

Opinion & Award

In the Matter of Arbitration Between

**Local 1034
Council of Prison Locals 33
American Federation of Government Employees**

&

**U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional Complex
Pollock, Louisiana**

FMCS Case No. 180626-05938

Patrick Halter, Arbitrator

Appearances

For Local 1034:

John-Ed L. Bishop
Whitehead Law Firm

For FCC-Pollock:

Isaac Thomas
Labor Relations Specialist

Dates of Hearing

November 14 - 15, 2018

Date of Post-Hearing Briefs

March 4, 2019

Date of Award

June 18, 2019

Issue

Contract Interpretation

Summary of Award

Grievance Sustained

Background

The Federal Correctional Complex (“FCC” or “Agency”) in Pollock, Louisiana, consists of three (3) facilities: Penitentiary, Federal Correctional Institution (“FCI”) and Camp. Inmates are assigned to a facility depending on security level: high-security Penitentiary, medium-security FCI or low-security Camp.

Approximately four hundred (400) non-supervisory and professional positions are represented by Local 1034, Council of Prison Locals 33, American Federation of Government Employees (“Union” or “Local”). Correctional Officers and support staff in Facilities, Food Service and Inmate Services are covered by a Master Agreement (“MA”). [Jt. Exh. 1]

Employees report to a first-line supervisor - - Lieutenant - - and upward to Captain, Assistant Warden, Facility Warden and Complex Warden, the top official. The Lieutenant is the employee’s rating official during the performance evaluation year that begins April 1 with standards and elements issued and discussed with the employee. A minimum of five (5) discussions are to occur during the year with quarterly performance log entries, mid-year progress review and end-of-year rating. Although performance is evaluated by the first-line supervisor, a reviewing official determines the overall yearly rating as Outstanding, Excellent, Successful, Minimally Satisfactory or Unacceptable. Depending on the overall rating, an employee may receive an award which could affect pay, retirement and promotions.

On May 4, 2018, the Local filed a formal grievance with the Agency alleging violations of, among other items, certain articles in the MA, Title 5 U.S. Code at Chapters 43 and 71 and Policy in Program Statements addressing the performance evaluation program for rating year April 1, 2017 - March 31, 2108. [Jt. Exh. 2]

On May 24, 2018, FCC Warden Johnson denied the grievance stating, in part, as follows:

A research of your grievance revealed the following. Management has only identified a limited number of staff that did not receive portions of their 2017 -2018 yearly evaluation within the time frames set forth by Program Statement 3430.09, Performance. Management is willing to meet with the Union to discuss the staff members mentioned above and to discuss a possible resolution. Management is aware of past timeliness issues involving staff performance evaluations at FCC Pollock, and has implemented several steps in order to help ensure the timely issuance of performance evaluations

Management has not identified or is not aware of any other issues regarding performance issues. Although the Union has raised other issues in the grievance, you did not provide or identify the staff members in order for management to research your claim. Once these staff members have been identified, Management will be able to research their claims and provide the appropriate response to them.

Management continues to support the concept of working with the Union to resolve issues at the lowest level possible. Management is committed to complying with the Master Agreement, as well as all policies and rules affecting staff. We share a mutual interest in securing staff are treated fairly and equitable in all aspects of personnel management.

[Jt. Exh. 3]

On June 21, 2018, the Union invoked arbitration stating, in part, as follows:

While this Local is appreciative of the Agency's willingness to resolve this issue at the lowest level possible, this Local is also aware of recent rulings by the Federal Labor Relations Authority (FLRA) has shown that mutual cooperation between the Agency and this Local will not alter the time lines requirements imposed by the Master Agreement. As such, this Local 1034 is now invoking their right to Invoke Arbitration per the Guidelines listed in Master Agreement Article 32-Arbitration.

[Jt. Exh. 4]

Consistent with Warden Johnson's offer "to meet with the Union to discuss the staff members mentioned above and to discuss a possible resolution" to the grievance, the Agency and Union met on June 27, 2018. As a result of that meeting, the parties agreed the Union would submit an "Evaluation Consent Form" ("ECF") to bargaining-unit employees requesting release of their performance evaluation records for 2017 - 2018. [Ag. Exh. 2]

On July 28, 2018, the Local issued a memorandum to all bargaining-unit employees regarding the ECF:

The Union and the Agency have agreed to review the 2017-2018 evaluations to look for, and attempt to correct, any problems with them.

If you would like your evaluations reviewed, **YOU MUST SIGN THE ATTACHED CONSENT FORM AND RETURN IT TO THE UNION.**

It is also **highly recommended** that you check off some of the check boxes on the form to notate some of the possible issues that may have impacted your evaluations, or explain any issues in the "other" section at the bottom of the form.

* * * * *

THE DEADLINE TO SUBMIT YOUR CONSENT FORM IS JULY 22ND 2018.

[Ag. Exh. 4]

The ECF attached to the memorandum states:

Signing this consent form will allow Management and the Union to review your evaluation for the periods of April 1st 2017 through March 31st 2018.

◆ I hereby give consent to the Local 1034, as the sole representative for bargaining unit staff at FCC Pollock, to receive un-redacted access to my yearly and quarterly performance evaluations for the period of April 1st 2017 through March 31st 2018.

I feel the issues with my evaluation may include, **but are not limited to**:

- time-lines not being followed by my rater.
- lowering of ratings without sufficient cause.
- not receiving performance log entries.
- supervisor not meeting with me.
- receiving ratings not based on my performance.
- supervisor not explaining the evaluation process in order to improve my performance.
- supervisor not telling me that only so many outstanding ratings can be given during the year.
- other: _____.

[Ag. Exh. 3]

On July 23, 2018, the Union submitted approximately seventy (70) signed ECFs to the Agency and, on August 2, 2018, the Agency reciprocated with the available performance records (standards, elements, performance logs, progress review, end-of-year appraisal) for those employees authorizing release.

On November 2, 2018, the Agency filed a pre-hearing brief identified as a “Motion to Dismiss” wherein FCC alleged numerous procedural deficits with the grievance that barred arbitration. On November 7, 2018, the Union filed its “Response to Agency’s Motion to Dismiss” asserting the grievance was properly before the Arbitrator.

On November 14 - 15, 2018, the hearing convened with each party afforded an opportunity to present evidence, to examine and cross-examine witnesses, and to argue its contentions including any alleged infirmities with the grievance. In the record are seven (7) joint exhibits, seven (7) Agency exhibits and ten (10) Union exhibits.

On March 4, 2019, the record in this proceeding closed with the exchange of post-hearing briefs between the Union and Agency.

Issues

FCC presents the following procedure-arbitrability issues:

1. Did the Union withdraw the grievance?
2. Did the Union comply with Article 31, Section d in the Master Agreement which states “[g]rievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence”?

If not, what is the appropriate remedy?

3. Did the Union identify the grievable occurrence as required by the Master Agreement in Article 31, Section d?

If not, what is the appropriate remedy?

4. Did the Union comply with the “Formal Grievance” form required by the Master Agreement under Article 31, Section f?

If not, what is the appropriate remedy?

5. Did the Union comply with Article 31, Section b in the Master Agreement which states 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?

If not, what is the appropriate remedy?

[Ag. Exh. 1; Tr. Vol. I at 8]

The Local presents the following merit-based issues:

Did the Agency commit an unjustified or unwarranted personnel action by violating the Master Agreement, laws or policy with regards to issuing performance evaluations and subsequent awards during the recovery period?

If so, was there a loss of pay or benefits to bargaining-unit staff based on the Agency’s failure to properly provide performance evaluations and what is the remedy?

[Un. Br. at 11]

Master Agreement

- Article 1: Recognition
- Article 3: Governing Regulations
- Article 4: Relationship of this Agreement to Bureau Policies, Regulations and Practices
- Article 5: Rights of the Employer
- Article 6: Rights of the Employee
- Article 7: Rights of the Union
- Article 14: Employee Performance and Ratings
- Article 31: Grievance Procedure
- Article 32: Arbitration

Policy: Program Statements

PS 3000.03: Chapter 4, Performance Evaluation Program
for Bargaining Unit Employees
PS 3430.09: Performance
PS 3451.05: Awards

Statute

5 U.S.C. Chapter 43
5 U.S.C. Chapter 55
5 U.S.C. Chapter 71

Summary of the Agency's Position and Arguments

The Agency's position and arguments are set forth in its pre-hearing brief "Motion to Dismiss" and opening statement, seven (7) exhibits, examination of its witnesses; cross-examination of the Union's witnesses and post-hearing brief.

Called by the Agency to testify were: Calvin Johnson, Warden; Tyler Meeker, Assistant Manager - Human Resources.

Pursuant to *U.S. Small Business Administration and American Federation of Government Employees, Local 3841*, 70 FLRA 525 (2018), a party may challenge an arbitrator's procedural-arbitrability determination when an award fails to draw its essence from the collective bargaining agreement ("CBA"). That is, when the award (1) cannot in any rational way be derived from the CBA; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the CBA; or (4) evidences a manifest disregard of the CBA. Moreover, an arbitrator may not look to extraneous considerations, such as past practice, to modify a CBA's clear and unambiguous terms. When the arbitrator's procedural arbitrability ruling is inconsistent with the plain wording in the CBA, the award is not a plausible interpretation of the agreement rendering it without legal effect.

On November 2, 2018, the Agency filed a pre-hearing brief Motion to Dismiss "to avoid the Union's argument that a claim was not raised prior to the arbitration and is therefore not creditable." FCC asserts the Local failed to comply with Article 31, Grievance Procedure; that failure cannot be mitigated or alleviated by the Arbitrator because Article 32, Arbitration at Section h states an "arbitrator shall have no power to add to, subtract from disregard, alter, or modify" the MA. To accept or credit the Union's position would be a modification of the MA.

The Agency identifies procedural deficiencies with the grievance; they are summarily described in Parts I, II, and III. Part IV is the Agency's response to the merits of the grievance.

I. Union's Grievance Lacks Specificity.

**A. Union Failed to Establish a "Grievable Occurrence"
(Article 31, Section d)**

Article 31 at Section d states, in part, that a grievance "must be filed within forty (40) calendar days of the date of the alleged *grievable occurrence*." [Emphasis added.] The word "occurrence"

is defined in *America Heritage Dictionary* as an action, event or incident. The Union offers scenarios for a possible violation but it fails to identify the *grievable occurrence* that sparked the filing of this grievance “within forty (40) calendar days of the date” of the alleged *occurrence*. In this regard, Executive Vice-President Logan’s testimony failed to provide names, dates or incidents. Filing a grievance without identifying a *grievable occurrence* represents a fishing expedition to obtain bargaining-unit employees’ performance evaluations for 2017 - 2018.

B. Union Failed to Follow Instructions on “Formal Grievance” Form (Article 31, Sections d, f and h)

Article 31 at Section f states, in part, that a formal grievance “must be filed on Bureau of Prisons ‘Formal Grievance’ forms and must be signed by the grievant or the Union.” The parties negotiated the “Formal Grievance” form; however, the Local refuses to follow its instructions such as identifying a *grievable occurrence*. By not following the instructions and providing the required information, the Union forfeits its right to proceed to arbitration.

Under *U.S. Department of the Army, 93rd Signal Brigade, Fort Eustis, Virginia and National Association of Independent Labor Local 11, 70 FLRA 733 (2018)*, the Arbitrator cannot assume jurisdiction over the merits of this grievance because the party invoking arbitration - Local 1034 - failed to comply with the procedural requirements in Section f. For example, Block 1 on the form states “AFGE Local 1034” is the grievant. The Union may file a grievance on behalf of an employee or a group of employees but it is not the grievant because, as an organization, the Local did not receive a performance evaluation.

Sections c and d state an employee and the Agency may file a grievance as the “grievant” but there is no comparable provision in the MA for the Union. The Local alleged violations in the performance evaluation program yet no employee stepped forward to be named. Furthermore, Section h precludes the Union from adding grievants after filing the formal grievance. Employees stepping forward with ECFs are too late for inclusion.

C. Grievance Lacks Specificity (Article 31, Sections b and f)

Block 6 on the Formal Grievance form requires specificity (“be specific”) to enable FCC to investigate the allegations and attempt to resolve them at the lowest level. Instead of specificity, the Union alleges a violation of the MA in its entirety and presents no facts tied to any allegation. FCC is under no obligation to search the MA to determine the Union’s alleged violations. As stated by the arbitrator in *American Federation of Government Employees, Local 1034 and Federal Bureau of Prisons, FCC Pollock, FMCS No. 16-53084-7 (2017)*, Sections b and f in Article 31 show the need for specificity with the when, where and how of each claimed violation to support informal resolution efforts.

D. Union Failed to Identify Date of Alleged Grievable Event (Grievance Form, Block 7)

For Block 7 - - “Date(s) of Violation(s)” - - the Union stated “continuing” violation and alleges all bargaining unit employees’ performance evaluations were untimely and improperly handled. The Local provides no dates and incidents; the grievable event remains undefined. An incident is not continuing when the initial incident is not identified or when the alleged violation affects different employees on different dates under different circumstances. A failure to list date(s) is a violation of the procedural requirements in Article 31, Grievance Procedure.

II. Union Failed to Attempt Informal Resolution at the Lowest Appropriate Level

Article 31, Grievance Procedure, Section b states:

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 informal resolution.

[Emphasis added.]

The rating official is the employee's first-line supervisor. Program Statement 3430.09, Performance, Section 1, Paragraphs 3(f) and 3(g) state that any concerns or issues an employee has about his or her performance evaluation, including awards, are to be directed to the "first level of management having supervisory responsibilities" and the employee is "responsible for seeking clarification from the supervisor on any performance standard or any other aspect of this program that is not clear."

Instead of following Program Statement 3430.09 and Article 31 by presenting performance evaluation program concerns at the lowest level, the Union attempted informal resolution at the highest level with the Warden. This does not constitute a reasonable attempt at informal resolution nor is failing to identify rating official(s) and reviewing official(s) considered a reasonable and concerted effort toward informal resolution. The words *must* and *will* in Section b are obligations that the Local failed to follow and, in doing so, violated Section b.

III. Union's Grievance is Untimely

The Local alleges continuing violations in the performance evaluation year April 1, 2017 - March 31, 2018. During the yearly rating cycle, each performance element under an employee's performance standard is addressed by the rating official in a performance log entry at least once quarterly and, at the end of the yearly cycle, an overall rating is assigned by the reviewing official - - Outstanding, Excellent, Successful, Minimally Satisfactory or Unacceptable - - based on each element rating combined/accumulated for the four (4) quarters.

Union witnesses confirmed that a performance rating is assigned to a performance log entry. In this regard, Article 14, Employee Performance and Ratings at Section b states that a bargaining unit employee "shall have the right to appeal their performance ratings through the negotiated grievance procedure with or without the Union." Thus, an employee dissatisfied with the rating assigned by his rating official for a performance log entry must file a grievance within 40 calendar days from the date the employee signs for or initials the entry, e.g., *grievable occurrence*. Any attempt to change a quarterly rating at the end-of-year rating is untimely. As noted in *American Federation of Government Employees, Local 466 and U.S. Department of Veterans Affairs, Medical Center, Asheville, North Carolina*, 70 FLRA 973 (2018), the date to file a grievance begins the day the agency takes the action grieved and subsequent discussions between the parties concerning the matter do not extend the filing deadline.

IV. Overall Rating 2017-2018

Article 5, Rights of the Employer, Section a., Subsection 2.a. mirrors the statutory wording at 5 U.S.C. § 7016(a)(2)(B) and management's right to assign work which includes the right to evaluate employee performance on the work assigned. The rating official is responsible for evaluating the work assigned under the performance standards and performance elements for the employee. The reviewing official determines the overall rating. The Union seeks an overall Outstanding rating with a Quality Step Increase ("QSI") for all employees.

The overall rating - - Outstanding, Excellent, Successful, Minimally Satisfactory or Unacceptable - - is based on the individual element ratings accumulated during four (4) quarterly performance log ratings. When there are equal numbers of performance log entries at different rating levels - - two (2) Outstanding ratings and two (2) Excellent ratings - - the rating official may assign either performance level unless there is an intermediate level or levels according to Program Statement 3430.09, Performance, Section 10(a), Determining Element Rating. "The Union cannot shoulder its burden of proof without the subjective mindset of the rating official. To request that all employees be rated an outstanding performance rating would render the performance evaluation system useless." [Br. at 24] No supervisor stated there are "only so many O's" that can be issued in a given rating year.

Since the overall rating issued at the end of the rating year does not extend the time for filing a grievance, the Union is procedurally barred from challenging the first, second and third quarter ratings in performance logs. In this regard, Program Statement 3430.09, Performance, states that employees have the right to appeal their performance *ratings* - - quarterly ratings in performance logs and the overall yearly rating. The employee's appeal is not limited to the overall yearly rating. Since the Union did not grieve quarterly ratings in a timely manner, its ability to secure or obtain a remedy for the overall yearly rating is limited.

In conclusion, FCC requests "the Arbitrator to procedurally reject and substantively deny the Union's grievance in its entirety." [Br. at 27]

Summary of the Union's Position and Arguments

The Union's position and arguments are set forth in its "Response to Agency's Motion to Dismiss" and opening statement, ten (10) exhibits, examination of its witnesses, cross-examination of the Agency's witnesses and post-hearing brief.

Called by the Union to testify were: Richard T. Logan, Correctional Officer and Executive Vice-President, Local 1034; LaTannier Burnett, Education Specialist; Thomas B. Moore, Jr., Correctional Officer and Treasurer, Local 1034; Joey L. Laborde, Correctional Officer; Robbie E. Hewlett, Food Service Assistant; Carmen Rachal, Assistant Supervisor - Education; and John E.G. Keith, Correctional Officer.

The Local asserts that its timely-filed grievance is specific and conforms with instructions on the Formal Grievance form because it identified a *grievable occurrence*, the grievant and the date(s) of the grievable event. Furthermore, the Local complied with Article 31 at Section b as it attempted to informally resolve the grievance at the lowest level.

The Local's assertions are spelled-out in summary fashion as follows.

I. Grievance Satisfies Any Specificity Requirement

A. Grievable Occurrence Established (Article 31, Section d) (Formal Grievance Form, Block 6)

The only reference to specificity is Block 6 on the Formal Grievance Form (“be specific”); the MA does not address it. The grievance is specific as it places the Agency on notice of the Union’s allegation that FCC violated Program Statement 3000.03, Chapter 4, Section 430, Performance Evaluation Program for Bargaining Unit Employees as well as Program Statement 3430.09, Performance:

. . . yearly evaluations and/or log entries for the rating period of April 1, 2017 through March 31, 2018 have not been issued and/or conducted in accordance with Human Resource Manual PS 3000.03, Chapter 4 and /or the newer program statement entitled ‘Performance’ PS 3430.09.

Further specificity is set forth with eight (8) examples demonstrating the Agency’s violations of the Program Statements. Based on identifying program statements and examples of alleged violations, the FCC’s claim that the Local failed to pinpoint a *grievable occurrence* is without merit.

B. Grievants Identified (Formal Grievance Form, Block 1)

Article 31, Section c, Subsection 4 that the “Union has the right to file a grievance on behalf of any employee or group of employees.” In this situation, the Local has standing to file a grievance on behalf of a group of employees which may encompass the entire bargaining unit. Regardless, the FCC acknowledged in its response to the grievance that it had “identified a limited number of staff that did not receive portions of their 2017-2018 yearly evaluation within the time frames set forth by Program Statement 3430.09, Performance.” The Union is not on a “fishing expedition” as it has placed the Agency on notice of the identity of grievants and the violations alleged.

C. Grievance is Specific

The Local is not required to detail and justify on the Formal Grievance Form each Agency violation of Statute, Program Statement or the MA. In Block 5 the Union alleged violations of “any other applicable statute, law, rule or regulation.” This wording is inclusive of violations or other agreements or statutes that may not be specifically alleged in this grievance. Comparable wording - - “any other applicable statute, law, rule or regulation” - - in *U.S. Department of Justice, Metropolitan Detention Center, Guaynabo, Puerto Rico and American Federation of Government Employees, Council of Prison Locals, Local 4052*, 70 FLRA 186 (2017) was found to draw its essence from the CBA.

D. Date of Grievable Event Identified

The Local identified the grievable event as continuing throughout rating year April 1, 2017 - March 31, 2018 when FCC did not timely issue performance standards and elements, yearly evaluations and/or performance log entries. The Local complied with the MA and Program Statements when it advised employees to discuss their concerns with first-line supervisors and attempt to informally resolve the violations.

As stated in *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institute, Miami, Florida and American Federation of Government Employees, Local 3960, FMCS Case No. 17-00787 (2018)*, the “Union must demonstrate either that it became aware of the circumstances underlying the grievance beyond the 40-day limit and that it filed the instant grievance within 40 days after becoming aware, or, that it made credible efforts to resolve the matter prior to filing the instant grievance.”

Applying that award to the circumstances in this grievance, FCC’s violations are continuous because the Local’s attempts to resolve this matter informally were unsuccessful and the Agency continues to violate the MA, Statute and Program Statements. The Local properly identified the violations occurring during the 2017 - 2018 rating period “as there is no other way to describe the time period of the Agency’s violations.” Thus, a grievable event has been identified.

II. Local Attempted Informal Resolution at the Lowest Appropriate Level

Article 31 at Section b requires attempts to informally resolve a grievance at the lowest level and Section d states that “both parties will devote up to ten (10) days of the forty (40) [days to file] to the informal resolution process.” There is no requirement for an attempt at informal resolution to be in writing; the Union attempted informal resolution when it filed the formal grievance. FCC asserts attempts at informal resolution must occur at the lowest level (first-line supervisor), not the highest level (Warden Johnson), the top official. Block 6 on the Formal Grievance form noted “numerous attempts, informally and formally, to have the supervisors at FCC Pollock” resolve performance evaluation issues. The Union has attempted informal resolution at the lowest level and, in doing so, satisfied Article 31, Sections b and d.

III. Timely Grievance

Article 31 at Section d addresses time period for filing a grievance. FCC asserts that Union was required to file a grievance within forty (40) days after the end of each quarter during the rating year. This grievance is a continuous violation where ongoing efforts have been attempted repeatedly to informally resolve performance evaluation issues. The Local attempted to resolve this resolve this matter before filing a formal grievance; the Union cannot reasonably be expected to identify the grievable occurrence until it recognized attempts at informal resolution were not plausible.

Furthermore, the filing of the formal grievance could not be undertaken until after the annual rating year had been completed. Although employees receive quarterly ratings, the annual rating determines whether an employee receives an award. Until that final rating is issued, the employee incurs no harm. This grievance is timely filed within forty (40) calendar days of the grievable occurrence as the filing date is May 4, 2019 and the annual rating year ended on March 31, 2018.

IV. Overall Rating 2017 - 2018

The purpose of the performance appraisal system is to improve an employee’s performance. Within thirty (30) days of the April 1 start of the rating cycle, performance standards are issued for each performance element and this sets performance expectations for the year. At least once a quarter during the rating year, a supervisor monitors an employee’s performance by recording performance incidents in a performance log entry which is discussed with the employee. A mid-year progress review is conducted and another review occurs at the end of the rating cycle when the overall rating is issued. Discussions occur with the employee at least five (5) times during the rating year.

Depending on the overall rating, an employee may earn a monetary award such as a QSI. An award may increase an employee's compensation, affect retirement contributions and benefits and are material for an employee applying for another position because the evaluation is assessed points which enhances an employee's promotion possibilities and an overall "Outstanding" rating receives additional points.

A. FCC Violated the MA, Policy and Statute When It Issued Improper Performance Evaluations and Misused the Performance Evaluation System Which Subjected Employees to Unjustified and Unwarranted Personnel Actions.

The Local asserts the Agency violated the MA, Policy and Statutes when it failed to provide bargaining-unit members with performance standards at the beginning of the rating cycle (April 1); failed to issue performance logs, progress reviews and end-of-year reviews in a timely manner; and failed to provide accurate and fair evaluations of work actually performed by an employee. FCC violated Article 3 - Governing Regulations, Article 6 - Rights of the Employee and Article 14 - Employee Performance and Ratings as well as 5 U.S.C. § 4302 and Program Statements 3451.05, 3000.03, 3430.09. These violations constitute unjustified and unwarranted personnel actions against bargaining-unit employees.

Specific examples follow:

- Rating Officials failed to evaluate employees on duties they performed while on light duty;
- Rating Officials informed employees in certain departments that the employees were ineligible to receive an Outstanding yearly rating because he or she had received an Outstanding rating the prior year;
- Employee's initials forged on performance evaluation documents;
- Rating Officials failed to properly calculate the final ratings on individual elements based on performance log entries;
- Rating Officials failed to hold meetings with employees to discuss performance standards, performance log entries, progress reviews and/or final ratings;
- Rating Official entered factually inaccurate performance log entries;
- Employees received no performance log entries for some quarters;
- FCC failed to follow the process or system for employees performing work for multiple supervisors during the rating year;
- Employees' requests for meetings with rating officials were denied by those officials;
- Rating Officials did not provide the affected employee with performance log entries within fifteen (15) days of the incident;

- Reviewing Officials failed to monitor the evaluation process; and
- Rating and Reviewing Officials used non-merit factors when issuing awards.

Documentary evidence and testimony from bargaining-unit employees establish the violations of the MA, Policy and Statute.

Justin Desplaines: Cook Supervisor

During the 2017 - 2018 rating year, Mr. Desplaines was on light duty and assigned to telephone monitoring. He received no performance log entries for the third quarter. He was not evaluated on the duties he actually performed. FCC's failure to evaluate the work he performed and failure to provide him with a performance log entry in the third quarter denied Mr. Desplaines the opportunity to increase his overall "Successful" rating. [Un. Exh. 2]

LaTannier Burnett: Education Specialist

In performance elements 4 and 5, Ms. Burnett received two (2) Outstanding ratings and two (2) Excellent ratings in each element. In this situation the supervisor has discretion to issue Ms. Burnett an Outstanding rating or an Excellent rating for either element. An Outstanding rating in either element would have resulted in Ms. Burnett receiving an overall Outstanding rating. Ms. Burnett's first-line supervisor informed her that an overall Outstanding rating could not be issued, even though the supervisor stated Ms. Burnett deserved it, because she had received an overall Outstanding rating the prior year ("only so many O's could be given" in any rating year). This shows that the Agency used a factor other than performance and merit to deny Ms. Burnett the overall Outstanding rating she earned. [Un. Exh. 4]

Thomas Moore: Correctional Officer

Mr. Moore received no performance log entries for the second and fourth quarters. For the performance log entries covering the first quarter, a Lieutenant other than Mr. Moore's rating official attempted to review the entries with him. The Lieutenant informed Mr. Moore that he could not explain the performance log entry. At that point, Mr. Moore decided to wait until the first-line supervisor with knowledge of the entry was available to discuss it. As a result of their discussion, the rating official upgraded Mr. Moore's element-one rating to Outstanding. During their discussion of Mr. Moore's end-of-year evaluation, the rating official upgraded another rating on Mr. Moore's evaluation which resulted in his receiving an overall Excellent rating. The discussions during the year and at the end-of-year demonstrate the importance of the rating official complying with the provisions of the performance evaluation program to discuss performance with the employee. Nevertheless, Mr. Moore was denied the opportunity to receive an overall Outstanding rating because the FCC failed to provide him with performance log entries for two (2) quarters during the rating year. [Un. Exh. 5]

Joey LaBorde: Correctional Officer

FCC forged Mr. LaBorde's initials in an attempt to show he received a performance log entry during the first quarter. The same date - - January 17, 2018 - - appears on his performance evaluation as the date he received his second quarter performance log entry, mid-year progress review and end-of-year rating. By failing to provide him with a timely performance log entry for the second and third quarters, Mr. LaBorde was denied an opportunity to improve his performance. For the fourth quarter, the supervisor informed Mr. LaBorde that he [supervisor]

had not been present for a sufficient length of time to issue Mr. LaBorde an Outstanding rating. The rating year 2017 - 2018 for Mr. LaBorde shows forged initials, no meetings or untimely meetings to discuss and review performance, supervisors without knowledge of his performance, and a non-performance factor relied on to determine his rating. [Un. Exh. 6]

Robbie Hewlett: Food Service Assistant

Ms. Hewlett's supervisor never reviewed the performance standards and elements at the beginning of the rating year (April 1) with her nor did the supervisor meet with her to discuss his performance log entries. Ms. Hewlett's performance evaluation was written by her supervisor prior to his retirement; this supervisor was not present during the fourth quarter to review and discuss her performance. Her performance record contained no performance log entry for the third quarter. Moreover, FCC miscalculated her rating on the first element. Policy calls for the rating to be determined by the majority of performance log entries, e.g., three (3) Outstanding ratings and two (2) Excellent ratings results in an Outstanding rating. The majority of her entries were Outstanding, not Excellent, for element one. This affected her overall rating because the supervisor had the discretion to issue her an overall Outstanding rating. [Un. Exh. 7]

John Keith: Correctional Officer

Mr. Keith's supervisor did not discuss performance log entries with him thereby denying him an opportunity to ensure he was evaluated on work he actually performed and the discussion could have resulted in an adjusted rating. His ratings were copied and pasted from other employees' ratings; performance log entries discussed his finding contraband and working in the Special Housing Unit ("SHU") but he never found contraband and never worked in the SHU. He provided examples of work he actually performed which should have been included in performance log entries. His work was inaccurately stated in his evaluation and the work he performed was never discussed with him. This denied him an opportunity to receive an overall Outstanding rating. [Un. Exh. 9]

V. Remedy

FCC's failure to administer its performance evaluation program violated governing documents such as, but not limited to, the MA at Article 3 - Governing Regulations (comply with existing law and regulations), Article 6 - Rights of the Employee (fair and equitable treatment) and Article 14 - Employee Performance and Ratings (evaluation and award policy). These violations of the MA constitute an unjustified and unwarranted personnel action against bargaining-unit employees as they were denied meetings with supervisors to discuss their performance to adjust their rating upward to an overall Outstanding rating and thereby receive a monetary award. In other words, the Agency's actions resulted in a reduction in pay. Testimony from Mr. Moore confirmed the significance of performance discussions with his rating official which, when they occurred, led to Mr. Moore's evaluation adjusted upward.

The Agency's violations are a continuation of violations identified in a prior arbitration award involving the FCC and the Union where the arbitrator determined FCC failed to comply with the MA, Program Statements and Statute. The harm to employees is not limited to those testifying at the hearing but was widespread across the bargaining unit. [Br. at 33-35] In view of the continuing violation of the MA, the Local proposes two (2) remedies.

The first proposed remedy is to award all employees affected by improper evaluations at quarterly and end-of-year ratings an Outstanding rating for those occasions and grant these employees a QSI backdated for the rating year.

The second proposed remedy is to direct formation of a six (6) person committee - - three (3) Union representatives and three (3) Agency representatives - - to examine evaluations, for those employees opting in, to determine which evaluations were improper and recommend revisions and/or monetary awards as appropriate. This committee will report to the Arbitrator within thirty (30) days should disagreements remain. This remedy was issued by Arbitrator Wetsch in *FCC Pollock and Local 1034*, FMCS Case Nos. 14-54741-7 and 14-54747-7 (2016).

VI. Attorney Fees and Costs

Payment of attorney fees and costs is mandatory under the Back-Pay Act when the employee is the prevailing party and the award is in the interest of justice. Under *U.S. Department of Homeland Security, U.S. Customs and Border Protection and National Treasury Employees Union*, 66 FLRA 104 (2010), an award is in the interest of justice in “any case in which a prohibited personnel practice was engaged in by the agency or a case in which the agency’s action was clearly without merit.”

The Local asserts FCC’s actions were clearly without merit or wholly unfounded because FCC acknowledged violating its policies on the performance evaluation program as reflected by supervisors not discussing standards and elements with employees and employees receiving untimely performance standards and elements, quarterly performance log entries and mid-year progress reviews. FCC knew or should have known it would not prevail on the merits. Since the Local satisfied criteria in *Allen v. U.S. Postal Service*, 2 MSPR 420, 435 (1980), employees are entitled to backpay with interest and reasonable attorney fees.

The Arbitrator should retain jurisdiction to resolve any disagreements over the evaluations and monetary loss as well as attorney fees. In the meantime, the Union requests the Arbitrator issue an interim award for attorney fees and allow the Union to submit an invoice for its services.

In short, the grievance was timely filed and is not procedurally defective. The Agency violated the Master Agreement, Program Statements and Statutes. Therefore, the grievance should be sustained and a remedy granted.

Findings and Conclusions

Issues associated with the administration of the performance evaluation program are common ground tilled by FCC and the Local dating from approximately 2005 and continuing to this grievance dated May 4, 2018. The governing documents - - Program Statements, Master Agreement, Federal laws and implementing regulations and Agency regulations - - are core elements of the performance evaluation program and well-known to the parties. Thus, this grievance is not an esoteric disagreement or isolated incident but an accumulated continuation of prior grievances of which at least one (1) was settled although FCC did not follow through with execution of that settlement and another arbitration ensued with an award issued.

Performance evaluation centers on conditions of employment intrinsically fundamental to maintaining the employee’s employment and extrinsically manifested with awards and promotions. Under the performance evaluation program, the intrinsic - extrinsic link is facilitated by continuously accumulated communication between the supervisor and employee throughout

the yearly rating cycle such that performance expectations are known in advance. That is, performing the work assigned and receiving a fair and accurate evaluation which may result in the immediate benefit of a monetary award and longer-term benefits shaped by promotions and retirement.

Notwithstanding the performance evaluation program, FCC presents a number of procedural deficits in the processing of this grievance coalescing around timeliness, specificity, Formal Grievance form instructions and attempts at informal resolution. The burden of proof to establish these deficiencies resides with FCC.

FCC's procedural arbitrability issues are framed in the order and descriptive terms presented by the Agency.

I. Procedural Arbitrability

1. Did the Union withdraw the grievance?

There is some argument but no evidence (first-person witness testimony or probative documents) in the record on issue #1. The evidentiary record before the Arbitrator shows no probative evidence from the Agency in support of its position.

Aside from the absence of probative evidence, the grievance before this Arbitrator is FMCS Case No. 180626-05938 in Pollock, Louisiana and addresses the performance evaluation program for April 1, 2017 - March 31, 2018. The Arbitrator has no authority to initiate action or render any decision - - procedural or substantive - - involving another grievance at a different location before another arbitrator even if the issue is similar. Only the Local can withdraw its grievance in this proceeding. The Union did not withdraw its grievance. Thus, procedural issue #1 is answered in the negative.

2. Did the Union comply with Article 31, Section d in the Master Agreement? which states “[g]rievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence”?

The performance evaluation year began April 1, 2017 and concluded on March 31, 2018. Within thirty (30) days after its conclusion, yearly performance evaluations are to be issued and discussed with the employee. Thus, an employee may receive his or her evaluation at any time during that 30-day window ending on April 30, 2018.

The Union filed its formal grievance on May 4, 2018, which is within the forty (40) calendar day window that opened on March 31, 2018 for filing a grievance. The Union complied with Article 31, Section d for procedural issue #2.

3. Did the Union identify the *grievable occurrence* as required by the Master? Agreement in Article 31, Section d?

The Union describes the *grievable occurrence* as the yearly evaluation (April 1, 2017 - March 31, 2018) process which culminates with the end-of-year rating. The final ratings on individual elements accumulate during the year and are fundamental to determining the overall rating for yearly performance; individual ratings on elements cannot be extricated from the overall final rating.

The quarterly performance log entries and mid-year progress review are grievable should the employee choose to piecemeal the yearly evaluation process. In this regard, an employee could file up to twenty (20) grievances in a performance year should the Agency fail to comply with any aspect of its performance evaluation program. The Agency described its Human Resource Department as “overwhelmed” with work; adding 20 grievances from one (1) employee could be detrimental to the Agency’s efforts to administer the MA and comply with the grievance procedure.

In prior years when multiple grievances were filed on piecemeal aspects of the performance evaluation program; the parties consolidated the grievances for purposes of hearing which advances the economical and efficient use of resources. This group grievance identifies the rating year process culminating with the end-of-year rating as the *grievable occurrence*. Once the overall rating is issued, the employee is aware of the impact and effect of harm received due to FCC violations administering the performance evaluation program.

These findings show that the Union complied with Article 31, Section d for procedural issue #3.

4. Did the Union comply with the “Formal Grievance” form required by the Master? Agreement under Article 31, Section f?

FCC states that the Union failed to comply with the instructions for providing information on the Formal Grievance form and, in doing so, forfeited its right to proceed to arbitration. There is no wording in the MA stating that failure by a party to comply with instructions on the Formal Grievance form constitutes forfeiture of its right to proceed to arbitration. Without forfeiture agreed-upon and identified as the penalty for not following instructions on the form, the Arbitrator retains the authority to fashion a remedy appropriate for this alleged infraction.

The Agency states that the Union cannot list itself as the “grievant” in Block 1 on the Formal Grievance form; FCC relies on an arbitrator’s award interpreting Sections c, d and f.5 in Article 31 as specifying only the employee or the Agency as a party filing a grievance but not the Union. Although there is no wording in Article 31 identifying the Union as a filing party in the same manner as an employee or the Agency, Article 31 must be interpreted within the context of the MA including Article 3 - Governing Regulations, at Section b:

In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.

In effect at the time the parties executed the MA was 5 U.S.C. § 7121(b)(1)(C)(i) which provides the Union with a statutory right to file a grievance “in its own behalf.” Specifically, “[a]ny negotiated grievance procedure . . . shall . . . include procedures that . . . assure an exclusive representative the right, *in its own behalf* or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances[.]” [Emphasis added.] Thus, the Union is a grievant by operation of law which was in existence with the execution of this MA.

The Union as grievant filed a formal grievance sufficiently specific to notify the Agency of the allegations about the performance evaluation program. Specific sections within Articles in the MA were spelled out (for example, Article 6 at Section b.2) along with sections and paragraphs in Program Statements 3000.03 and 3430.09. Statutes cited in the formal grievance - - 5 U.S.

Chapters 43 and 71 - - are referenced in the Program Statements. Examples of violations are identified. This formal grievance is similar in detail and substance to prior years formal grievances about the performance evaluation program. The Agency cannot claim surprise or lack of notice or knowledge about the gravamen of this grievance. This is a continuous grievance based on an accumulative process arising from a failure to comply with the performance evaluation program at the lowest level of the organizational structure at FCC.

The Union satisfied Article 31, Section f for procedural issue #4.

5. Did the Union comply with Article 31, Section b in the Master Agreement? which states 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?

The Union instructed employees with concerns and issues about their performance evaluations to address such matters with their first-line supervisor, the lowest level in the management hierarchy with program responsibilities for performance evaluation. There is no data on the number of attempts at informal resolution in 2017 - 2018. Some informal resolution occurred during performance evaluation discussions (quarterly and yearly as testified to by Union witnesses). There is insufficient evidence to conclude that the Union did not attempt, through affected employees, informal resolution at the lowest level.

According to the Agency, the Union's filing its formal grievance with the Warden, the top official, shows the Local circumvented the lowest level and nixed informal settlement attempts. The Warden is the top official at FCC and, as with lower-level officials, has performance evaluation program responsibilities. For example, Program Statements 3430.09 and 3003.03 state that the chief executive officer "is responsible for ensuring that there is an effective performance evaluation program[.]" Furthermore, the Agency did not deny the grievance based on no attempts or effort at informal resolution at the lowest level prior to filing the formal grievance. The testimony by Executive Vice-President Logan was that he discussed informal resolution with the Warden whereas the Warden testified he was unaware of any such discussion although he acknowledged regular discussions with Union officials on a variety of matters. The burden of proof is the Agency's which it fails to carry.

Once the formal grievance was filed, the Agency offered to engage in informal efforts to resolve it. This effort by the Union and FCC occurred on June 27, 2018, and effectively modified the grievance procedure process in Article 31 with a post-formal grievance filing mutual effort to determine the scope of the performance-related issues in the bargaining unit for 2017 - 2018.

In sum the Union advised employees to discuss their concerns with first-line supervisors prior to taking further action such as filing a grievance. As mutually-agreed to by the parties, there was an attempt and effort at informal resolution after the formal grievance was filed. These pre-formal grievance attempts at resolution and post-formal grievance filing attempts to resolve concerns and grievances satisfy Article 31, Section b in procedural issue #5.

In view of these findings, the alleged procedural deficits with the formal grievance are without merit and do not bar arbitration of the merits of this grievance.

II. Merits

As described by the Local, the for arbitration on the merits of the grievance is:

Did the Agency commit an unjustified or unwarranted personnel action by violating the Master Agreement, laws or policy with regards to issuing performance evaluations and subsequent awards during the recovery period?

If so, was there a loss of pay or benefits to bargaining-unit staff based on the Agency's failure to properly provide performance evaluations and what is the remedy?

[Un. Br. at 11]

Through its documentary evidence and first-hand testimony from affected bargaining-unit employees, the Union established violations of 5 U.S. Code Chapter 43, Program Statements 3000.03 and 3430.09 and Articles 3, 6 and 14 in the MA. The probative evidence established the following:

- Rating Official failed to evaluate a light-duty employee on the duties he actually performed;
- Employee's initials forged on performance evaluation documents and performance log entries, mid-year review and end-of-year rating had the same date;
- Rating Officials failed to properly calculate the final ratings on individual elements for employees based on performance log entries;
- Rating Officials failed to hold meetings with employees to discuss performance standards, performance log entries, progress reviews and/or final ratings;
- Rating Official inserted factually inaccurate work data in performance log entries;
- Employees received no performance log entries for some quarters;
- FCC failed to follow the process or system for employees performing work for multiple supervisors during the rating year;
- Employees' requests for meetings with rating officials denied by those officials;
- Rating Officials did not provide the affected employee with performance log entries within fifteen (15) days of the "specific" incident;
- Reviewing officials failed to monitor the evaluation process; and

- Non-merit factors considered when determining awards.

These actions by rating and reviewing officials shows that employees were not “treated fairly and equitably in all aspects of personnel management” as required by Article 6, Rights of the Employee, at Section b.2. Examples of unfair and inequitable treatment was the testimony of Officer Keith establishing that work he was evaluated on represented cut and paste statements taken from other employees’ evaluations without regard to whether Officer Keith actually performed the work. Officer LaBorde’s initials on performance log entries were not entered by him.

Another violation of the MA occurred when incidents were not recorded in performance log entries in a timely manner as required by Article 14 - Employee Performance and Ratings, Section c.1; witnesses testified to not receiving quarterly log entries followed by discussions during the year. Employees did not receive performance standards and elements in a timely manner nor did first-line supervisors discuss these matters with the employees at the outset of the performance rating year (April 1) contrary to 5 U.S.C. Chapter 43 and Article 3 - Governing Regulations at Section b where “in the administration of all matters covered by this Agreement, Agency officials ... are governed by existing ... laws” which were in existence when the MA was executed.

A core purpose of the performance evaluation program is communication between management and employee to improve the individual’s performance which furthers the effectiveness of operations consistent with the Agency’s strategic plans and goals. Unless the communication occurs as directed by Policy and the MA, then the performance evaluation program cannot attain its intended purpose. The lack of some or all communications and discussions by first-line supervisors and other officials harms employees as some employees may have had an opportunity to discuss their end-of-year rating with a supervisor while the same employees or others may have received different or higher-tiered ratings had the Agency complied with its obligation to conduct the performance evaluation program in accordance with Program Statement 3000.03, Chapter 4 and Program Statement 3430.09, Performance.

These violations of the MA constitute unwarranted and unjustified personnel actions against affected employees and, for some employees, they were unfairly and inequitably denied an award thereby enduring monetary loss and/or other benefits such as extra points credited for promotion. These violations are of the same nature and context as presented to Arbitrator Wetsch in 2016; FCC’s actions were without merit and wholly unfounded in 2016; the Agency knew or should have known its actions were without merit or wholly unfounded in 2017 - 2018 based on the prior proceeding. FCC essentially concedes that supervisors did not discuss standards and elements with employees and employees received untimely performance standards, performance log entries and progress reviews. FCC knew or should have known it would not prevail on the merits in this grievance.

The parties are knowledgeable about the deficiencies in the performance evaluation program given their experienced gain through the committee process directed by Arbitrator Wetsch. A similar process will be followed to remedy the continuing violation in this grievance. That is, three (3) Union representatives and three (3) Agency representatives will meet within thirty (30) calendar days from the date of this award and audit the performance evaluations of the approximately seventy (70) employees who signed the ECFs. This should be an expeditious audit because affected employees marked boxes identifying concerns or described concerns under “other” on the ECFs. End-of-year ratings and awards, if any, will be determined in accordance with applicable law, regulations, policies and the MA.

No later than forty-five (45) days from the date of this award each party will submit a written report to the Arbitrator on the status of the audit. Thereafter the Arbitrator will determine what, if any, remedial action is appropriate. As for the Local's request for an interim award on attorney fees and costs, the Union may submit its request to the Agency when the status report is filed with the Arbitrator.

In rendering these findings and conclusions, the Arbitrator considered the arguments and evidence presented by each party as well as those arguments and evidence not specifically referenced or identified in the text of this opinion.

The findings and conclusions are summarized in the Award that follows.

Award

1. The grievance is not procedurally deficient.
2. The grievance is sustained.
3. Within thirty (30) calendar days from the date of this Award a committee of three (3) Local representatives and three (3) FCC representatives will audit the performance evaluations of those employees signing the Employee Consent Forms.
4. Within forty-five (45) calendar days from the date of this Award the committee will submit a written status report on the audit. The report will be in accordance with applicable laws, policies, regulations and the Master Agreement.
5. After receipt of the written report the Arbitrator will determine what, if any, remedial action would be appropriate.
6. The Local may submit a request for attorney fees when the report is issued.

Patrick Halter /s/
Patrick Halter
Arbitrator

Signed on this 18th day
of June 2019¹

¹The Agency and the Union granted the Arbitrator's request for an extension of time to issue this Opinion and Award.