IN THE MATTER OF THE ARBITRATION
BETWEEN

ALASKA CORRECTIONAL OFFICERS ASSOCIATION	)	OPINION
and	)	AND AWARD
STATE OF ALASKA	)	

Grievance: *Blended Staffing Schedule*

ACOA Grievance: *12-002*
State Case No.: *12-C-305*

Janet L. Gaunt
Arbitrator

April 20, 2013

APPEARANCES

For the Union:

Brad Wilson, Business Manager
Alaska Correctional Officers Assn
203 E. 5th Avenue
Anchorage, AK 99501-2519

For the Employer:

Kate Sheehan, Deputy Director
Div. of Personnel & Labor Relations
State of Alaska
P.O. Box 110201
Juneau, AK 99811

WITNESS LIST

1. John Umhauer, former DOC Correctional Officer
2. Randy McClellan, DOC Sergeant and ACOA President
3. Martin Crowley, ACC Booking Sergeant and ACOA Secretary/Treasurer
4. Danny Colang, FAI CC Sergeant and former ACOA President
5. Larry Rendon, former DOC Correctional Officer (by phone)
6. John Scott, Anchorage CC Training Sergeant
7. Jim Lecrone, ACOA Business Agent
8. Mike Addington, former DOC (or was it DOI?) Director
9. Bryan Brandenburg, Director, Division of Institutions, DOC

EXHIBIT LIST

Association

1. Correctional Officer Collective Bargaining Agreements and LOA's
    a. 2009-2012 ACOA CBA
    b. 2006-2009 ACOA CBA
    c. 2004-2006 ACOA CBA
    d. 2003-2004 PSEA CBA
    e. 2000-2003 PSEA CBA
    f. 1999-2002 PSEA CBA LOA
    g. 1998-1999 PSEA Interim LOA
    h. 1996-1999 ASEA CBA
    i. 1995-1996 ASEA CBA LOA
    j. 1990-1993 ASEA CBA
    k. 1987-1990 APEA CBA
    l. 1984-1987 APEA CBA
2. Negotiation and Arbitration Documents
    a. Interest Arbitration Decision (Brown, 2012)
    b. ACOA Interest Arbitration Closing Brief (2012)
    c. State Interest Arbitration Closing Brief (2012)
    d. Interest Arbitration Decision (Greer, 2009)
    e. ACOA Interest Arbitration Closing Brief (2009)
    f. State Interest Arbitration Closing Brief (2009)
    g. Interest Arbitration Decision (Greer, 2006)
    h. ACOA Interest Arbitration Closing Brief (2006)
    i. State Interest Arbitration Closing Brief (2006)
3. Grievance 12-002 Documents (Blended Staffing)
    a. Step II Grievance
    b. Step I - List of Grievants
    c. Step II Grievance Denial
    d. Step III Grievance

e. Step II - List of Grievants
f. Step III Grievance Denial
g. Step IV Demand for Arbitration

4. Grievance 12-008 Documents (Meal Breaks)
   a. Step I Grievance
   b. Step I - List of Grievants
   c. Step I Grievance Denial
   d. Step II Grievance
   e. Step II - List of Grievants
   f. Step II Grievance Denial
   g. Step III Grievance
   h. Step III - List of Grievants
   i. Step III Grievance Denial
   j. Step IV Demand for Arbitration
5. Grievance 12-010 Documents (42 Hour Holidays)
   a. Step I Grievance
   b. Step I - List of Grievants
   c. Step I Grievance Denial
   d. Step II Grievance
   e. Step II - List of Grievants
   f. Step II Grievance Denial
   g. Step III Grievance
   h. Step III - List of Grievants
   i. Step III Grievance Denial
   j. Step IV Demand for Arbitration
   k. Memo to PCC Officers (7/3/12)
6. Legislative Audits
   a. Audit 20-4420-92 re: Spring Creek Safety and Staffing (3/17/92)
   b. Audit 20-4441-93 re: DOC CO Schedule Issues and Costs (3/17/93)
   c. DOC Response to Audit 20-4441-93 (6/2/93)
   d. Audit 20-30053B-10 re: DOC Selected Health & Safety Issues (3/5/10)
7. Kay Walter Reports
   a. DOC Staffing Study Report (2/10/05)
   b. DOC Staffing Report (2/1/08)
8. ALRA Documents (Case No. 12-1617-ULP)
   a. ULP filing (1/11/12)
   b. ULP Receipt Notification (1/19/12)
   c. ACOA Injunction Request Letter (2/8/12)
   d. ALRA Response to ULP (2/22/12)
   e. State Response to ULP (2/22/12)
   f. ACOA Supplement to ULP (3/22/12)
9. Institution Implementation Memos
   a. HMCC Implementation Email (1/19/12)
   b. HMCC Implementation Memo (1/19/12)

c. HMCC Implementation Memo (4/23/12)
d. WWCC Implementation Memo (1/24/12)
e. FCC Implementation Email (1/24/12)
f. FCC Implementation Memo (1/24/12)
g. PCC Implementation Memo (1/25/12)
h. PCC Implementation Memo (4/20/12)
i. PCC Memo on Meal Breaks (5/10/12)
j. PCC Revised Memo on Meal Breaks (5/10/12)
k. ACC Implementation Email (2/9/12)
l. ACC Implementation Memo (2/9/12)
m. ACC Email re: Management Visit (2/9/12)
n. ACC Maccagno Email (2/16/12)
o. ACC Maccagno Email (2/17/12)

10. Other State Studies and News Articles
    a. Correction News, North Carolina DOC (Feb-Mar 2002)
    b. Florida DOC Pilot 12-hour shifts (April 2011)
    c. Applied Research Project, Eastern Michigan Univ. (September 2003)
    d. Police Chief Magazine (March 2008)
    e. FORUM on Corrections Research (August 2009)
    f. This Week Online (April 2002)
11. Alaska Legislature Documents
    a. Sub-Committee Intent Language (3/1/12)
    b. Sub-Committee on Corrections Closeout Document (3/22/12)
    c. Sen. Ellis Letter to DOC Commissioner Schmidt (1/17/12)
    d. DOC Commissioner's Response to Ellis Letter (1/23/12)
    e. DOC Commissioner's Response to Sen. Edgmon (2/29/12)
    f. Recording of Senate Finance Sub-Committee on Corrections (3/10/11)
    g. Former Deputy Commissioner Edwards' Testimony (1/30/09)
    h. Email from Paula Spreter (1/19/12)
    i. Letters from Correctional Officers opposing Blended Staffing Model
12. Alaska Superior Court Filings (Case No. 3AN-12-6968 CIV)
    a. Injunctive Relief Complaint (5/1/12)
    b. Injunctive Relief Exhibits (5/1/12)
    c. Judicial Assignment Notice (5/2/12)
    d. Motion for Preliminary Injunction (5/4/12)
    e. Affidavit of Deputy Commissioner Sam Edwards (5/4/12)
    f. State Opposition to Preliminary Injunction (5/11/12)

13. Governor Parnell Correspondence
    a. ACOA Request for Assistance (4/19/12)
    b. Response from Governor's Office (6/20/12)
    c. ACOA Reply (8/13/12)
14. Letters of Understanding re: 12 Hour Shifts
    a. 1981 LOU

b. 1985 LOU
c. 1986 LOU

15. Grievance 05-007 Documents (Shift Change)
    a. ACOA Closing Brief
    b. State Closing Brief
    c. Arbitration Decision (Adler, 2006)
16. State of Alaska Website link
17. Website for Alaska Statutes, Administrative Code, Executive Orders, Etc.
18. Message from Commissioner Schmidt (5/24/10)
19. Message from Commissioner Schmidt (1/4/12)
20. ACOA Demand to Bargain (1/5/12)
21. Richard Schmitz email (1/9/12)
22. DOI Director Bryan Brandenburg email to all Correctional Officers (1/9/12)
23. State Response to ACOA Bargaining Demand (1/23/12)
24. Email from Deputy Commissioner Sam Edwards (4/28/12)
25. ACOA Email exchange with State re: Information and Witnesses
26. Email between State Advocates (2/1/12)
27. DOC Recruitment Advertising
28. Additional Exhibits
    a. Study re: PTSD Prevalence in Corrections (2012)
    b. Officer Brueckner Letter re Blended Staffing Change (undated)
    c. Tape of Senator Menard (3/13/12)
    d. Public Testimony at House Finance Committee (3/6/12)
    e. Operating Budget Bill HB 284 (2012)

State

1. Correctional Officer I Class Specification (10/20/97)
2. Correctional Officer II Class Specification (10/20/97)
3. Correctional Officer III Class Specification (10/20/97)
4. SRF Charts

PROCEEDINGS

The Alaska Correctional Officers Association ("ACOA" or "Association") initiated this arbitration on behalf of members of its bargaining unit pursuant to the terms of a Collective Bargaining Agreement ("CBA" or "Agreement") with the State of Alaska ("State" or "Employer"). At issue is a unilateral change by the Department of Corrections ("DOC" or "Department") to the work schedules of some Correctional Officers assigned to security posts.

The Arbitrator was selected through mutual consent, and a hearing was held in Anchorage, Alaska on January 29-30, and February 22, 2013. ACOA was represented by its Business Manager Brad Wilson. The State was represented by Labor Relations Deputy Director Kate Sheehan. The parties stipulated that the Arbitrator had jurisdiction to render a binding decision regarding the issues presented.

At the hearing, both sides had an opportunity to make opening statements, submit documentary evidence, examine and cross-examine witnesses (who testified under oath), and argue the issues in dispute. The hearing was tape recorded with an understanding the tape was solely for the Arbitrator's use and would not be retained. The parties' posthearing briefs were received on March 22, 2013, and the hearing was thereupon closed.

STATEMENT OF THE ISSUES

The parties were unable to agree upon a statement of the issues and left that to the Arbitrator to resolve. Article 16.4.D specifies that when an unresolved grievance is submitted to arbitration: "The Association shall state specifically which Article(s) and Section(s) the State may have violated and the manner in which the violation is alleged to have occurred." Ex. A-1.a. The Association's Demand for Arbitration submitted on June 13, 2012 alleged violations of Articles 4 (Management Rights), 13.1 (Forty-two Hour Schedule, Article 13.2 (Eighty-Four Hour Schedule), Article 22.1.B (Hours of Operation), Article 30 (Conclusion of Collective Bargaining), and Article 36 (Availability of Parties to Each Other). Ex. A-3.g.[1] With that in mind, I conclude that the issues are appropriately framed as follows:

1. Did the State violate provisions of the Collective Bargaining Agreement cited in the ACOA Demand for Arbitration when it unilaterally changed the work schedule of Correctional Officers assigned to security posts from an eighty-four (84) hour, 7 days on/7 days off work schedule to a forty-two (42) hour, 5 days a week work schedule?

2. If so, what is an appropriate remedy?

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[1] Exhibits are referred to as either Association ("Ex. A-__") or State (Ex. S-__"). Witnesses are referred to by last name. References to exhibits or testimony are intended to be illustrative, not all-inclusive, of evidence in the record that supports a particular statement.

RELEVANT FACTS

The State of Alaska is a public employer within the meaning of AS 23.40.250(7). The Department of Corrections oversees the operation of numerous correctional institutions located throughout the State. The ACOA serves as the exclusive bargaining representative for a bargaining unit of DOC Correctional Officers. At the time of the events in question, the ACOA and State were parties to a Collective Bargaining Agreement in effect from July 1, 2009 through June 30, 2012. Ex. A-1.a.

The primary responsibility of Correctional Officers is the care and custody of offenders committed to the custody of the Department of Corrections. Each institution has different staffing needs and levels, and within each facility there is a recognized distinction between administrative support positions and security posts. Ex. A-7.a. The vast majority of Correctional Officers are assigned to security posts where a officer oversees the daily activities of the incarcerated inmates ("security officers"). These officers perform tasks directly related to the security and control of inmates, and count towards shift minimums so they have to be relieved before they can leave their posts.

A much smaller number of Correctional Officers are assigned to administrative support positions that are not directly responsible for inmate supervision and usually do not even work on the secured side of an institution ("administrative officers"). Representative examples of these positions include: Housing Unit

Supervisors, Institutional Training Officers, Institutional Compliance Officers, Disciplinary Sergeants, Records Sergeants, Special Projects Officers, Commissary Officers, etc. Officers filling administrative support positions do not count towards shift minimums, and do not require relief before they take breaks or lunch.

Adoption of the Eighty-Four Hour Work Schedule

Until 1981, all Correctional Officers worked a forty (40) hour schedule, consisting of five days a week, eight hours a day with two consecutive days off each week. In 1981, the parties signed a Letter of Understanding ("LOU") that established a twelve (12) hour shift, week on/week-off schedule that consisted of seven consecutive twelve hours days on duty followed by seven consecutive days off ("the eighty-four (84) hour schedule"). The eighty-four (84) hour schedule was specifically tailored for Correctional Officers assigned to security posts in the DOC institutions.

Subsequent LOU's were adopted in 1985 and 1986 that maintained the eighty-four (84) hour schedule with some adjustments to reduce the built in overtime costs. The eighty-four (84) hour schedule was then formally incorporated in the 1990-1993 Agreement as Appendix B. Ex A-1.e. Provision for an eighty-four (84) hour schedule remained in all the subsequent Correctional Officer CBA's, along with the forty (40) hour schedule that became a forty-two (42) hour schedule

effective with the 2006-2009 Agreement.[2] The numbered section of the CBA where the work schedules appears has varied until the 2000-2003 CBA. Since then, the work schedule descriptions have been included in Article 13 of the applicable Correctional Officer contract.

> The forty-two (42) hour schedule has always been described as follows:
>
> A. The workweek for employees assigned to a forty-two (42) hour schedule shall consist of forty-two (42) hours in pay status within a maximum of seven (7) days allowing for two (2) consecutive days off and all such employees shall be guaranteed a full workweek.

Exs. A-1.a and A-1.b. The 84-Hour schedule has always been described as follows:

> A. The workweek for employees on the twelve (12) hour schedule shall be a fourteen (14) day work period consisting of eighty-four (84) hours in pay status with a maximum of seven (7) working days and seven (7) consecutive days off, and all employees shall be guaranteed a full workweek. . . . .

Exs. A-1.a to A-1.l. Since adoption of the eighty-four (84) hour schedule, all Correctional Officers assigned to security posts have worked that schedule on either a twelve (12) hour day shift, or twelve (12) night shift. The night shift receives a shift differential. Ex. A-1.a, Section 13.2.C.[3]

Adoption of a Blended Staffing Plan

In November, 2011, the ACOA began hearing rumors that the DOC was considering fundamental changes to the shift schedules of the security officers.

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[2] The forty-two hour schedule consists of four days a week of 8.5 hours and one day of 8 hours.

[3] In 2012, the day shift security officers worked from 6 a.m. to 6 p.m, and night shift security officers worked from 6 p.m. to 6 a.m.

In early December, 2011, at the parties' first bargaining session for a 2012-2015 CBA, ACOA's lead negotiator, Business Manager Brad Wilson, asked the State's lead negotiator, Labor Relations Deputy Director Kate Sheehan, about the rumored shift change. Ms. Sheehan indicated that she was unaware of any change but would inquire of the DOC.

On January 4, 2012, DOC Commissioner Joe Schmidt sent an e-mail to all Correctional Officers, which read in relevant part:

> Current leave usage, subsequent supplemental budget requests and the legislature's intent language have led to a review of staffing levels, Correctional Officer schedules and prisoner activity schedules. Changes are being carefully considered.
>
> Deputy Commissioner Sam Edwards will post a letter to you within two weeks detailing expected changes and a timeline for the changes to be put in place. These changes will be designed to keep us in compliance with our constitutional mandate, statutes, regulations and budgetary directives.

Ex. A-19. The ACOA was not included as an addressee on the email, and received no contemporaneous notice from the State of the planned change. The Association learned of this email from Correctional Officers who forwarded a copy.

Upon learning of Commissioner Schmidt's email, the Association sent a Demand to Negotiate on January 5, 2012 to the State Department of Administration ("DOA").[4] The ACOA letter asserted that any modification of shifts would violate provisions of the CBA, and reminded the State of its obligation to bargain

[4] The DOA, not the DOC, handles negotiations with the ACOA.

in good faith prior to making unilateral changes to terms and conditions of employment. Ex. A-20.

On January 9, 2012, Deputy Commissioner Sam Edwards sent a memo to all DOC Superintendents that described the planned staffing change as follows:

> This memorandum is to serve as notification of the changes to the staffing methodology for our correctional officers in our in-state facilities and units. Basically, we will be moving from a predominantly 12 hour model to a more blended model utilizing both 12 hour and 8 hour for maximum efficiency and utilization of staff resource. The shift offering the highest efficiency in the most fiscally responsible manner will be utilized.
>
> Director Brandenburg and I will visit each facility/unit impacted by the blended staffing model beginning the week of January 16th. We will explain the process in greater depth at that time and assist with questions related to implementation. Target date for implementation will be April 1. Specific dates will be provided to each Superintendent from Director Brandenburg.
>
> . . . . As a rough gauge of what this will look like initially, our current staffing plan has roughly 90 percent of our correctional officers working 12 hour shifts and 10 percent working eight hour shifts. The blended staffing plan, as initially implemented, will look more like 75 percent working 12 hour shifts and 25 percent working eight hour shifts. Some facilities will have higher percentages of officers working eight hour shifts and some will have lower percentages of officers working eight hours shifts.

Ex. A-21. The ACOA was not sent a copy of this memo nor a follow-up email issued to all Correctional Officers by Director of Institutions Bryan Brandenburg. Ex. A-22.

In an effort to enforce its claimed right to bargain before any Blended Staffing Plan was implemented, the Association filed an Unfair Labor Practice charge ("ULP") with the Alaska Labor Relations Agency ("ALRA") on January 11, 2012. Ex. A-8.a. A subsequent request that ALRA seek injunctive relief to prevent any shift changes prior to that Agency ruling on the ULP was denied on the basis that ALRA lacked the necessary resources to do so. Ex. A-8.d.

On January 30, 2012, ACOA received a response to its bargaining demand from DOA Commissioner Becky Hultberg, who acknowledged that some Correctional Officers would be moved to a forty-two (42) hour schedule from their eighty-four (84) hour schedule. Hultberg rejected the bargaining demand on the basis that the current contract language permitted moving any Officer from an eighty-four (84) hour schedule to a forty-two (42) hour schedule, so long as certain notice requirements were satisfied. Therefore, the State contended it had no obligation to bargain over the change. Ex. A-23.

That same day, the parties held their second negotiating session for the next labor contract. Throughout that bargaining session, State representatives refused to bargain over or discuss the Blended Staffing Plan implementation. DOC representatives only agreed to listen to concerns about implementation of the Blended Staffing Plan. One meeting occurred on February 13, 2010, when ACOA Business Agent Jim Lecrone and some Correctional Officers met with Deputy

Commissioner Sam Edwards, Director of Institutions Bryan Brandenburg, and Human Resources Manager Dana Phillips. Another meeting occurred between Mr. Wilson, Mr. Lecrone and Deputy Director Lee Sherman.

On March 6, 2012, the ACOA filed a class action grievance challenging the Blended Staffing Plan. Ex. A-3.d. The grievance alleged that the State's actions were in violation of the following provisions of the CBA:

> Management's actions are in violation of the Bargaining Agreement, to include, but not necessarily limited to, Article 4 (Management Rights), Article 13.1 (Forty-two (42) hour Schedule), Article 13.2 (Eighty-Four Hour Schedule), Article 22.1.B. (Hours of Operation), Article 30 (Conclusion of Collective Bargaining), and Article 36 (Availability of the Parties to Each Other).

Ex. A-8.d.[5] In its subsequent grievance denials, the State contended that the contract language was clear and unambiguous and provided express authority for the shift change at issue. Exs. A-3.c and A-3.f.

Beginning in May 2012, the DOC began implementing the Blended Staffing Plan at its seven larger institutions. Ex. S-4. The plan created new shift hours for the security officers placed on the forty-two (42) hour schedule. They worked from either 6:00 a.m. to 2:00 p.m. or 2:00 p.m. to 10:00 p.m. Security officer staffing during the hours from 10:00 p.m. to 6:00 a.m. when inmates are locked down in

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[5] The Association also filed a Complaint for Injunctive Relief in Alaska Superior Court. Ex. A-12.a. This request for injunctive relief was later dismissed, at least in part because the court felt the ACOA needed to exhaust its remedy in arbitration.

their cells was thereby reduced. The DOC first sought volunteers to change to a forty-two (42) hour schedule, and then filled the remaining slots with the least senior Correctional Officers.

Prior to the change, approximately 72 officers (around 15% of the workforce) had been working a forty-two (42) hour schedule. Ultimately, 119 Correctional Officers moved from an eighty-four (84) hour schedule to the forty-two (42) hour schedule. The total number of officers working a forty-two (42) hour schedule after the change remained less than 25% of the total number of officers. Ex. S-4. The change resulted in an estimated savings of 80,640 hours per year, which is equivalent to forty-three (43) full-time employees. Testimony of Bryan Brandenburg; Ex. S-4.

In November 2012, terms of the parties 2012-2015 Agreement were resolved through an Interest Arbitration Award. Ex. A-2.a. The issue of whether the 2009-2012 Agreement had been violated by the DOC's earlier implementation of the Blended Staffing Plan remained unresolved, so that dispute ultimately proceeded to hearing before this Arbitrator.

RELEVANT CONTRACT LANGUAGE

ARTICLE 4 - MANAGEMENT RIGHTS

Except – and only to the extent – that specific provisions of this Agreement expressly provide otherwise, it is hereby mutually agreed that the Employer has, and will continue to retain, regardless of the frequency of exercise, rights to operate and manage its affairs in each and every respect. Nothing in this Article shall be considered as superseding those rights granted to the Association in the Articles and/or Amendments of this Agreement.

ARTICLE 13 - OVERTIME

13.1 Forty-two (42) Hour Schedule

A. The workweek for employees assigned to a forty-two (42) hour schedule shall consist of forty-two (42) hours in pay status within a maximum of seven (7) days allowing for two (2) consecutive days off and all such employees shall be guaranteed a full workweek. The furlough provisions of 2 AAC 07.407 do not apply.

B. Members shall receive overtime pay at the rate of one and one-half (1 ½) times their regular rate of pay for all hours in pay status over the member's normal scheduled workday. Overtime pay or other premium pay shall not be pyramided or duplicated. Hours paid at the rate of one and one-half (1 ½) the appropriate rate of pay for any reason shall be credited only once in the calculation of hours in the workweek.

13.2 Eighty-four (84) Hour Schedule

A. The workweek for employees on the twelve (12) hour schedule shall be a fourteen (14) day work period consisting of eighty-four (84) hours in pay status with a maximum of seven (7) working days and seven (7) consecutive days off, and all employees shall be guaranteed a full workweek. The furlough provision of 2 AAC 07.407 shall not apply.

B. Employees working a twelve (12) hour shift shall receive a one-half hour (thirty minutes) duty-free paid meal period as well as two (2) fifteen (15) minute paid relief breaks. Every effort shall be made to provide a meal break midway through the shift not earlier than the three (3) hours after the start of the shift and not later than three (3) hours prior to the end of the shift. Meal breaks that are not given shall be reported before the end of each shift. If the employee does not report the

missed meal break, it will be assumed the break was taken. Missed meal breaks will be treated as time worked and will be paid at the applicable rate.

C. There shall be two (2) shifts, day and night. Night shift shall receive the swing shift differential set out in Section 21.

D. Work performed by overtime eligible employees in excess of eighty-four (84) hours of work in the work period is overtime and shall be paid at one and one-half (1 ½) times the appropriate regular or shift rate of pay. Overtime pay or other premium pay shall not be pyramided or duplicated. Hours paid at the rate of one and one-half (1 ½) the appropriate rate of pay for any reason shall be credited only once in the calculation of hours in the workweek.

E. Overtime pay for hours worked on a holiday shall be computed only on the hours worked between 12:01 a.m. and the following 11:59 p.m. on the holiday. This overtime compensation will be paid in addition to the eight (8) hours at the straight-time rate for holiday pay and is subject to paragraph D above.

F. If a holiday falls on the employee's regularly scheduled day off, the employee shall receive payment for the holiday for eight (8) hours at the straight-time rate provided the employee was in pay status for a portion of the last regularly scheduled workday prior to the holiday and in pay status for a portion of the next regularly scheduled workday after the holiday. Such holiday pay does not count for the purpose of computing overtime, nor the purpose of fulfilling the work period unless worked as provided in paragraph E above.

G. Every effort will be made to include adjustment(s) for holiday pay in the pay warrant issued for the appropriate pay period. If not possible, the adjustment(s) for holiday pay may appear on the next regularly issued pay warrant for the pay period following the pay period in which the holiday(s) occurred. Penalty pay shall not apply for pay shortages, which result from holiday pay adjustments.

ARTICLE 16 - GRIEVANCE ARBITRATION

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16.2 Filing Requirements

A. Authority to File:

All grievances must be filed by or through the Association Business Manager or Agent.

B. Initial Filing Time Frame:
A grievance must be brought to the attention of the Employer, consistent with the procedures set forth in this Article within thirty (30) calendar days of the effective date of the disputed action or inaction, or the date the member is made aware of the action or inaction, whichever is later. A grievance not brought within these time limits shall be considered untimely and shall be void.

C. Advancing the Grievance:
If the Employer fails to render a decision in the allotted time frame, the grievance must be advanced to the next step of the procedure by the Association within the time frames stated below in order to obtain further consideration.

D. Waiver of Grievance Steps and Time Frames:
Individual grievance steps and time limits for filings and responses may be waived by written mutual agreement of the Association and the Employer representative named at the appropriate step.

E. Grievance Format:
Grievances shall be processed in the format of or on the forms provided by the Employer. The grievance shall state the facts giving rise to the grievance, the provisions of the Agreement that may have been violated, and the remedy requested. If such information is not provided, the Employer may return the grievance to the Association without further action. The Association may resubmit the grievance, including the required information, within fourteen (14) calendar days of receipt of the returned grievance. A grievance not resubmitted within these time frames shall be considered untimely and shall be void.

F. Proof of Receipt:
All mailed material relating to Steps One-Four filings of a grievance shall be accomplished through a proof of receipt method.

16.3 Special Grievance Types

A. Class Action Grievances:

1. A class action grievance is a disputed action or inaction, which affects two (2) or more members in a substantially similar manner. To be accepted for processing, class action grievances must identify at least two grievants and whenever possible, all known grievants, or attempt to identify all others by name, job class, and work location.

2. Class action grievances shall be submitted by the Association Business Manager or Agent to the first (1st) level supervisor having jurisdiction over all grievants. For example, if a class comprises members working in more than one (1) institution or Division, grievances shall be submitted at Step Two; if only one (1) institution but more than one first level supervisor is involved, grievances shall be submitted at Step One to the Superintendent.

* * * *

16.4 Grievance Procedure

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D. Step Four:

Any grievance, which is not settled at Step Three, may be submitted to arbitration for settlement. This request must be submitted to the Commissioner of Administration in writing within thirty (30) calendar days after the response from Step Three is due or received, whichever is earlier. The Association shall state specifically which Article(s) and Section(s) the State may have violated and the manner in which the violation is alleged to have occurred. The parties will meet within twenty-one (21) calendar days after receipt of the request for arbitration to strike names and make arrangements to contact the arbitrator about scheduling the hearing. The Association shall contact the State representative assigned to the case to strike names.

16.6 Authority of the Arbitrator

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B. The parties agree that the decision or award of the arbitrator shall be final and binding. The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from, or eliminate any terms of this Agreement.

16.7 Arbitration Procedures

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F. Expenses incident to the services of the arbitrator shall be borne as designated by the arbitrator. Normally, the losing party shall be expected to pay the arbitrator's expenses. If neither party can be considered the losing party, the arbitrator shall apportion expenses using the arbitration decision as a guide.

ARTICLE 22 - SHIFT ASSIGNMENT

22.1 Hours of Operation

A. Hours of operation shall be established by the Employer.

B. The Employer will notify the Association prior to implementing any large scale change in the hours of operation.

22.2 Shift Assignments

A. Shift assignments shall be made in accordance with the needs of the Employer.

B. Neither permanent assignments nor temporary assignments shall be used as a means of disciplining employees. The parties acknowledge that the changes in assignment may be appropriate as part of a corrective or investigatory action.

C. Except in emergencies or situations in which the employee agrees, shift assignment will not be changed without at least five (5) days notice; except that nothing in this Article precludes temporary reassignment of an employee because of illness, vacation, emergency, training, orientation, or similar causes.

D. When the Employer changes the shift assignment of an employee, the Employer, whenever feasible, will solicit volunteers from among the group of potentially affected employees and select the senior employee from among the qualified volunteers in the job class. If there are no qualified volunteers, the Employer shall select the least senior qualified employee. For purposes of this section, seniority is construed as Bargaining Unit seniority.

22.3 Alternative Workweeks

A. A four (4) day workweek or other form of alternative workweek schedule may be established by written mutual agreement of the Employer and the Association, the terms of which schedules shall be set forth in Letters of Agreement.

B. The Commissioner of Corrections or designee may approve flexible work hours.

* * * *

22.6 Temporary Duty Assignments

A. When the Employer changes the duty assignment of an employee from an 84-hour assignment to a 42-hour assignment, or vice versa, the Employer, whenever feasible, will solicit volunteers from among the group of potentially affected employees and select the senior employee from among the qualified volunteers in the job class. If there are no qualified volunteers, the Employer shall select the least senior qualified employee. For purposes of this section, seniority is construed as Bargaining Unit seniority.

B. The Employer shall notify the Association when temporary duty assignments exceed sixty (60) days.

ARTICLE 30 - CONCLUSION OF COLLECTIVE BARGAINING

The Agreement expressed herein in writing constitutes the entire agreement between the parties and no oral statement shall add to or supersede any of its provisions.

The parties acknowledge that during the negotiations which preceded this Agreement, each had the unlimited right and opportunity to make proposals with respect to any subject or matter not removed by law from the area of collective bargaining and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been with the knowledge or contemplation of either or both the parties at the time they negotiated and signed this Agreement.

The parties further agree that, notwithstanding the above Section, maintenance of contract matters, should they develop, may be negotiated under the supplemental agreement provision.

ARTICLE 32 - SUPERSEDING EFFECT OF THIS AGREEMENT

32.1 Superseding Effect of this Agreement

If there is conflict between the terms of this Agreement and any Personnel Memoranda or rules of the merit system, the terms of this Agreement shall supersede those memoranda or rules in their application to the Bargaining Unit.

32.2 Supplemental Agreement

This Agreement may be amended by supplemental agreements at any time during the life of this Agreement. Should either party desire to negotiate a matter of this kind, it shall notify the other party in writing of its desire to and of the specific subjects it wishes to negotiate. Authorized State and Association representatives will sign supplemental agreements thus completed. Unless otherwise agreed to in writing by both parties, supplemental agreements shall remain in effect for the duration of the Agreement.

32.3 Conditions Not Specifically Covered

In the event of any enactment by the Legislature, which creates conditions not specifically covered by this Agreement, the parties agree to confer immediately for the purpose of arriving at a mutually satisfactory supplement covering such action. Such supplement shall become part of this Agreement.

ARTICLE 36 - AVAILABILITY OF PARTIES TO EACH OTHER

The parties agree that representatives of the Association and the State shall meet at reasonable times for discussions of this Agreement, its interpretations, continuation, or modification. Both parties agree that an obligation to meet expeditiously and in good faith exists.

This provision is established for the purpose of facilitating two-way communications.

OPINION

Through testimony presented at the hearing, the Association demonstrated the disruptive impact that being switched from the eighty-four (84) hour schedule to the forty-two (42) hour schedule had on the lives of impacted Correctional Officers. The wisdom of the staffing change has been questioned not just by the ACOA, but also by members of the State Legislature. However, it is not this Arbitrator's role to decide whether the DOC's Blended Staffing Plan is a good idea or not. What I must decide is whether the DOC was entitled to do what it did. In the course of that endeavor, I am mindful of the following contractual limitation that the parties have placed on the authority of their arbitrators: "The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from, or eliminate any terms of this Agreement." Ex. A-1.a (Article 16.6.B).

The State contends that Article 22.2.A of the 2009-2012 Agreement provides express authority for moving Correctional Officers from the eighty-four (84) hour schedule to the forty-two (42) hour schedule. That provision states: "Shift Assignments shall be made in accordance with the needs of the Employer." The State regards this language as clear and unambiguous. The Association disagrees. An arbitrator's failure to follow clear and unambiguous language in a collective bargaining agreement is one of the limited grounds upon which an arbitration decision may be overturned by the courts. Thus, when a dispute arises over the

meaning of a collective bargaining agreement, my first consideration is whether an ambiguity can be said to exist. As this Arbitrator noted in a decision cited by both sides:

> Collective bargaining agreements are a unique type of contract, but their interpretation is governed primarily by established principles of contract law adapted to the collective bargaining context. According to one of those principles, where contract language is clear and unambiguous, the evident meaning must be given effect. [citations omitted.]

Anchorage Police Department Employees Association v. Municipality of Anchorage, Grievance No. 94-4 (Gaunt, 1998).

Ambiguous language is language which can reasonably be given more than one meaning. Language does not become ambiguous simply because parties disagree over the meaning of a phrase or contract provision. An arbitrator must decide whether language in dispute is capable of being read in more than one reasonable way. A party's offered interpretation may not ultimately be found to best reflect the negotiated intent of contract language, but if plausible contentions can be made for conflicting interpretations, then an ambiguity will be said to exist.

The question of whether relevant language is ambiguous turns on the particular facts of each case. Sometimes ambiguity is readily apparent on the face of a contract ("patent ambiguity"). Ambiguity may also arise from language which appears on its face to be clear but which becomes unclear when applied to a specific situation ("latent ambiguity"). Courts and arbitrators once considered only

the express terms of a contract to decide whether an ambiguity exists (the "plain meaning rule"). The "context rule" now seems the preferred approach; one this Arbitrator has adopted.

The context rule holds that any determination of meaning or ambiguity should be made after considering relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

> The intended meaning of even the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983)(emphasis added), *cert. denied*, 465 U.S. 1007 (1984). Sometimes such extrinsic evidence will make contractual language seem ambiguous, when on its face two plausible ways of applying contractual language did not initially appear evident. It is important to note, however, that evidence of context is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument.

I. THE CONTRACT CONTAINS AN AMBIGUITY THAT REQUIRES INTERPRETATION.

The management rights clause found in Article 4 reserves to the State the right to operate and manage its affairs in every respect, "except – and only to the extent – that specific provisions of this Agreement expressly provide otherwise." The State thus reasons that unless there is contract language prohibiting the DOC from moving Correctional Officers to a different shift, doing so is permitted by Article 22.2.A, and obviously contemplated by subsections C and D of that same Article.[6] Reading Article 22 in isolation, the State's contention is certainly plausible. However, it is by now axiomatic that an arbitrator should read a labor contract as a whole and not just focus on portions in isolation. Northern Illinois Mason Employers Council, 91 LA 1147, 1153 (Goldstein, 1988). When that is done, the existence of an ambiguity becomes apparent.

Article 22 refers to changing "shift" assignments, but the record and Agreement itself indicates the parties have referred to shifts in different ways for different purposes. For example, Article 2.2 gives the ACOA the right to have two representatives "per shift" at any DOC facility. Ex. A-1.a, p.7. Does that mean a day shift, or night shift, or eight hour shift, or twelve hour shift? Article 13.2.C

[6] Article 22.2.C requires five (5) days notice of a change in shift assignment except in emergencies, and Article 22.2.D requires that volunteers first be solicited whenever feasible.

says there are two shifts ("day and night") for the eighty-four (84) hour schedule, but because of the week on, week off rotation worked by officers on that schedule, the parties actually recognize four (4) shifts that security Officers work: (1) the day shift on the week 1 rotation, (2) the night shift on the week 1 rotation, (3) the day shift on the week 2 rotation, and (4) the night shift on the week 2 rotation.[7] These shifts were once identified by letter (A, B, C, D)but the parties now refer to them as shifts 1, 2, 3 or 4. They are also sometimes referred to by the shift Sergeant's name. Ex. A-15.c, p. 3. In comparison, forty-two (42) hour shifts are typically identified by job titles, *e.g.*, Disciplinary Sergeant shift.

In addition to ambiguity regarding what the word "shift" is intended to cover in a particular section of the Agreement, an ambiguity arises when Article 22 is read in combination with Article 13. Article 13.1 and 13.2 describe two different "schedules:" a forty-two (42) hour schedule (Section 13.1.A) and an eighty-four (84) hour schedule (Section 13.2.A). The CBA does not state which Correctional Officers will work which schedule, but the Association introduced evidence that the eighty-four (84) hour schedule was incorporated into the labor contract specifically for Correctional Officers to work *when assigned to security posts*. For security officers, the ACOA contends the shifts that could be changed pursuant to

[7] Before the start of each calendar year, security officers select one of these shifts in order of their seniority. Once the bidding process is completed, they plan their lives for that next year around the shift rotation.

Article 22 were the four recognized shifts worked under that eighty-four (84) hour schedule. That contention is lent plausibility by a wording change between Article 13.1.A and 13.2.A.

> Regarding the 42-Hour Schedule, Article 13.1.A reads in relevant part:
>
> A. The workweek for employees *assigned to* a forty-two (42) hour schedule shall consist of forty-two (42) hours in pay status within a maximum of seven (7) days allowing for two (2) consecutive days off and all such employees shall be guaranteed a full workweek.

Ex. A-1.a (emphasis added by italics). The first sentence of Article 13.2.A is worded differently regarding the 84-Hour Schedule:

> A. The workweek for employees *on the twelve (12) hour schedule* shall be a fourteen (14) day work period consisting of eighty-four (84) hours in pay status with a maximum of seven (7) working days and seven (7) consecutive days off, and all employees shall be guaranteed a full workweek.

Id. (emphasis added by italics). The difference in the wording dates back to the 1990-1993 Agreement, when the eighty-four (84) hour schedule was first incorporated into the Correctional Officer labor agreement, and it has been maintained in all the subsequent labor contracts. The wording change does arguably indicate a work schedule the parties intended certain officers would be "on," not just assigned to at the State's discretion.

I also find it significant that Article 13 describes established "schedules." The twelve (12) hour shift worked by security officers is part of a "schedule" that has been established by Article 13.2.A. The Blended Staffing Plan did not just

change the twelve (1) hour shift; it changed the workweek associated with that shift and thus changed the entire work schedule. The State reads Article 22.2.A as allowing it to assign Correctional Officers to whichever of the two described "schedules" best fit the DOC's needs. Article 22 refers to changing "shifts; it does not provide *express* authority to change work "schedules."

The State contends work schedules are only described in Article 13 to define when an employee assigned to either schedule receives overtime. That may be a plausible assertion, but so is the Association's contention that the eighty-four (84) hour schedule was incorporated into Article 13 specifically to describe the type of schedule Correctional Officers would work when assigned to security duties. I therefore find that a contractual ambiguity exists regarding whether Article 22 gives the DOC the right to assign Correctional Officers to either of the schedules established by Article 13, regardless of the duties they perform.

II. UNILATERALLY MOVING SECURITY OFFICERS TO THE FORTY-TWO (42) HOUR SCHEDULE DID VIOLATE ARTICLE 13 OF THE AGREEMENT.

When contract language is unclear in its application, it becomes an arbitrator's task to provide an interpretation consistent with the parties' most evident intent when negotiating that language. Principles that guide arbitrators in this endeavor have been described as follows in a treatise produced by the National Academy of Arbitrators:

> Arbitrators customarily rely on three sources of principles as guides to determine contractual intent. They are (1) standards of contract interpretation, (2) the concept of past practice, and (3) the principle of reasonableness. Such interpretive guidelines are frequently used in conjunction with each other.

The Common Law of the Workplace, 65 (BNA 1998). Various rules of construction are utilized, but they are not inflexibly applied. They are merely tools to search out the parties' likely intent at the time of contracting.

A. The Parties' Long-Standing Past Practice Supports the ACOA's Contention.

It is by now well established that when an ambiguity exists, evidence of past practice may be relied upon in determining the intentions that parties have under their collective bargaining agreement. An established practice that precedes contract language may evidence what the parties had in mind when they were negotiating for their current contract. A practice that develops after the addition of ambiguous contract terms may likewise evidence what the parties thought would result from the language being adopted. The presumption is that the parties' intended meaning is reflected in their subsequent application of the contract language. Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Rev. 1017, 1025 (1961).

The weight accorded past practice depends upon the purposes for which the past practice is introduced, the language of the applicable collective bargaining

agreement, and the particular facts surrounding the creation and maintenance of the past practice. As the party asserting a binding past practice, the Association bears the burden of proving its requisite elements. The practice must be unequivocal, established over a reasonably long period of time, and mutually accepted by the parties. Celanese Corp. of America, 24 LA 168, 172 (Justin 1954).

Through its witnesses and various documentary evidence, the ACOA convincingly established that after the 1990 CBA was adopted, and probably for many years before, security officers have always worked the eighty-four (84) hour schedule. That practice has been well documented in prior Legislative Audits and a 2006 Staffing Study by Kay Walter. Exs. A-6-b, A-6.d, and A-7.a. The State offered no evidence that, until the change at issue in this case, any *security* officer was ever involuntarily moved to the forty (or forty-two) hour schedule after 1990.[8] There was thus a consistent, long-standing, unequivocal practice of keeping security officers on the eighty-four (84) hour schedule.

The State correctly notes that some practices develop from choices made by an employer in the exercise of retained managerial discretion without any intention of a future commitment.

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[8] There can always be exceptions by mutual agreement, which is why the ACOA acknowledges that on a few occasions, the DOC has assigned officers in administrative support positions to twelve hour schedules without objection from the ACOA. The reverse was never shown to have occurred. The State offered no evidence of any specific instance when it assigned a security officer to the forty or forty-two hour schedule.

> Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion.

Ford Motor Co., 19 LA 237 (Shulman, 1952). A historic practice is not necessarily a binding one. Thus, longevity and consistency alone do not suffice. Mutual acceptability is a crucial element. The surrounding circumstances must support a conclusion that the established practice was viewed as the *exclusive* way of proceeding, not merely a present way. In the instant case, I find the record persuasive that the parties' long-standing practice did reflect a mutual understanding that the eighty-four (84) hour schedule described in Article 13.2 was the applicable schedule for security officers.

B. The Parties' Bargaining History Supports ACOA's Contention.

Evidence as to what was proposed and said during negotiations that lead to adoption of disputed language is frequently a valuable aid in the interpretation of ambiguous contract language. Arbitrators look for both evidence of the respective parties' intent and also for evidence regarding whether intent was manifested in some way to the other side. In the instant case, neither side offered any evidence of bargaining notes or discussions at the bargaining table when the eighty-four (84) hour schedule was first added to the Correctional Officers Agreement. However,

a number of witnesses testified regarding their participation at subsequent negotiations.

It is undisputed that until the 1990-93 Agreement, the eighty-four (84) hour schedule had been memorialized in Letters of Understanding that were revocable with notice by either party. The fact that this schedule was then incorporated into the CBA itself had a significant implication. Normally, express commitments made in a collective bargaining agreement must be maintained for the duration of that Agreement. They cannot be changed unilaterally without bargaining. The Correctional Officers bargaining representative back in 1990 could thus have expected that since the eighty-four (84) hour schedule was being adopted for security officers to work, that would remain the schedule they were "on" for the duration of the 1990-1993 contract.

The State contends that because the 1990 CBA and its successors had the same language that now appears in Article 22.2.A, the DOC remained free to move security officers to the forty-two (42) hour schedule whenever it chose to do so.[9] I find it significant that the State called no witness from any of its bargaining teams to support that assertion. Instead, all the offered testimony supports a conclusion

[9] Article 27 of the 1990-1993 CBA addressed "Shift Assignment" and the text of Section B.1 read: "Shift assignments shall be made in accordance with the needs of the Employer." That is identical to the text of Article 22.2.A in the 2009-2012 CBA.

that the State never evidence such an intent during bargaining table discussions between the parties.

After retiring as a Correctional Officer in 2001, Jim Lecrone began working for the Public Safety Employees Association (PSEA), and then the ACOA. He participated in subsequent contract negotiations. Lecrone testified that the parties' discussions regarding the forty-two (42) hour schedule had always treated that as the "administrative" shift. The eighty-four (84) hour schedule was regarded as the "security shift" worked by officers on security posts. As a past President of the Correctional Officers, Danny Colang has been a member of every Correctional Officer bargaining team since 2004. He testified that the parties' understanding regarding security officers was that "shift assignment" meant being assigned to one of the four 12 hour shifts worked on that schedule.

Mike Addington served as DOC Director of Institutions from 2002-2006. Addington acknowledged that during his DOC tenure, which started in 1988, the forty-two (42) hour schedule had only been used for Correctional Officers assigned to non-security support and administrative functions. The eighty-four (84) hour schedule had been the applicable schedule for security officers. Addington confirmed that the "shift assignments" mentioned in Article 22 had been viewed as referring to changes between the existing shifts for whichever schedule was applicable to the duties performed.

Mr. Addington served on the State's bargaining team for the 2004-2006 Agreement, which was the first CBA negotiated with the State by the ACOA after Correctional Officers formed their own Association. He was called to testify as an ACOA witness. Both Addington and members of the ACOA's negotiating team agreed that during the 2004 negotiations, there was extensive discussion of Article 22 and shift changes that the DOC might want to make. It is undisputed that the negotiators for both sides spent a great deal of time trying to identify all the possible "what if" scenarios that might arise. At no point, did State negotiators suggest that one scenario would be changing the "shift" of any security officer from the eighty-four (84) hour schedule to the forty-two (42) hour schedule. Addington acknowledged that during his tenure in management, he did not feel the Department was free to do so without bargaining.

Danny Colang was on the ACOA bargaining team for the 2004-2006 Agreement. He testified that when discussing ways to satisfy the DOC's operational needs, ACOA specifically described its bargaining intent to protect the week on/week off schedule that security officers worked. In response, State bargaining team members gave no indication that they felt the existing contract language allowed the DOC to change security officers from the week on/week off schedule back to the forty-two (42) hour weekly schedule.

Larry Rendon also served on that ACOA bargaining team. He too described the parties' extensive discussion of "what if" situations where the DOC might want to make an involuntary shift change. Rendon testified without rebuttal that the discussion was prolonged because the parties were trying to be sure they addressed all possibilities. Rendon said State negotiators never indicated that one possible scenario under the existing contract language was moving security officers from the twelve (12) hour shift, eighty-four (84) hour schedule to the eight (8) hour shift, forty-two (42) hour schedule.

Jim Lecrone concurred regarding the 2004 negotiations. Lecrone said the State never indicated that changing security officers to the forty-two (42) hour schedule was a possible scenario or asserted it had the right to do that. Whenever the discussion focused upon the security officers, the parties only spoke of the four existing shifts within the eighty-four (84) hour schedule. The State called no witness to dispute the assertion of these ACOA witnesses.

In cases where each side may have had a different intent regarding the application of contract language, one commonly applied arbitral rule holds that an undisclosed intent cannot prevail in the face of language whose intent was manifested in some way at the bargaining table. I agree with the view that the controlling consideration should be whose interpretation was best evidenced at the negotiating table. After so many years of unvarying practice with no prior

bargaining table assertion that Article 22.2.A left DOC management free to move security officers back to eight (8) hour shifts on the forty-two (42) hour schedule, the intent most evident in recent years is that asserted by the ACOA, *i.e.* that security officers would be on the eighty-four (84) hour schedule and the shift assignments made by the DOC pursuant to Article 22.2.A would be among the four established shifts for that work schedule.

C. The State's Interpretation Is Less Reasonable Than The ACOA's.

Contracting parties are presumed not to have intended a nullity. A favored interpretation is thus one which allows each part of the contract to have some effect and avoids unreasonable results. When implementing the Blended Staffing Plan, the State moved fewer than 25% of its security Officers over to the forty-two (42) hour schedule, but if its interpretation of Article 22.2.A were adopted, there would be no limit to how many of those officers could be removed from the eighty-four (84) hour schedule. The State's only witness, current DOI Director Bryan Brandenburg acknowledged that fact when he testified that the DOC feels it can move as many security officers over to the forty-two (42) hour schedule as it wants; even 100% of them. If that were true, then the provision for an eighty-four (84) hour schedule could be so readily circumvented as to become a nullity. The Association's contention that Article 13.2.A describes the schedule for officers

working security posts, with Article 22.2.A allowing the DOC to move those officers between the existing four shifts for that schedule is a more reasonable way to give effect to both Articles 13 and 22.

Conclusion: This dispute is not about the State's management right to assign an individual Correctional Officer to one correctional facility or another, to move a Correctional Officer between day shift and night shift on the different weekly rotations, or to reassign an officer from the eighty-four (84) hour schedule to a forty-two (42) hour schedule when their duties change from security to administrative support functions. The dispute in this case is limited to the issue of whether the State can unilaterally move officers from the eighty-four (84) hour schedule to the forty-two (42) hour schedule while still using those officers to work security posts.

The rights retained by the DOC management pursuant to Article 4 of the Agreement are subject to limitations applicable through other express provisions of the CBA. Article 13 is one such provision. The Association convincingly established that the eighty-four (84) hour schedule expressly described in Article 13.2.A was incorporated into the Correctional Officer Agreement as the schedule to be worked by security officers. The forty-two (42) hour schedule described in Article 13.1.A was contractually intended for Correctional Officers assigned to administrative positions. Rights conferred by Article 22 must be exercised in

compliance with that contractual understanding for Article 13. Because of the contract ambiguity, and the established past practice and bargaining history, the contractual "zipper clause" in Article 30 of the Agreement does not constitute a waiver. As the State acknowledged in its posthearing brief, zipper clauses do not negate practices that are relied upon for the purpose of casting light on ambiguous contract language.

The Blended Staffing Plan was not the only way the DOC could have responded to recommendations from the Alaska State Legislature and funding bills. Unless an officer was assigned an administrative position, the DOC was not contractually free to unilaterally move those Correctional Officers assigned to security posts from an eighty-four (84) hour work schedule to a forty-two (42) hour work schedule during the term of labor contract. By doing so, the DOC did violate Articles 13.1 and 13.2 of the 2009-2012 Agreement when it implemented the Blended Staffing Plan.

III. THE STATE ALSO VIOLATED ARTICLE 36 OF THE CBA.

The ACOA grievance alleged violation of one other contract provision worth mentioning.[10] Article 36 is entitled: "Availability of Parties To Each Other." It reads:

> The parties agree that representatives of the Association and the State shall *meet* at reasonable times *for discussions* of this Agreement, its interpretations, continuation, or modification. Both parties agree that an obligation to meet *expeditiously and in good faith* exists.
>
> This provision is established *for the purpose of facilitating two-way communications*.

Ex. A-1.a (emphasis added in italics). The State says it only refused to negotiate, not to meet, and that the ACOA received timely notice of the Blended Staffing Plan. I cannot agree with either assertion.

Article 36 sets forth an obligation to meet for "discussion" of the Agreement and its interpretation. The stated purpose is to facilitate "two-way" communication. Yet the unrefuted testimony by ACOA witnesses indicated that the State and DOC representatives would only listen to ACOA concerns. They would not respond or engage in two-way discussion. Discussions can occur without waiving one's position that contract language relied upon is clear and unambiguous. The fact

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[10] The ACOA grievance also alleged a violation of Article 22.1.B, which requires notice to the ACOA prior to implementing any large scale change in the hours of "operation." What occurred was a change to individual work schedules, not to DOC's hours of operation so I do not view this contract provision as applicable to the instant dispute.

that one side believes it has a winning interpretation does not relieve that party of the obligation to engage in a two way discussion of a contract interpretation issue when that is raised.

Article 36 requires good faith communication regarding contract issues. The State feels it complied with any applicable notice requirement because it gave the ACOA formal notice of the Blended Staffing Plan in February 2012, which was at least two months before implementation actually occurred. What I find problematic is the lack of notice while the DOC was making pronouncements to its Correctional Officers about the planned change.

The ACOA is the certified bargaining representative of the Correctional Officers affected by the announced change. In that capacity, the Association is entitled to direct notice of changes to the working conditions of the officers it represents. The ACOA should not be left unadvised until members of its bargaining unit forward copies of DOC pronouncements to the ACOA office. That is especially true when the Association had previously asked about rumored plans when the parties met in December 2011 to start negotiating the 2012-2015 CBA. Despite that prior query, the DOC chose not to copy the ACOA on either DOC Commissioner Schmidt's January 4, 2012 email, Deputy Commissioner Sam Edwards' memo of January 9, 2012, and Director Brandenburg's email sent to

Correctional Officers that same day. Failing to notify the ACOA at that point was not an act of good faith and did not serve the declared purpose of Article 36.

IV. AN APPROPRIATE REMEDY.

When no remedy is specified in a collective bargaining agreement, an arbitrator has inherent and broad authority to determine an appropriate remedy. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations.

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). For proven contract violations, the traditional remedy is to restore to any injured party the wages and/or benefits they would have received if the violation had not occurred.

In the instant case, what is appropriate may vary for each security officer affected by the work schedule change. I therefore find it appropriate to direct the parties to see if they can reach agreement regarding each circumstance or at least narrow the issues that remain unresolved. Pursuant to the parties' agreement at the hearing, I will reserve jurisdiction to resolve any remaining issues. An appropriate remedy for the violation of Article 36 is specified in the Award.

AWARD

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the foregoing Opinion, it is awarded that:

1. The State did violate Articles 13 and 36 of the Collective Bargaining Agreement when it unilaterally changed the work schedule of Correctional Officers assigned to security posts from an eighty-four (84) hour, 7 days on/7 days off work schedule to a forty-two (42) hour, 5 days a week work schedule.

2. As an appropriate remedy, the State is directed to:

   (a) make affected Correctional Officers whole for those wages and benefits they lost by virtue of having their work schedules improperly changed; and

   (b) send the ACOA direct notice of significant staffing plan changes at the same time that the DOC announces those changes to Correctional Officers the ACOA represents.

3. Pursuant to the parties' agreement at the hearing, the Arbitrator reserves jurisdiction to resolve any disputes regarding what is required to comply with this Award.

4. Pursuant to Article 16.7.F of the CBA, the fees and expenses of the Arbitrator will be assessed to the State.

Dated this 20th day of April, 2013 by

Janet L. Gaunt