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Re: FMCS Docket No. 14-54741-7(Consolidated with 14-54747-7); Performance Evaluations; Order

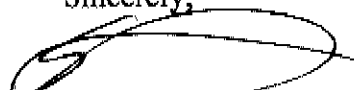
Dear Parties:

Enclosed please find an **ORDER** in this matter. The Order instructs the parties to form an evaluation review committee within thirty (30) calendar days from today. The committee is to file a status report with me on or before **October 15, 2016**.

The Order also sets this case for another hearing on **November 29, 2016**. If either of you have a scheduling conflict with that date, let me know asap.

If you have any questions, do not hesitate to contact me.

Sincerely,



Sherry Wetsch

Enclosure

CF: Brian Richmond

FMCS DOCKET NO. 14-54741-7 (Consolidated with 14-54747-7)

AFGE, COUNCIL OF PRISON LOCALS 33	§	BEFORE ARBITRATOR
#1034, Petitioner	§	
	§	
v.	§	SHERRY WETSCH
	§	
BUREAU OF PRISONS, FCC POLLOCK	§	
Respondent	§	

ORDER

On March 18 and 19, 2015 a hearing was held in this cause at FCC Pollock. During this hearing the parties agreed to consolidate FMCS 14-54747-7 with 14-54741-7. The request to consolidate these matters was granted. Appearing for the Petitioner was Attorney Jack Whitehead. Appearing for Respondent was Michael Markiewicz. These individuals represented the parties throughout every hearing held in this matter. The undersigned was appointed by the Federal Mediation & Conciliation Service to arbitrate this matter on April 28, 2014.

The following individuals provided sworn testimony at the March 2015 hearing: Brian Richmond, Sean Bernard, Rodney Dodge, Juan Ramos, Walter Lawson, Chadwick Luke, Ron Wester, Josh Gaspard, Harlan Crews, and Michelle Cottingham. Ms. Cottingham appeared via telephone video conference. All other witnesses appeared in person.

Admitted Exhibits in this matter are as follows:

- Joint 1: Master Agreement
- Joint 2: 1st Quarter Grievance, Invocation, Response & Informal Resolution.
- Joint 3: 2nd Quarter Grievance, Invocation, Response & Informal Resolution
- Joint 4: 3rd Quarter Grievance, Invocation & Response
- Joint 5: Annual Grievance, Invocation & Response
- Joint 6: Human Resource Management Manual-Chapter 4

- Union 1: Bureau of Prisons Awards Program-Policy 3451.04
- Union 2: 12/11/2014 Data Request; 3/9/2015 Second Data Request; 1/19/2015 Response to Data Request
- Union 3: 03-04 Awards Data Request Report
- Union 4: Opinion/Award FMCS #07-01054
- Union 5: Union Power Point Opening Statement
- Union 6: Feb 26, 2013 e-mail
- Union 7: Settlement Agreement dated October 15 , 2012
- Union 8: Sean Bernard Performance Log
- Union 9: April 24, 2014 Acknowledgement Memorandum

Union 10: Chadwick Luke Performance Log
Union 11: August 14-15, 2013 Minutes
Union 12: ePerformance Supervisory User Quick Reference Guide
Union 13: Ron Wester Employee Performance Appraisal
Union 14: Josh Gaspard Employee Performance Appraisal
Union 15: Harlan Crews Employee Performance Appraisal
Union 16: September 6, 2013 Memorandum
Union 17: Justin Netherlin Employee Performance Appraisal
Union 18: Anthony Koeppel Employee Performance Appraisal
Union 19: 4/1/14-3/31/15 Evaluation of Chadwick Luke
Union 20: Standard Set Number 3B (Bargaining Unit) For Non-Supervisory Correctional Officers
Union 21: Standard Set Number 8B (Bargaining Unit) For Technician Assistant
Union 22: Performance Appraisal Quarterlies For Anthony Koppel
Union 23: Appraisal Data Pertaining To Josh Gaspard
Union 24: February 2, 2015 E-mail from Josh Gaspard to Rodney Dodge
Union 25: Appraisal Data Pertaining To Clifton Francis

Agency 1: ePerformance Bargaining Unit Basic User Quick Reference Guide Dated March 2011

On April 3, 2015 a telephone hearing was held. On said date the undersigned issued an Order. During this hearing the Respondent asserted that the relevant time period in this matter was the one-year rating period of 4/1/13 through 3/31/14. The question as to whether this grievance was an ongoing violation and whether the relevant time period adjusted accordingly was raised. The underlying grievance in this matter asserts that numerous yearly evaluations and/or log entries for the rating period of April 1, 2013 through March 31, 2014, have not been issued and/or conducted in accordance with the Human Resource Manual. The Union asserted that there is a continuing violation of the yearly evaluation and log entry process, and that this proceeding should include the 2014-2015 Performance Evaluation Program. The parties filed written submissions on the issue.

On May 26, 2015 this Arbitrator determined that the allegations in this matter involve an ongoing violation and that the relevant time period adjusts accordingly. The May 26th Order ruled that the jurisdiction in this matter includes the rating periods of April 1, 2013 through March 31, 2014, and April 1, 2014 through March 31, 2015.

On October 15, 2015 a hearing was held at FCC Pollock. During this hearing the Respondent asserted that this Arbitrator does not have jurisdiction over the rating period of April 1, 2015 through March 31, 2016. The parties stipulated that this Arbitrator does not have jurisdiction over the rating period of April 1, 2015 through March 31, 2016 and thereafter. On said date the undersigned ordered that the relevant time period for this arbitration proceeding is April 1, 2013 through March 31, 2015.

The following witnesses provided sworn testimony at the October 15th hearing: Jeffrey Roberts, Justin Netherland, Anthony Koppel, Chadwick Luke, Josh Gaspard, Clifford Francis, and Angela Scarber.

On October 16, 2015 the parties were given a deadline of December 31, 2105 to submit post hearing submissions in this matter. The parties thereafter requested and were granted several extensions of this deadline due to scheduling commitments of the parties. On April 28, 2016 the parties were granted an extension of the deadline for filing post hearing briefs to May 16, 2016. The parties filed their post hearing briefs on May 16, 2016.

On May 20, 2016 the Union filed a *Motion to File Reply To Agency's Post Arbitration Brief*. On June 1, 2016, this Arbitrator issued an *Order Granting Union's Motion to File Reply Brief to Agency's Post Hearing Arbitration Brief*. In this Order, the Respondent was given until June 17, 2016 to enter a reply to the Union's Reply Brief. The Agency filed a Reply Brief on June 16, 2016.

ISSUES:

1. Did the Agency fairly and equitably issue performance evaluations during the relevant time period in accordance with Agency policy and the Master Agreement, and if not, what is the appropriate remedy?
2. Did the Agency violate the Master Agreement during the relevant time period with respect to issuing employees' performance evaluations, and if so, what is the appropriate remedy?
3. Were the grievances in this matter timely file?

BACKGROUND

This arbitration pertains to four grievances filed. (Joint Exhibits 2-5) These grievances assert that Management violated Articles 6 & 14 of the Master Agreement; Human Resource Manual, PS 3000.03; 5 U.S.C. 7116; and 5 U.S.C. 4302.

Joint 2 is a grievance that asserts that numerous, if not all, quarterly evaluations and/or log entries for the rating period of April 1, 2013 through June 30, 2013 have not been issued and or conducted in accordance with the Human Resource Manual. The stated date of violation is "continuous".

Joint 3 is a grievance that asserts that numerous, if not all, quarterly evaluations and/or log entries for the rating period of July 1, 2013 through September 30, 2013 have been issued and/or conducted in accordance with the Human Resource Manual. The stated date of violation is "continuous".

Joint 4 is a grievance that asserts that numerous, if not all, quarterly evaluations and/or log entries for the rating period of October 1, 2013 through December 31, 2013 have not been issued and/or conducted in accordance with the Human Resource Manual. The stated date of violation is "continuous".

Joint 5 is a grievance that asserts that numerous, if not all, yearly evaluations and/or log entries for the rating period of April 1, 2013 through March 31, 2014 have not been issued and/or conducted in accordance with the Human Resource Manual. The stated date of violation is "continuous".

These grievances cited the following examples of how quarterly evaluations and/or log entries have not been issued and/or conducted in accordance with Chapter 4 of the Human Resource Manual:

1. Supervisors are not issuing the quarterly performance log entries and/or performance standards in a timely manner, nor are they communicating their expectations with the bargaining unit staff and the reasons for the ratings.
2. Bargaining Unit staff are not being afforded the opportunity to improve their performance through proper communications between supervisor and employee(s).
3. Supervisors are giving ratings for employee(s) that they are not supervising with no documented input from each employee's direct supervisor.
4. Supervisors are lowering ratings without justifying the reduction in rating, or giving any avenues for improving their performance.
5. Supervisors are not meeting with staff members to discuss their performance log entries.

The grievances requested the following combined remedies:

1. That the Agency and the Union shall identify all employee performance evaluations that were untimely or improperly handled by the Agency.
2. That the Agency make whole all employees at FCC Pollock affected by awarding them "Outstanding" evaluations for all improperly conducted quarterly evaluations and that these employees receive any benefits/award associated with this rating in accordance with statute and policy.
3. That the Agency ensure that all corrections are to be made on the Employee's EOPF page as well as the Employee's NFC page.
4. That the Agency establishes a listing of all affected employees with the corrections that were conducted which is to be presented to the Local for the final resolution.
5. That the Agency follows PS 3000.03 and the Master Agreement in its entirety, including the requirements established for the issuance of evaluations.
6. That the Managers/Supervisors at FCC Pollock be trained on all aspects of the Master Agreement and PS 3000.03.
7. That the Managers/Supervisors that are responsible for the failure of providing accurate and relevant evaluations, be removed from a supervisory position until such time as the proper training for giving evaluations can be conducted.
8. That the Agency give the employees of FCC Pollock and this Local a written apology to be posted on all bulletin boards for a period of no less than 90 days and via an e-mail submitted to all staff at FCC Pollock.
9. The Agency makes whole all employees affected by awarding them the highest monetary award allowable by policy.
10. That the grievant(s) will suffer no reprisals, harassment, or intimidations as a result of filing this grievance.
11. Any other appropriate relief that may be requested at the hearing.
12. Any other actions(s) or sanction(s) deemed appropriate by the Arbitrator.
13. The arbitrator retain jurisdiction over this case until all affected staff at FCC Pollock have been made whole.
14. That the Agency pay all legal costs incurred in this matter to include attorney fees, if applicable.

On September 27, 2013, the Agency denied the grievance identified as Joint Exhibit 2. The Agency's response letter, signed by the Warden states in pertinent part, "...A review of the institution's report, regarding the issuance of performance standards and quarterly performance log entries, revealed staff are receiving their standards, as well as quarterly performance log entries. However, as you failed to cite specific instances regarding your allegations and failed to provide documentation to substantiate your claims that the Agency was not in compliance with the Human Resources Manual, P.S. 3000.03, I am unable to specifically investigate and address the issues claimed in your grievance..... For the above stated reasons, your grievance is procedurally rejected and substantively denied."

On December 20, 2013, the Agency denied the grievance identified as Joint Exhibit 3. The Agency response letter signed by the Associate Warden states in pertinent part, "...A review of the institution's report, regarding the issuance of performance standards and quarterly performance log entries, revealed staff are receiving their standards, as well as quarterly performance log entries. However, as you failed to cite specific instances regarding your allegations and failed to provide documentation to substantiate your claims that the Agency was not in compliance with the Human Resources Manual, P.S. 3000.03, I am unable to specifically investigate and address the issues claimed in your grievance..... For the above stated reasons, your grievance is procedurally rejected and substantively denied."

On March 6, 2014, the Agency denied the grievance identified as Joint Exhibit 4. The Agency's response letter, signed by the Warden states in pertinent part, "...A review of the institution's report, regarding the issuance of performance standards and quarterly performance log entries, revealed staff are receiving their standards, as well as quarterly performance log entries. However, as you failed to cite specific instances regarding your allegations and failed to provide documentation to substantiate your claims that the Agency was not in compliance with the Human Resources Manual, P.S. 3000.03, I am unable to specifically investigate and address the issues claimed in your grievance..... For the above stated reasons, your grievance is procedurally rejected and substantively denied."

On May 30, 2014, the Agency denied the grievance identified as Joint Exhibit 5. The Agency's response letter, signed by the Warden states in pertinent part, "...A review of the institution's report, regarding the issuance of performance standards and quarterly performance log entries, revealed staff are receiving their standards, as well as quarterly performance log entries. However, as you failed to cite specific instances regarding your allegations and failed to provide documentation to substantiate your claims that the Agency was not in compliance with the Human Resources Manual, P.S. 3000.03, I am unable to specifically investigate and address the issues claimed in your grievance. As a result, your grievance is procedurally rejected and substantively denied."

The American Federation of Government Employees is recognized as the sole and exclusive representative/bargaining agent for all bargaining unit employees. The Master Agreement that was applicable during the relevant time period is Joint Exhibit 1.

On October 15, 2012, the parties entered into a settlement agreement regarding a grievance that was filed on May 18, 2012. That grievance contended that evaluations at FCC Pollock were being given in an untimely and/or improperly handled manner, and not in accordance with the Master Agreement and the Human Resource Manual. In that case the parties agreed to form an evaluation review committee comprised of four union and four management officials to review 2012 yearly evaluations and any concerns with evaluations up to September 30, 2012 (which also include the 2011 final annual performance evaluation). The purpose of the committee was to review the individual evaluations in accordance with the Human Resource Manual, and where necessary, make corrections in accordance with this policy. The parties agreed that if an employee receives a higher overall rating, appropriate action will take place, if required, to award them in a similar manner of other similarly situated employees in their department.

On October 16, 2015 this Arbitrator issued an *Order Regarding Notice To Grievance Participants, And Deadline For Post Hearing Submissions*. This Order provided a deadline for the Union to send notice to members of the bargaining unit regarding whether or not they wanted to opt in on the grievance pertaining to the rating periods of 2013-2014 and 2014-2015. The "opt in" list was to be provided to the Agency on or before January 21, 2016. On January 19, 2016 the Union mailed the consent forms to this Arbitrator and the Agency. Two hundred thirty-nine (239) bargaining unit members opted in on this grievance.

RULING ON TIMELINESS

In the *Agency's Closing Brief*, the Agency raised the issue of timeliness of the underlying grievances. However, procedural threshold issues are to be raised at the earliest possible time. Additionally, the parties previously argued and this arbitrator has already ruled on the relevant time period covered by this proceeding, that being April 1, 2013 through March 31, 2015. Article 31 of the Master Agreement states that grievances 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*. The first grievance that is at issue in this arbitration was filed on August 28, 2013. Its assertions pertain to the rating period of April 1, 2013 through June 30, 2013, and that the violation was "continuous". The Agency was on notice that this was an ongoing violation. Additionally, the parties have a history of this specific issue repeating itself and/or continuing, namely the Agency's failure to conduct timely and proper performance evaluations for all employees pursuant to federal statute and other mandates. (Union Exhibit 7) A grievance was filed in May of 2012 regarding the issue of evaluations being given in an untimely and/or improperly handled manner and not in accordance with the Human Resource Manual and Master Agreement. Despite entering into a settlement agreement in October of 2012, the performance evaluations continued to not be completed according to policy and the Master Agreement. Based upon the evidence presented, this Arbitrator concludes that the grievances were timely filed. Therefore, the Agency's request that this Arbitrator determine that the underlying four grievances were untimely filed is denied.

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT (Joint 1)

ARTICLE 6-Rights of the Employee

Section b. 2. To be treated fairly and equitably in all aspects of personnel management.

ARTICLE 14-Employee Performance and Ratings

Section a. The Employer's performance evaluation program as applied to bargaining unit employees is intended to increase the efficiency of operations, foster good employee morale, strengthen Employee-Management relationships, and evaluate work performance based upon established elements and performance standards. These standards and elements will be developed and communicated to each employee, and as they are applied to an employee, will be fair and based upon objective criteria and job relatedness. In the event that employees do not understand portions of their performance requirements, it is the employees' responsibility to bring those specific areas of attention to their supervisors.

Section b. Bargaining unit employees shall have the right to appeal their performance ratings through negotiated grievance procedure with or without the Union. It is understood that only the Union or the Agency can pursue the matter to arbitration.

Section c. The parties to this Agreement endorse the concept that evaluations should be completed by supervisors who have knowledge of an employee's performance. Where employees serve subject to multiple supervision, it is recommended that, where practicable, such employees' ratings be completed by the supervisors for whom they worked during the rating period. This endorsement is not intended to waive any rights employees may otherwise have to grieve their performance ratings.

1. The Employer and its representative are committed to following Agency policy regarding the performance appraisal program. This policy will be available for the employee's review upon request. This policy states that the following time frames will be adhered to in relation to performance log entities:
 - a. Rating officials must record specific incidents in the performance log within fifteen (15) working days of becoming aware of the incident;
 - b. After an entry has been made in the performance log, the employee will be given an opportunity to see the entry as soon as practicable and before the entry is used officially, but no later than fifteen (15) working days after the entry is made; and
 - c. These time requirements may be adjusted, if necessary, because of the rating official's or employee's absence.

Section d. The Employer agrees to provide information requested by the Union regarding the performance evaluation program and distribution of ratings if a valid request is made under the provisions of 5 U.S.C., Chapter 7 7114(b)(4).

ARTICLE 31-Grievance Procedure

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 U.S.C. 7121.

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward the informal resolution.

Section c. Any employee has the right to file a formal grievance with or without the assistance of the Union.

1. After the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representatives of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect not to participate.
2. If an employee files a grievance without the assistance of the Union, the Union will be given a copy of the grievance within two (2) days after it is filed. After the Employer gives a written response to the employee, the Employer will provide a copy to the Union within two (2) working days. All responses to grievances will be in writing.
3. The Union has the right to be notified and given an opportunity to be present during any settlement or adjustment of any grievance; and
4. The Union has the right to file a grievance on behalf of any employee or group of employees.

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. 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.

1. If a matter is informally resolved, and either party repeats the same violation within twelve (12) months after the informal resolution, the party engaging in the alleged violation will have five (5) days to correct the problem. If not corrected, a formal grievance may be filed at that time.

Section e. If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.

Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

1. When filing a grievance, the grievance must 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 Office of the institution/ facility has disciplinary authority over;
2. 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 an employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director.
3. When filing a grievance against a Regional Director, the grievance will be filed with the Director of the Bureau of Prisons, or designee;
4. In cases of violations occurring at the national level, only the President of the Council of Prison Locals or designee may file such a grievance. This grievance must be filed with the Chief, Labor Management Relations and Security Branch, Central office; and
5. Grievances filed by the Employer must be filed with a corresponding Union official.

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. If the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 31 of this Agreement within thirty (30) calendar days from receipt of the final response; and
 2. A grievance may only be pursued to arbitration by the Employer or Union.
- Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/ adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action on one (1) of two (2) ways;
1. By going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?"; or
 2. Through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.
- Section i. The employee and his/her representative will be allowed a reasonable amount of official time in accordance with Article 11 to assist an employee in the grievance process.

ARTICLE 32-Arbitration

Section a. 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 joint submission of the issue 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.

RELEVANT PROVISIONS OF BUREAU OF PRISONS AWARDS PROGRAM, INCENTIVE AWARDS, PS 3451.04

1. Purpose and Scope. To recognize and promptly reward exemplary contributions to the organizations efficiency and effectiveness. Merit shall be the sole basis for granting any award. The provisions of this Program Statement apply to all BOP employees at all organizational levels.

This Program Statement establishes the Incentive Awards Program as a key component within the BOP. In addition to presenting new incentive awards initiatives, the Program Statement also incorporates previously published policy and instructions into a logically structured guide to be used by Human Resource officials and supervisors in fulfilling their responsibilities in human resource management.

Chapter 1

101. Purpose of Program

1. The purpose of the Bureau of Prisons Incentive Awards Program is to recognize and reward promptly employees who perform in an exemplary manner or make significant contributions to the efficiency and effectiveness of Bureau operations and to honor those who have served the government faithfully and well.

The integrity of the program will be preserved when meritorious awards are given expeditiously and only to those who are truly deserving of recognition. Merit will be the sole basis for granting any award. This will diminish inequities that could undermine the credibility of the awards program. Awards should be granted without regard to grade level or type of position.

Awards received within the past five years will be a factor when considering all employees for a promotion through the competitive merit promotion procedures.

2. Employee recognition is extremely important to encourage and maintain employee morale and a high level of achievement. Unfortunately, this can have a negative impact on all employees if recognition is awarded indiscriminately, without a clear connection between the award and the contributions made to the Bureau

We need to ensure that in our efforts to recognize employees, we also remain cognizant of our public trust and fiscal responsibilities. In the interest of all taxpayers, it is of the utmost importance that we maintain the integrity of the incentive awards program. We must not indiscriminately grant awards. Always consider factors such as: impact, perception of others, and cost savings of the contribution being rewarded.

Chapter 2

201. Quality Step Increases

2. Evaluation Criteria. A QSI may be considered only when the employee's most current overall performance rating of record is "outstanding". This level of achievement must have been sustained for at least six months prior to nomination. The same period of performance may not be used as justification for more than one QSI.

4. Nomination Procedures.

Normally, a QSI is recommended concurrent with the annual performance appraisal. The immediate supervisor is responsible for initiating the recommendation and obtaining information on the employee's eligibility for a QSI.

Nominations should be submitted using either of the methods described below:

When the performance evaluation contains substantial documentation of the employee's performance in relation to the performance standards, the supervisor can submit a copy of the performance evaluation and a cover memorandum (or local form) which recommends the QSI.

202. Special Achievement Award For Sustained Superior Performance (SSP)

1. Introduction. This is a lump sum cash award granted in recognition of an employee's sustained superior performance which exceeds normal job requirements for a period of at least six months.

2. Evaluation Criteria. An SSP award may be given only to an individual (rather than a group). One or more job elements of an employee's position must be performed for a period of at least six months in a manner which clearly exceeds normal job requirements. The SSP award must be supported by a current performance rating of "exceeds" or higher.

RELEVANT PROVISIONS OF HUMAN RESOURCE MANUAL, PS 3000.03

1. Purpose and Scope. To provide for the recruitment, selection, promotion, training, and evaluation of Bureau employees and to establish a Human Resource Management system to conduct these operations.

Chapter 4

430.1 Performance Evaluation Program For Bargaining Unit Employees

1. PURPOSE AND SCOPE. The objectives of the performance evaluation program are to help improve performance, strengthen supervisor-employee relationships and communications, identify and inform employees of work requirements and standards, recognize employee accomplishments and good work, identify and correct work deficiencies, and guide personnel actions such as within-grade and quality step increases, promotions, demotions, removals, reassignments, performance awards, and training.

4. COVERAGE. This section applies to all employees in the bargaining unit except those serving under appointments of less than 90 days.

5. RESPONSIBILITIES.

- a. The Assistant Director, Human Resource Management Division, is responsible for the overall administration of this program.
 - b. The Federal Bureau of Prisons Personnel Director is responsible for ensuring that the performance evaluation program is carried out throughout the system in compliance with current laws and regulations.
 - c. Chief Executive Officers are responsible for ensuring that there is an effective performance evaluation program at their level of the organization.
 - d. The Approving Official for outstanding performance ratings is the Chief Executive Officer for the institution and regional office staff or the appropriate Assistant Director for Central Office staff. The approving official must be at least two supervisory levels above the employee being rated.
 - e. The Reviewing Official is the next supervisor above the rating official and is responsible for assigning overall rating and approving or adjusting individual element ratings. Reviewing officials are also responsible for monitoring the performance appraisal practices of subordinate supervisors and providing advice or instruction as needed. Reviewing officials ensure that recommendations for incentive awards based on performance ratings are consistent with policy and determine whether recommendations for outstanding performance ratings will be forwarded to the approving official.
 - f. The Rating Official is the first level of management having the full range of supervisory responsibilities, including recommending performance awards. Rating officials are responsible for maintaining the employee's performance log, conducting progress reviews and completing the annual performance rating in accordance with the procedures in this section.
 - g. Employees are responsible for becoming familiar with the objectives and procedures of the performance evaluation program and for understanding the elements and performance standards for their positions. The employee is responsible for seeking clarification from the supervisor on any performance standard or any other aspect of this program which is not clear. The employee should inform the supervisor of any factors or circumstances which the employee believes should be considered in evaluating his/her performance.
 - h. Human Resource Managers are responsible for providing training, advice and assistance to employees and supervisors on this program. They are also responsible for maintaining adequate supplies of the rating forms and performance standards for distribution to supervisors.
 - i. Local Procedures. Specific procedures and responsibilities for initiating the issuance of performance standards, monitoring changes in performance standards and rating periods, maintaining rating forms during the rating period, recommending training and incentive awards based on performance ratings and other aspects of this program not described in this section are left to the discretion of the local Chief Executive Officer. Institutions and offices should develop written procedures to ensure that the requirements of this program are fully implemented.
6. BASIC PROGRAM REQUIREMENTS. The basic structure of the performance evaluation program is outlined below and is described in detail in subsequent sections.
- a. At the beginning of the rating period, the rating official gives the employee a copy of the performance standards for their position and discusses them. Both the employee and rating official sign the rating form, indicating that the discussion has taken place.
 - b. Throughout the rating period, the rating official makes entries in the employee's performance log. Each element of the performance standards must be addressed at least once each quarter. The

rating official discusses each entry in the performance log with the employee as it is made. Entries in the performance log serve as the basis for the progress review and final rating.

c. Halfway through the end of the rating period, the rating official completes a written progress review and discusses it with the employee. Both the employee and rating official sign the progress review section of the rating form.

d. At the end of the rating period, the rating official evaluates each element of the performance standards, assigns an adjective rating to each element and forwards the rating to the reviewing official. The reviewing official approves or adjusts the individual element ratings, assigns an overall rating (and forwards the rating to the approving official in the case of outstanding ratings) and returns the rating to the rating official for discussion with and signature by the employee. Except in unusual circumstances, employees must receive their performance rating within three weeks after the end of the rating period.

e. An employee must have worked under a set of performance standards for a minimum of 90 days before receiving a rating based on those standards. A rating official must have supervised an employee for a minimum of 90 days before he or she can rate the employee. These 90 day requirements apply only to final ratings, not to progress reviews. There is no minimum time requirement before a reviewing official can review a rating.

7. RATING PERIOD. The rating period for non-probationary employees begins April 1 each year and ends March 31 the following year except as provided below:

a. Common job elements and performance standards have been developed for all occupations within the Bureau of Prisons. Elements and standards are issued on pre-printed forms, making it unnecessary to type the elements and standards on the rating form. Rating officials must review these standards and delete any element which is clearly not applicable to a particular position. Rating officials must review these standards and delete any element which is clearly not applicable to a particular position. Rating officials may also develop one additional element with standards and tasks to meet unique or unusual responsibilities for a particular position, however, since all job elements are critical, these responsibilities must be substantial and highly important to the position. If such an element or standard is developed, it must be reviewed and approved for use by the Bureau Personnel Director. Once an element and standard are approved for use, it will be typed on the preprinted elements and standards which apply to that position.

b. A job element is an aspect of the position consisting of one or more duties or responsibilities which is sufficiently important that inadequate performance of the element would result in unacceptable performance in the position. All job elements are critical.

c. A performance standard is a statement of the expectations or requirements established by management for an element at a particular rating level. A performance standard may include factors such as quality, quantity, timeliness and manner of performance.

d. Tasks are examples of job duties that are representative of a job element under the performance standards. Not all tasks described under an element are applicable to all occupations covered by that performance standard. The tasks described in the performance standards are examples of typical duties which would be performed in that job element.

e. The performance appraisal program allows for rating individual elements, as well as overall performance, at one of five levels. The performance standards and tasks are described at only three

levels. Rating officials may infer performance at one of the levels not described by comparing the employee's actual performance to the levels which are described. For example, if an employee's performance is better than the examples given for the "fully successful" level, but does not meet the examples given for the "outstanding" level, the employee's performance should be rated at the "exceeds" level.

9. ISSUING PERFORMANCE STANDARDS. At the beginning of the rating period, the rating official will discuss the elements, standards and tasks for the position with the employee. This discussion should take place as soon as possible after the start of the rating period, normally within 30 days. The rating official and employee will sign and date the rating form, certifying that the elements and standards are understood. If a new element and standards are added during the rating period (or if an element is deleted), the rating official and employee will again discuss them and sign and date the rating form. If the rating official changes during the rating period but there is no change in the performance elements and standards, it is not necessary for the new rating official to review the standards with the employee or sign the rating form, however, rating officials are always responsible for discussing performance standards and responding to employees' requests for clarification of the standards.

10. MONITORING PERFORMANCE-PERFORMANCE LOG. The performance appraisal process requires that rating officials observe and note employee performance continuously throughout the rating period. Rating officials must record examples of employee performance to ensure that the rating at the end of the rating period is an accurate and fair appraisal of the employee's performance during the whole rating period. The performance log is used to document and substantiate the final rating.

b. Time Requirements. The rating official must record performance incidents in the log so that each element is addressed at least once each quarter. If no significantly positive or negative performance is noted for a particular element during a quarter, the rating official will make an entry describing typical performance over the course of the quarter. Rather than waiting until the end of the quarter, rating officials must make entries in the log as the performance is noted in order to meet the following time requirements. Rating officials must record specific incidents in the performance log within fifteen working days of becoming aware of the incident.

After an entry has been made in the performance log, the employee will be given an opportunity to see the entry as soon as practicable and before the entry is used officially, but no later than fifteen working days after the entry is made. The employee will be asked to initial the entry, indicating only that the entry was discussed, not necessarily that they agree with it. These time requirements may be adjusted, if necessary because of the rating official's or employee's absence.

c. Content of Performance Log Entries. Performance log entries will document instances of important or significant job-related performance, both positive and negative. Log entries must document the actual behavior of the employee, not personality traits or judgmental conclusions drawn by the supervisor. Instances of performance recorded in the log must be related to one or more elements of the employee's performance standards and include, at a minimum:

- (1) The date of the performance incident,
- (2) What the employee did that was particularly effective or ineffective,

- (3) Circumstances surrounding or contributing to the performance incident such as the consequences of the performance, whether the employee had sufficient time and resources or whether circumstances outside the employee's control contributed to the performance.
- (4) Level of performance assigned.
- d. Multiple Supervision. If an employee is supervised by more than one supervisor during the rating period, those supervisors are responsible for providing the rating official with any comments or incidents for consideration for inclusion in the performance log. This provision does not apply to employees who are detailed to another supervisor for 90 days or more and who receive new standards and an interim rating in accordance with paragraph 9 of this section.
11. PROGRESS REVIEW. In addition to the frequent informal discussions of performance resulting from performance log entries, the rating official will conduct at least one formal progress review during the rating period.
- a. One progress review is required for non-probationary employees and it will be conducted at the halfway point of the rating period.
- c. The rating official will make narrative comments for each job element in the progress review section of the performance appraisal form. No adjective rating is assigned to the elements at this time. The rating official will discuss the progress review with the employee and both will sign the form at the bottom of the progress review section. There is no provision or requirement for the reviewing official to review or comment on the progress review, however, reviewing officials may examine the progress reviews prepared by their subordinate supervisors.
12. FINAL RATING.
- a. Determining Element Ratings
- (1) The rating of an employee's performance in each job element is based upon the incidents recorded in the performance log.
- (2) Each element will be rated at one of five levels: Unacceptable, Minimally Satisfactory, Fully Successful, Excellent, or Outstanding.
- (3) Each element will be rated at the level which reflects the level assigned to the majority of performance log entries for that element. If there are an equal number of performance log entries at two different levels, the rating official may assign either of the two levels unless there is an intermediate level or levels. For example, if two log entries are "fully successful" and two are "excellent," the rater may assign either "fully successful" or "excellent" as the element rating. If two log entries are "fully successful" and two are "outstanding," the rater must assign "excellent" as the element rating.
- (4) Special provisions apply when rating an element as unacceptable. Refer to paragraph 22 of this section for the procedures for documenting unacceptable performance.
- (5) The rating official will mark the block on the rating form which reflects the adjective rating for each element, write narrative comments in the space provided for each element and write narrative comments on the employee's overall performance in the "rater's comments" section of the form. Rating officials are also encouraged to complete the training and career development section of the form with recommendations for training or other developmental activities.

(6) For dual or multiple supervisors, all supervisors of 90 days or more should provide input into the rating process and initial the rating form as rating officials. Reviewing officials may also seek input from supervisors of lesser periods of time.

b. Overall Rating

(1) The overall rating is assigned by the reviewing official, based on the individual element ratings. Reviewing officials assign the overall rating by marking the appropriate block and writing narrative comments in the "reviewer's comments" section of the form.

(2) Except in the case of outstanding ratings, the rating assigned by the reviewing official is the final rating. If the proposed rating is outstanding, the Chief Executive Officer or Assistant Director is the approving official. Reviewing officials must adjust individual element ratings to be consistent with the overall rating, however, any such changes by the reviewer must be substantiated by the comments in the reviewing official's block on the rating form.

(7) An overall rating of outstanding is demonstrated by a rating of outstanding in a majority of the elements and no element rated less than excellent. When an outstanding rating is approved by the approving official, the rating official must also recommend the granting of additional recognition in the form of a cash or non-cash award or a quality step increase for those employees who are otherwise eligible. Refer to the Incentive Awards Manual for the criteria for performance awards.

13. FINAL DISCUSSION. After the reviewing official has approved the final rating (and the approving official has approved an outstanding rating), the rating form is returned to the rating official for discussion with the employee. No rating will be discussed with the employee until after the reviewing official and, if necessary, the approving official, has approved the final rating. The rating official should give adequate time and attention to this part of the evaluation process, reviewing with the employee the strengths and weaknesses noted in the performance appraisal. Rating officials are strongly encouraged to specify areas in which their employees should seek out training, education, or other developmental activities to improve skills and/or knowledge or enhance career advancement and promotion potential (using section H on the appraisal form for this purpose). The employee will sign the bottom of the form indicating that the performance rating has been discussed and the employee will receive a copy of the rating. The original copy of the rating, with signatures, will be returned to the HRM office for recording and filing. This is also an appropriate opportunity to review the performance standards for the next rating period and obtain the rater's and employee's signatures on the blank form which will be used for the next rating period.

14. FILING AND DISPOSITION OF PERFORMANCE LOGS AND RATING FORMS

d. Rating officials will retain the performance log for one year after the performance rating based on the log is approved.

e. If a rating is increased or changed as a result of a successfully pursued grievance or other proceeding, the amended rating will be filed and the contested rating removed and destroyed.

17. PERFORMANCE RATING GRIEVANCES. Bargaining unit employees may seek to change their performance ratings by using the negotiated grievance procedure contained in the Master Agreement.

18. RELATIONSHIP TO WITHIN-GRADE INCREASES. To be eligible for a within-grade step increase, an employee must meet the requirements described in 5 CFR 531.404 (General

Schedule) or 5 CFR 532.417 (Prevailing Rate System). One of these requirements is that the employee must demonstrate an acceptable level of competence in the duties and responsibilities of their position. Acceptable level of competence is determined by the employee's most current rating of record being an overall rating of fully successful or higher. The rating of record used as the basis of a within-grade increase determination must have been assigned no earlier than the most recently completed appraisal period. If a decision to grant or deny the within-grade increase is inconsistent with the most recent rating of record, a more current rating of record must be prepared. If the employee's most recent rating of record is fully successful or higher and the performance has deteriorated below an acceptable level of competence, a new rating of record must be prepared on which to base the decision to deny the increase. Similarly, if the most recent rating of record was below fully successful; and the performance has improved to an acceptable level of competence, a new rating of record must be prepared on which to base the decision to grant the increase.

19. QUALITY STEP INCREASES AND PERFORMANCE AWARDS. Refer to the Incentive Awards Manual for eligibility criteria for Quality Step Increases and performance awards.

5 U.S.C. 4302 ESTABLISHMENT OF PERFORMANCE APPRAISAL SYSTEMS

- (a) Each agency shall develop one or more performance appraisal systems which
 - (1) provide for periodic appraisals of job performance of employees;
 - (2) encourage employee participation in establishing performance standards; and
 - (3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.
- (b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for-
 - (1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;
 - (2) as soon as practicable but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;
 - (3) evaluating each employee during the appraisal period on such standards;
 - (4) recognizing and rewarding employees whose performance so warrants;
 - (5) assisting employees in improving unacceptable performance; and
 - (6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.
- (c) In accordance with regulations which the Office shall prescribe, the head of an agency may administer and maintain a performance appraisal system electronically.

DISCUSSION

The evidence presented in this hearing showed that during the relevant time period, the Agency violated the applicable Master Agreement and policy by failing to properly issue performance evaluations to certain bargaining unit staff members. The Agency failed to follow Agency policies regarding the performance appraisal program by not ensuring that all evaluations were timely, accurate, and fair. Management failed to timely and accurately record performance log entries, and share those log entries with the employee. The Agency failed to provide employees the standards at the beginning of the rating period. Improper performance evaluation practices by the Agency affected numerous employees. By failing to properly evaluate these employees, the Agency failed to establish a fair standard for employees. Failure to treat all bargaining unit employees fairly and equitably in the evaluation process is a violation of Article 6 of the Master Agreement. The evidence revealed that the Agency also violated Article 14 of the Master Agreement.

Supervisors and managers have the requirement to hold in-person meetings with employees to discuss performance standards/measure, log entries, progress reviews and final evaluations. (Union 16) The evidence revealed that during the relevant time period, this did not always happen.

Chapter 4 of the Human Resource Manual (HRM), which was in effect during the relevant time period, instructs the rating official to provide the employee with a copy of the performance standards for their position and discuss the standards with the employee. The employee and the rating official are to sign the rating form indicating that the discussion has taken place. Chapter 4 of the HRM also requires that throughout the rating period, the rating official is to make entries into the employee's performance log. Each element of the performance standards must be addressed at least once each quarter. The rating official is to discuss each entry in the performance log with the employee as it is made. Entries in the performance log serve as the basis for the progress review and final rating. Halfway through the rating period, the rating official is to complete a written progress review and discuss it with the employee. Both the employee and rating official are to sign the progress review section of the rating form. At the end of the rating period, the rating official is to evaluate each element of the performance standards, assign an adjective rating to each element and forward the rating to the reviewing official. The reviewing official approves or adjusts the individual element ratings, assigns an overall rating and returns the rating to the rating official for discussion with and signature by the employee. Employees should receive their performance rating within three weeks after the end of the rating period. The evidence revealed that during the relevant time period, Chapter 4 was not always followed by Management.

Chapter 4 of the HRM also notes that an employee must have worked under a set of performance standards for a minimum of 90 days before receiving a rating based on those standards. A rating official must have supervised an employee for a minimum of 90 days before he or she can rate the employee. The rating officials are to observe and note employee performance continuously throughout the rating period. Rating officials are to record examples of employee performance to ensure that the rating at the end of the rating period is an accurate and fair appraisal of the employee's performance during the whole rating period. The performance log is used to document and substantiate the final rating. Rating Officials are to

record performance incidents in the log so that each element is addressed at least once each quarter. Rather than waiting until the end of the quarter, rating officials must make entries in the log as the performance is noted. Rating Officials must record specific incidents in the performance log within fifteen working day of becoming aware of the incident. Rating Officials are to conduct at least one formal progress review during the rating period. After the reviewing official has approved the final rating, the rating form is to be returned to the rating official for discussion with the employee. However, the evidence revealed that during the relevant time period, Management was not always complying with these requirements of Chapter 4.

The HRM is clear that Agency policy puts the burden of undertaking and completing the performance evaluations and ratings on Management. The evidence revealed that supervisors were neglecting to perform their duties in accordance with this policy.

Pursuant to 5 U.S.C. 4302, Management has the obligation to execute their established and properly noticed periodic performance evaluations, and to use those results as the basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, removing, and recognizing employees. The evidence reflects that the Agency violated 5 U.S.C. 4302 by failing to conduct the performance evaluations of all of their employees accurately and timely during the relevant time period of April 1, 2013 through March 31, 2015.

The Agency also failed its contractual duty pursuant to the Master Agreement to ensure that the evaluation system is fair and equitable for all employees. During the relevant time period, the performance evaluation system was inconsistent, inefficient, and inaccurate. The Union asserts that flaws in the evaluation process affects promotions, step increases, awards and retirements.

The Bureau of Prisons Awards Program is the Bureau wide policy which details cash awards available based upon merit, and that said merit is measured by the performance evaluation and ratings. The QSI and SSP are program awards to the employee predicated upon the performance of the employee. The performance evaluations are the process for monitoring the employee performance and gauging their merit. The QSI can have long term benefits affecting the employee's future career, salary and retirement benefits. Neither the QSI or the SSP award can be given objectively without the fair review of proper performance evaluations of all employees considered for the award(s). This is impossible when some employees are not evaluated correctly by Management.

In their post hearing brief, the Union asserts the following three options as the requested remedy:

1. *Grant an "Outstanding" to all affected employees based on Table of Consent Forms.*
2. *Order a Committee of three (3) Union Representatives and three (3) Agency Representatives to review all two hundred thirty-nine (239) employee evaluations and advise this Arbitrator who will receive an award within thirty (30) days of this Arbitrator's Ruling.*
3. *Listen to the testimony of all 239 affected employees by scheduling a four week hearing so that all two hundred thirty nine (239) employees may testify (12 per day).*

In their post hearing brief the Union also requests that an Award be issued under the Back Pay Act (5 U.S.C. 5596, and for an Interim Award of attorney fees.

AWARD AND ORDER SETTING NOVEMBER 29, 2016 HEARING

Based upon the evidence submitted, the undersigned has determined that the Agency failed to fairly and equitably issue performance evaluations in accordance with the Master Agreement and policy. During the relevant time period, the Agency violated the Master Agreement with respect to the employees' performance evaluations. Some of the problems identified during this arbitration are as follows: Rating Officials are not giving employees a copy of the performance standards; Rating Officials were not discussing standards with employees; Performance evaluations were not done timely by Agency supervisors; The logging of incidents was not done timely or accurately, and with the proper notice to employees; Employees were not rated by the proper supervisor; Mandated performance evaluation meetings/discussions were not held with employees.

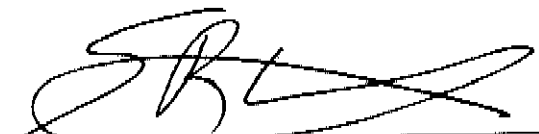
After consideration of this matter, the undersigned GRANTS in part the Petitioner's request for an Order authorizing an evaluation review committee of three (3) Union Representatives and three (3) Agency Representatives to review all two hundred thirty-nine (239) employee evaluations. The parties have thirty calendar days from this Order to form the committee. The parties are to submit a report with this Arbitrator regarding the status of this matter on or before October 15, 2016. The Committee's report should include a recommendation regarding the evaluations the 239 employees should have received during the period of April 1, 2013 through March 31, 2015. The report should also include a recommendation as to which of the 239 employees, if any, should have been nominated to receive an award. **The recommendations of the parties, and the report will be addressed during a hearing on November 29, 2016.**

An in person hearing in this matter is set for November 29, 2016 @ 8:00 a.m. The Petitioner's request for an Award under the Back Pay Act, and for attorney fees will be taken up at that time. If a party desires to file a pre-hearing brief on these issues, they are to submit same on or before November 14, 2016.

The Union requested that this Arbitrator retain jurisdiction in this matter. This request is GRANTED.

Pursuant to Article 32 of the Master Agreement the fees and expenses of this Arbitrator are to be borne equally by the Employer and Union.

SIGNED this 6th day of July, 2016.



Sherry R. Wetsch
Arbitrator