (16) hours of interferes with staff's regular shift will be a "Shift Conflict". Staff with a "Shift Conflict" status will maintain the original place on the list.

Exhausted Overtime Lists:

There will be a paper sign-up list located in the Lieutenant's Office used by non-bargaining staff. If the Computerized bargaining overtime roster is exhausted Management will then utilize the non-bargaining paper sign-up list to fill overtime.

Errors in Hiring:

The Union and Management agree that from time to time honest mistakes will be made in hiring overtime. Before filing a formal grievance, the Union and Management agree to try to informally resolve these instances in the following manner:

"Skipped" employees will be provided the opportunity to work overtime, regardless of category, within a 21-days prior following notification to the employee of the skip. The affected employee(s) will pick the shift and day they want to work the overtime with at least a 24-hour notice to the Operations Lieutenant of that day/date, with the Operations Lieutenant providing notice to the employee at the time of the post assigned on this day/date. This overtime will not be counted against the "skipped" employee or any other employee in the overtime roster program. This overtime will be recorded by the Lieutenant as "List Exempt/Informal Resolution." If the "skipped" employee refuses the post assigned on the day/date selected, the "skipped" employee's opportunity is considered moot.

Effects on Other MOUs.

This MOU supersedes all previous MOUs dealing with Overtime signed by the Agency and Local 408. Any new negotiations concerning the procedures for overtime will review the procedures listed here and be incorporated for negotiation in the new negotiations.

Should any issues/concerns arise as a result of this MOU, the Agency and Local 408 agree to discuss them within seven (7) working days of notification of the issue or concern.

For the Agency

//Signed 02/25/2013 Craig Apker//
~~Sara M. Revell~~ Craig Apker
Complex Warden

//Signed 02/25/2013//
Angela P. Dunbar
Warden FCI-2

//Signed 02/25/2013//
Tracy Johns
Warden FCI-1 & LSC

For the Union

//Signed 02/25/2013//
~~Merrie Dillard~~, President Anthony Little
Local 408

~~Edwin Kirton~~, 1st Vice President

~~Frank Climo~~, 2nd Vice President

[109] Arbitrator/Joint Exhibit, A/J-2 and 9...

The Preamble of the parties' MA provides, in pertinent part:

> "...The Bureau of Prisons will develop and maintain constructive and cooperative relationships with its employees, through their exclusive representative, where applicable, the Council of Prison Locals and the American Federation of Government Employees...Therefore, the Federal Bureau of Prisons...hereinafter referred to as "the Employer" or "the Agency," and the Council of Prison Locals and the American Federation of Government Employees, hereinafter referred to as "the Union" or "exclusive representative"...This Agreement and such supplementary agreements and memorandums of understanding by both parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union." [Emphasis added...Note: the Preamble of the latest agreement has exactly the same wording]

Article 1 – Recognition provides in pertinent part:

> " Section a. The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71...Section b. The Employer recognizes the Union as the exclusive bargaining agent...of all the employees in the unit, as the recognized Union for bargaining purposes...The Union has full authority as provided by Statute to meet and confer with the Agency for the purpose of entering into negotiated agreements concerning changes in conditions of employment covering bargaining unit employees and to administer the Collective Bargaining Agreement..." [Emphasis added...Note: no change in this wording between the two agreements]

Article 2 - Joint Labor Management Relations Meetings:

> "Section f. The parties at the national level endorse the concept of regular labor management meetings at the local level. It is recommended that such meetings occur at least monthly, that there be an established method of written minutes, and that there be suspense dates for responses or corrective act. The actual procedures for local labor management meetings will be negotiated locally." [Emphasis added...Note: no change in this wording between the two agreements]

Article 3 – Governing Regulations:

> "Section a. 1. Local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level...Section d. 5. When locally-proposed policy issuances are made, the local Union President will be notified as provided above, and the manner in which local negotiations are conducted will parallel this article..." [Emphasis added...Note: no change in this wording between the two agreements]

Article 4 – Relationship of This Agreement to Bureau Policies, Regulations, and Practices:

> "Section a. In prescribing regulations relating to personnel policies and practices and to conditions of employment, the Employer and the Union shall have due regard for the obligation imposed by 5 USC 7106, 7114, and 7117. The Employer further recognizes its responsibility for informing the Union of changes in working conditions at the local level...Section b. On matters which are not covered in supplemental agreements at to local level, all written benefits, or practices and understandings between the parties implementing this agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties...Section c. The Employer will provide expeditious notification of the changes to be implemented in working conditions at the local level. Such changes will be negotiated in accordance with the provisions of this agreement." [Emphasis added...Note: no change in this wording between the two agreements]

Article 7 – Rights of the Union:

> "Section a. There will be no restraint, interference, coercion, or discrimination against any employee...or upon duly designated Union representatives acting as an agent of the Union on behalf of an employee or group of employees in the bargaining unit...Section d. Union representatives are authorized to perform and discharge the duties and responsibilities which are assigned to them by the Union in accordance with applicable laws, rules, regulations, this Agreement, and applicable supplemental agreements...Section k. The Union and Employer recognize the role of the Union at the local level...the Agency will inform new employees at Institutional Familiarization Training of the specific local Union designation and identify the officers of the local Union..." [Emphasis added...Note: no change in this wording between the two agreements]

Article 9 – Negotiations at the Local Level:

> "The Employer and the Union agree that this Agreement will constitute the Master Collective Bargaining Agreement between the parties and will be applicable to all Bureau of Prisons managed facilities and employees included in the bargaining unit as defined in Article 1 - Recognition. This Master Agreement may be supplemented in local agreements in accordance with this article. In no case may local supplemental agreements conflict with, be inconsistent with, amend, modify, alter, paraphrase, detract from, or duplicate this Master Agreement except as expressly authorized herein....Section a. One supplemental agreement may be negotiated at each institution/facility. Supplemental agreements covering shared services will be negotiated at the local level by the concerned parties...1. It is understood that local supplemental agreements will expire upon the same day as the Master Agreement, except as noted in a(2) below. If the Master Agreement's life is extended beyond the scheduled expiration date for any reason, local supplemental agreements will also be extended; and...2. provided that nothing in the local supplemental agreement is in conflict with the provisions of the Master Bargaining Agreement, or changes in any policies, regulations, or laws, the parties at the local level may mutually elect to execute new signatures and dates, if neither party desires to renegotiate the local supplemental agreement...Section b. Notwithstanding the provisions of this article, the parties may negotiate locally and include in any supplemental agreement any matter which does not specifically conflict with this article and the Master Bargaining Agreement..." [Emphasis added...Note: slight change in this wording between the two agreements in Section d.]

[110] As explained in the beginning of this decision and documented earlier in the Endnotes, the record contains a signed/date copy of the Master Agreement between the Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees for the period March 9, 1998 – March 8, 2001, executed February 6, 1998 (Arbitrator/Joint Exhibit, A/J-3), as well as, a signed/date copy of the Master Agreement between the Federal Bureau of Prisons and Council of Prison Locals, American Federation of Government Employees for the period July 21, 2014 – July 20, 2017, executed May 29, 2014 (Arbitrator/Joint Exhibit, A/J-9)...The primary agreement applicable during the majority of the grievance period is the first cited agreement which the parties stipulated was the appropriate contract for the Arbitrator to use and it had been properly extended from the end of its base period up to and until the execution of the new agreement in 2014. As for the Arbitrator's discussion, analysis, and findings, where attention is placed on contract provisions the discussion, analysis, and findings will concentrate on the first agreement; however, the Arbitrator has reviewed and compared both agreements, and where there is a significant difference in the provisions of the two agreements, notations and observations might be made.

[111] This characterization/recognition designation is not original but the findings of the FLRA Office of Administrative Judges as expressed in several different decisions; see U.S. Department of Justice, Bureau of Prisons, U.S. Medical Center for Federal Prisoners, Springfield, Missouri and American Federation of Government Employees, AFL-CIO, Local 1612, Case Number DE-CA-80741, August 19, 1999; and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon and AFGE, Local 3979, Case No. SF-CA-11-0607, September 30, 2014.

[112] See Customs Service, 18 FLRA 1, 85 FLRR 1-1146; Letterkenny Army Depot, 34 FLRA 606, 90 FLRR 1-1126; NTEU, Chapter 103 and U.S. Department of Homeland Security, U.S. Customs and Border Protection, Port of Long Beach, Long Beach, California 67 FLRA 34 (2013; U.S. Department of Defense, Defense Logistics Agency and AFGE, Local 916 66 FLRA 12 (2011); U.S. Department of Veterans Affairs, Northern Arizona VA Health Care System, Prescott, Arizona and AFGE, Local 2401 66 FLRA 175 (2012; and AFGE, AFL-CIO, Council of Prisons Locals, Local 501 and US. DOJ, FBOP, Federal Detention Center, Miami, FL FMCS Case No. 11-52732-3 decided September 7, 2012 by Arbitrator Martin A. Soll.

[113] See AFGE, Council of Prison Locals 33, Local 3690 and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Miami, Florida 69 FLRA 15 (2015); U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Sheridan, Oregon and AFGE, Local 3979, Case No. SF-CA-11-0607, September 30, 2014; and U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Oxford, Wisconsin and AFGE, Local 3495, Case No. CH-CA-12-0403, December 19, 2014.

[114] See MA, Article 4, Section b which provides..."Om matters which are not covered in supplemental agreements at the local level, all written benefits, or practices and understandings between the parties implementing this agreement, which are negotiable, shall not be changed unless agreed to in writing by the parties; also, AFGE, AFL-CIO, Local 1661 and Department of Justice, Bureau of Prisons, Federal Correctional Institution, Danbury, Connecticut 2 FLRA 56

[115] See AFGE, Local 1592, 64 FLRA 861, 861-62 (2010).

[116] 5 USC 5596

[117] Citing AFGE Local 5690 and Bureau of Prisons 69 FLRA 21 (2015) Exhibit 23 of the Unions post-hearing brief.

[118] Citing Defense Finance and Accounting Service, 104 LRP 45548, 60 FLRA 281 (2004). Exhibit 24 of the Union's post-hearing brief.

[119] The concept of prevailing party status was explained in Department of the Navy, Norfolk Naval Shipyard, 90 FLRR 1-1148, 34 FLRA 725 (1990), [Exhibit 25, Union's post-hearing brief] where the FLRA, borrowing language from the U.S. Court of Appeals, Federal Circuit said that determining who prevails is essentially "a totaling up of who won and who lost."

[120] Citing General Services Administration, 105 LRP 31780, 61 FLRA 68 (2005). Exhibit 26, Union's post-hearing brief.

[121] Citing Denver VA Medical Center, 94 FLRR 1-1145, 49 FLRA 1403 (1994). Exhibit 27, Union's post-hearing brief.

[122] Testimony of Mr. Eric Young, President of the Council of Prison Locals, Vol. IV, pgs 26-70.

[123] See MA, Article 9, Section a 1 which provides in part "...it is understood that local supplemental agreements will expire upon the same day as the Master Agreement, except as noted in a(2)...If the Master Agreement's life is extended beyond the scheduled expiration date for any reason, local supplemental agreements will also be extended; and [in a(2)]...providing that nothing in the local supplement agreement is in conflict with the provisions of the Master Agreement, or changes in any policies, regulations, or laws, the parties at the local level may mutually elect to execute new signatures and dates, if neither party desires to renegotiate the local supplemental agreement." See also, U.S. Border Patrol Livermore Sector, Dublin, California and AFGE, National Border Patrol Council, Local 2730, AFL-CIO 58 FLRA 56 (2002).

[124] *Elkouri & Elkouri*, 7th Edition, at 7-22 FN 103.

[125] Id at 7-46-47 FN210.

[126] The Arbitrator fully understands this decision and award may have impact on management's relations with the other AFGE Locals representing BUEs in the other institutions at Butner; nevertheless, management must take all measures necessary to make whole its contractual relationship and obligations with AFGE Local 408 and the BUEs in the institutions/facilities it represents, FCI-2 and FMC.

[127] Example of the kind of report the parties are to provide the Arbitrator...

BUE Number	Name of BUE Deprived of Overtime	Classification of BUE Deprived of Overtime	Total Number of Hours Overtime Lost		Total Amount of Pay/Benefits/Allowances, etc. Owed Computed at $XX.XX per overtime hour		Name of Employee Who was Assigned/Hired for The Overtime	Classification of Employee Who Was Assigned/Worked the Overtime of Overtime
			Month of August 2013	Running Total to Date	Month of August 2013	Running Total to Date		
1	Robert G. Smith	Correctional Officer GS-0007-09/6	42	42	$1680.00	$1680.00	Sally A. Brown	Correctional Officer GS-0007-09/6
258	James K. Duck	Correctional Officer GS-0007-09/6	18	18	$840.00	$840.00	Fred Y. Cook	Correctional Officer GS-0007-09/6
			Month of December 2013	Running Total to Date	Month of December 2013	Running Total to Date		
1	Robert G. Smith	Correctional Officer GS-0007-09/6	34	214	$1360.00	$18,880.00	Sally A. Brown	Correctional Officer GS-0007-09/6
258	James K. Duck	Correctional Officer GS-0007-09/6	18	540	$720.00	$8,820.00	Fred Y. Cook	Correctional Officer GS-0007-09/6