BEFORE JANET GAUNT, ARBITRATOR

Alaska Correctional Officers Association	)	
vs.	)	
State of Alaska, Department of Corrections	)	Blended Staffing Model State Case No. 12-C-305 Association Case No. 12-002

State of Alaska's Closing Brief

I. Background

The Alaska Correctional Officers Association (hereinafter referred to as either "Association" or "ACOA") filed this class action grievance in response to a Department of Corrections' (hereinafter referred to as either "Department", "DOC", "State" or "Employer") decision to move approximately 15-25% of corrections officers working eighty-four (84) hour schedules to forty-two (42) hour schedules. The DOC made this change in an effort to comply with a 2010 legislative audit that specified the Department was using an incorrect shift relief factor of 4.8 (based on a prior study) and should instead apply a shift relief factor of 5.[1] When using the new shift relief factor of 5, the DOC was approximately 62 positions short. As a result, the decision was made by management to reduce staffing between the hours of 10 p.m. – 6 a.m., the night shift, in which inmates are locked down in their cells. The Association opposed this change and a grievance resulted.

II. Issue Statement

The parties disagree on the issue statement. As such, the arbitrator must determine the issue before her.

The State proposes the following issue statement: Did the State violate Article 22 of the Collective Bargaining Agreement when it implemented a blended scheduled? If so, what is the appropriate remedy?

Article 22- Shift Assignments, seems to be the controlling article in this matter. However, should the arbitrator expand the articles listed in the issue statement, the State is opposed to the statement prepared by the Association as it is vague and violates the parties' contract language.

[1] See testimony of Bryan Brandenburg. Shift relief factor is a nationally recognized computation to determine how many officers are required to cover a 24-hour post.

Article 16.4(D) states that, at step four of the grievance process, "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." Association Exhibit 3(g) is the step IV grievance filing. This filing only lists as violated Articles 4, 13.1, 13.2, 22.1(B), 30 and 36. Therefore, only these articles (with the inclusion of the entire article 22) should be listed as articles potentially violated. To use the Association's issue statement would violate the parties' agreed to practice and put the State at a disadvantage by not being able to respond to ACOA's allegations throughout the grievance process. Additionally, if further alleged violations were discovered by ACOA, it has the ability to file subsequent grievances which it in fact has done.

III. Arbitrator's Authority

The scope of the bargaining agreement covers wages and other compensation and the terms and conditions of employment. All arbitrators are subject to arbitral constraints in the agreement at issue. In the agreement, the Association and State negotiated limits to the authority of arbitrators selected to resolve grievances subject to arbitration. The limitation is expressed in Article 16.6(B), which states in relevant part:

> The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from, or eliminate any terms of this Agreement.

(Emphasis added)

The arbitrator must be mindful that although there is another view that arbitrators' remedies may not explicitly be cited within the four corners of an agreement, she is constrained to this agreement that is required to be in writing under AS 23.40.210(a). Pursuant to AS 23.40.210, the writing is the agreement. The agreement is clear. The arbitrator shall have no authority to rule contrary to, amend, add to, subtract from or eliminate any terms of this agreement. It is a bedrock collective bargaining principle that a union cannot be granted a remedy through grievance arbitration that is not derived directly from the terms of the collective bargaining agreement.[2] To do otherwise subverts the collective bargaining process.

IV. 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.

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[2] see Fairweathers' Practice and Procedure in Labor Arbitration, Third Edition 1991. Page 210. Ray J. Schoonhoven, 363 U.S. 593, 46 LRRM 2423 (1960

Article 13.1- Overtime (Forty-two 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.

Article 13.2- Overtime (Eighty-four 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, or 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 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.

22.4 Shift Exchanging

A. An employee may be permitted to exchange shifts with other employees in the same classification or level provided:

1. The employee makes a written request to his/her shift supervisor(s) at least twenty-four (24) hours prior to the exchange;

2. The shift supervisor(s) approves the exchange; and

3. The employees exchanging shifts shall not be entitled to any additional compensation (e.g., overtime, holiday pay, shift differential) that they would not have otherwise received.

B. Once approved, the shift exchange becomes a regular work assignment for the period of the exchange.

C. Once approved, shift exchanges shall not be subject to further review, except to cover operational needs. If a shift exchange is denied, the shift supervisor denying the exchange shall state the reason for the denial on the written request.

22.5 Split Shifts
The Employer agrees that employees will not be scheduled to work split shifts except in those instances where there is no reasonable alternative.

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 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.

V. Argument

a. The contract language is clear and unambiguous

The contract language cited above is clear and unambiguous. The Employer had the right to move some of its correctional officers from an 84-hour schedule to a 42-hour schedule.

i. Management Rights

The management rights clause found in Article 4 states that unless specific provisions of the agreement *expressly provide otherwise*, the Employer has the right to operate and manage its affairs in each and every respect, *regardless of the frequency of exercise.* This is a strong management rights clause in that unless there is contract language prohibiting the Department from moving officers to a different schedule, it is permitted. However, it is recognized by the Employer that this right is not all encompassing.[3] As was evidenced at hearing, this decision was not arbitrary, capricious or taken in bad faith. Director Bryan Brandenburg testified that, based on the legislative audit, the Department should have a shift relief factor of 5.0. In order to reach this level, 62 new positions would need to be created and funded. Sixty-two new positions would require a tremendous amount of money and the Department would not be receiving the additional money or positions.[4] Faced with this challenge, the Department decided to implement the blended staffing model at seven institutions.[5] It's important to note that, as the director testified, staffing was not reduced. As a result of the implementation, instead of being short 62 positions, the Department is only short 2.65 positions.[6] In addition, the blended staffing model results in a "savings" of 80,640 hours per year

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[3] *See* Elkouri & Elkouri, HOW ARBITRATION WORKS, 640-41 (Alan Miles Ruben ed., 6th ed., ABA Section of Labor and Employment Law, 2003) - "Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the 'sole judge' of a matter, management's action must not be arbitrary, capricious, or taken in bad faith."

[4] Testimony of Bryan Brandenburg.

[5] Testimony of Bryan Brandenburg and State Exhibit 4. As Director Brandenburg testified, this change was only made at the larger institutions. As a result, even though the blended staffing model was implemented at seven institutions, only five had its minimums reduced during the night.

[6] The Department was able to maintain a 5.0 Shift Relief Factor by changing to a blended staffing model using existing resources and eliminating the need for 62 new positions and funding.

which is equivalent to 43 full time employees.[7] This mitigates overtime and costs that before would have been borne by the Department. State Exhibit 4 also demonstrates that only 119 positions moved from an 84-hour schedule. There were already 72 correctional officers working a 42-hour workweek prior to the recent implementation. That brings the total number on a 42-hour schedule to 192, less than 25% of the total number of officers (approximately 15% moved to the new schedule). This is hardly a majority of officers nor was there a state-wide impact on officers.

Further, the scheduling of work has been deemed a normal and customary function of management rights unless limited by some express provision of the agreement.[8] In this case, the agreement between the parties contains a savings clause which indicates that management retains all rights not limited by the agreement. This clause, combined with the widely accepted notion that management has the right to schedule work, supports the fact that the Department had the right to implement the blended staffing model. Additionally, the DOC's actions were reasonable in light of the business needs and fiduciary responsibility of the Department.[9]

ii. Overtime Provisions

ACOA continually cites Article 13.1 and 13.2 for the premise that security shifts are assigned to an 84-hour schedule and administrative shifts are assigned to a 42-hour schedule. Yet nowhere in this article, or the entire agreement, are security shifts or administrative shifts defined.[10] All Articles 13.1 and 13.2 do is to define when an employee assigned to either schedule receives overtime. It is separated due to different overtime thresholds for each schedule. Article 13.2(C) cannot be taken out of context. It cannot be used to argue that there are only two shifts (day and night); therefore, the Employer is precluded from moving officers to a 42-hour schedule. That interpretation is nonsensical and renders Article 31.1 meaningless. These provisions merely set forth the overtime thresholds and requirements; they do not dictate which officers are assigned to which shifts. Nowhere is there language such that the normal schedule will be 84-hours or officers shall normally be assigned to an 84-hour schedule. That language doesn't exist. The current language allows the Employer to determine which officer is assigned to which schedule and then provides the information to the employees as to what their overtime threshold will be.[11]

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[7] See testimony of Bryan Brandenburg.

[8] *Supra* note 3 at 723.

[9] *Id* at 725 "Another arbitrator upheld management's right to schedule Sunday work where not prohibited by the agreement; the reasonableness of management's action was tested from the point of view of the needs of the business rather than the convenience of the employees."

[10] Testimony of Jim Lecrone and Bryan Brandenburg. Additionally, see State Exhibits 1, 2 and 3. The class specifications for Correctional Officers I, II and III do not define security shift or administrative shift. These are duties, not schedules. In fact, the class specifications do not separate out the duties of COs; rather, all COs are required to have the same qualifications regardless of the post or duty they are assigned to.

[11] This is one distinguishing character from the award in APDEA v. MOA (see note 28, at 6) in that APDEA's contract language stated that "the workweek for regular employees shall consist of either five (5) consecutive days of eight (8) hours per day or four (4) consecutive days of ten (10) hours per day."

iii. Shift Assignment

Article 22.2 states that shift assignments shall be made in accordance with the needs of the Employer. It doesn't state "after consultation with the Association." It doesn't state "after bargaining." It states in accordance with the needs of the Employer. This language means something. It is not just words filling up the page. It is a strong management rights provision that should be given deference. In fact, similar language dates back to the 1984-1986 agreement found in Association Exhibit 1(k).[12] In the 1990-1993 contract,[13] Appendix B is the agreement between the State and the Alaska State Employees Association (then representatives of the Correctional Officers) regarding the work schedule. Mr. Lecrone testified that this agreement is the first time that a contract directly discussed the 40-hour and 84-hour schedule. However, Mr. Lecrone, in that same line of testimony, also acknowledged that never in the contract does it set forth who works what schedule. Mr. Wilson goes on to ask the question "so the first time it showed up in the contract, the 12 hour shifts were security shifts and the 40 were administrative shifts?" The answer from Mr. Lecrone was yes. However, the contract language does not state that anywhere in Appendix B. It does, however, state that scheduling of employees and assignments to a shift shall be determined by the Employer.[14] This similar language continues with every agreement bargained between the parties. There was no evidence at the hearing that the Association tried to bargain language that would define which duties/posts were assigned to each schedule. There was no evidence presented that the State bargained away its right to determine shift assignments in accordance with its needs.

Article 22.2 also contains language that supports the Employer's position that the contract gave it the right to move some officers to a new schedule. Section (C) of 22.2 states that "except in emergencies or situations in which the employee agrees, shift assignment will not be changed without at least five (5) days notice..." The contract language clearly allows shift assignment changes provided there is adequate notice. In the present matter, officers were notified in January while the changes did not occur until April (or later).[15]

More language that supports the Employer's position can be found in Article 22.2(D) where it states "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." This language expressly grants the

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[12] *See* Article 23- Shift Assignment.

[13] *See* Association Exhibit 1(j).

[14] Appendix B, (A)(2).

[15] ACOA also argued that timely notice was not given to the Association since it was not informed of the decision in January when staff was informed. However, in its own grievance filings, it acknowledges that it was informed on February 13 when the Association met with the Deputy Commissioner and Director. Since implementation did not occur until April or later, the notice provisions under the contract were complied with.

Employer the right to change shift assignments but requires it to be based on seniority, whenever feasible. This language would not be necessary if the Employer did not have this right.

iv. Zipper Clause

Article 30 is a classic example of what is commonly known as a "zipper" clause. "To establish a waiver of the statutory right to negotiate over mandatory subjects of collective bargaining, there must be a clear and unmistakable relinquishment of that right."[16] In this agreement, the parties have expressly stated that this is the entire agreement, that each had the unlimited right and opportunity to make proposals and that each waives the right to bargain with respect to any subject or matter not specifically referred to or covered in this agreement. This is clear and unmistakable language that the parties intended the written agreement to serve as the entire agreement. And this agreement allows the Department to implement the blended staffing model. Arbitrators have held that if the contract language is explicit, the binding effect of customs or practices may be eliminated.[17]

Additionally, Association witness and former director Mike Addington testified about the 2004 negotiations in which Article 22.2 section (D) was added. Mr. Addington testified that the State and Association discussed in detail assigning officers to shifts and that the State, in order to look out for its best interests, agreed to language that would require the assignments to be done based on seniority but that the term "whenever feasible" had to be included in the clause. Mr. Addington's testimony clearly indicates that management has the right to assign shifts, within the parameters discussed above. He went on to testify that Article 22.2(A) and (D) work together.[18] The State does not dispute that. In fact, it has been the State's argument in each venue that Article 22 allows it to assign shifts based on its needs, knowing that seniority may need to be the determining factor. The State acknowledges this and has complied with it. As Director Brandenburg testified, the DOC first sought volunteers to change to a 42-hour schedule, and then filled the remaining slots with the least senior. Interestingly enough, ACOA did not have a single witness that was impacted by the implementation. None of its witnesses were moved to a 42-hour schedule. Association witness, John Umhauer, acknowledged resigning from his position at the Anchorage Correctional Complex (ACC) prior to the implementation of the blended staffing. Sergeant Martin Crowley testified that no employees who were assigned to the 42-hour schedule to the blended staffing model were still working that schedule at ACC. Those who desired to do so have already moved back to the 84-hour schedule.

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[16] *Supra* note 3 at 648.

[17] *Supra* note 3 at 621. Elkouri goes on to state with regards to zipper clauses "Thus even where a practice of providing employees with a 'bonus' was the product of negotiations between company and union and had existed for several years, but had not been written into the contract, an arbitrator held that it could be unilaterally discontinued by the employer... ."

[18] Mr. Addington further testified that 22.2(A) was dealing with the shifts present. A 42-hour schedule (or 40-hour schedule) existed at this time.

While arbitrators have also cautioned that "zipper clauses do not negate practices that are relied on for the purpose of casting light on ambiguous contract language"[19], that is not an issue in the present matter. Webster's Dictionary defines ambiguous as "capable of being understood in two or more possible senses or ways." The parties' agreement in this case does not include ambiguous language. It is not capable of being understood in two or more ways. The language is quite clear in that it allows the Employer to move officers to a 42-hour schedule from an 84-hour schedule and vise versa.

v. Availability of Parties to Each Other

It is not clear to the State how Article 36 has been violated. Association witnesses testified that the Department met with ACOA representatives twice on this issue, as well as the institutional meetings where it is presumed board members attended. The State never refused to meet with the Association on this matter. It instead informed ACOA that it did not believe it was required to negotiate over the implementation because current contract language allowed the schedule changes.[20] There is a significant difference between the two statements. The contract language in Article 30 does not require the State to bargain but rather to meet. This was complied with. The Department went even further by going to each institution impacted to meet with all Correctional Officers in order to deliver the message in person and hear the concerns and questions raised by the officers.[21] These meetings resulted in some additional safety standard modifications.[22] Director Brandenburg also used the contract language that allowed him to suspend the transfer policy so that the Department could assist those officers who needed a hardship transfer based on their personal situations such as custody arrangements, living outside the community in which they were employed, etc.[23] The Department did all it could to keep its employees informed and assist them in continuing employment with the DOC.[24]

b. Past Practice

Past practice has been defined as an existing practice sanctioned by use and acceptance over an extended period of time that is not specifically included in the collective bargaining agreement. It is usually applied to arbitration decisions involving employee grievances when contract language is ambiguous or contradictory, when a contract fails to address the matter disputed, or to support

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[19] *Supra* note 3 at 621.
[20] *See* Association Exhibit 23.
[21] Testimony of Bryan Brandenburg.
[22] Subsequent to the implementation, the Field Training Officer program was also altered in response to officers' concerns. As Director Brandenburg testified, recruits are now do a 42-hour orientation and are then placed a week on night and a week on days, with the same FTO each week in order to ensure consistent training.
[23] Id.
[24] ACOA's case in chief raised concerns with regards to increased assaults due to the blended staffing. Director Brandenburg testified that only four assaults occurred since implementation and none of the four occurred in units in which minimums were reduced.

allegations that clear language of a contract has been amended by mutual action or agreement.[25] It is the State's position that the contract language is clear and not contradictory so the first application is inapplicable in this matter. The second application is also inapplicable since the contract does address shift assignments. As was previously argued, the contract expressly grants the Employer the right to assign correctional officers to shifts. It appears to be this third application upon which the Association rests their case.

In order for clear contract language to be amended by mutual action or agreement, arbitrators have held that there must be mutuality between the parties concerning that practice.[26] Dean Harry Shulman in *Ford Motor Co.* stated the following regarding mutuality:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. And in some industries there are contractual provisions requiring the continuance of unnamed practices in existence at the execution of the collective bargaining agreement.... A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which it is based.
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> There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. 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. The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character.[27]

This quote from Dean Shulman is especially applicable in this present case. There was no evidence presented at the hearing that management at any time made any guarantees that security shifts would remain on an 84-hour schedule. ACOA used the 1993 audit[28] to document the past practice of the parties. While it certainly provides the history of the various schedules, it does little else. The audit itself recognizes that it is management's right to move officers from one schedule to another or

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[25] Bloomberg BNA, Labor and Employment Law Resource Center www.bna.com

[26] *See* MANAGEMENT RIGHTS, 26 (Marvin Hill, Jr. and Anthony V. Sinicropi., BNA Books, Arbitration Series, 1986).

[27] H. Shulman, Umpire, *Ford Motor Co.-United Automobile Workers*, Opinion A-278, Sept. 4, 1952. Reported at 19 LA 237(1952)

[28] *See* Association Exhibit 6(b).

change the schedule all together. Then Commissioner Endell told Correctional Officers and their representatives that the 12-hour shift "would be retained so long as resources would allow."[29] The State is continuing to retain the 84-hour schedule to the extent that resources allow. Once the higher shift relief factor was used, and additional leave accrual was paid out, it wasn't feasible anymore.[30] In this case, placing officers on either a 42-hour or an 84-hour schedule is a choice by "management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things."

ACOA also argues that page 15 of the 1993 audit is illustrative of its position that the State must bargain the movement of officers to the 42-hour schedule. Witness Jim Lecrone pointed to Commissioner Prewitt's statement that "correctional officer work schedules are subject to the collective bargaining process which is underway at this time."[31] The State does not dispute this statement and agrees that work schedules (hours) are subject to bargaining. However, the contract already covers the actions taken by the DOC. It is also important to recognize that the Association could have, at any time during bargaining for the successor agreement, proposed language that would define a security shift and administrative shift but they chose not to. That is especially interesting in light of the fact that ACOA knew the State's position with regards to its ability to implement the schedule change was based on current contract language. The Association has not presented any convincing proof that there was mutuality between the parties with regards to this matter.[32]

c. Present case is distinguishable from APDEA v. MOA

Throughout the grievance process, ACOA has cited to the case, *Anchorage Police Department Employees Association (APDEA) v. Municipality of Anchorage (MOA)*[33] as authority for its position that the State should have bargained the implementation of the blended staffing model. In *APDEA*, management moved police officers from a four day, 10 hour workweek to a five day, 8 hour workweek without bargaining the change. This arbitrator opined that whether or not there was a duty to bargain rested on the interpretation of the contract.[34] This arbitrator also adopted the "context rule" for

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[29] Id at page 8.

[30] Testimony of Bryan Brandenburg and Association Exhibit 11(d).

[31] *See* Association Exhibit 11(d), page 15.

[32] ACOA presented evidence of a hearing in which then-Deputy Commissioner Sam Edwards testified that "the last thing Correctional Officers would want to give up is the 12-hour shift." Association witness Mike Addington also testified "it would have been suicide to go to the eights." Neither of these is evidence that the Department had bargained a change to its management rights or shift assignment contract language. Rather, it is merely evidence that the 84-hour schedule is important to correctional officers.

[33] *Anchorage Police Department Employees Association and Municipality of Anchorage*, Grievance No. 94-4, AAA Case No. 75-L390-00142-97, Gaunt (August 1, 1998).

[34] Id at 13.

determining ambiguity.[35] The opinion and award goes on to state "language does not automatically become ambiguous merely because parties disagree over the meaning of a phrase. An arbitrator must decide whether, judged in context, a single, obvious and reasonable meaning appears on the face of disputed language. If so, then no ambiguity is present. If plausible contentions can be made for two or more interpretations, then an ambiguity will be said to exist."[36]

In the *APDEA* case, there was contract language that defined the workweek for "regular" employees as four/tens. There was also contract language that the Association argued was essentially a past practice clause that preserved the continuing duty to bargain.[37] This is distinguishable from the present case. Here, there is no definition of which duties/posts are assigned to which schedule. Nowhere in the contract does it state that security shifts must be an 84-hour schedule. There is no ambiguity in the language such as there was in the APDEA contract (i.e. what does "regular employee" mean). Another distinguishing characteristic is that the ACOA agreement does not contain a "past practice clause."[38]

While an ambiguity was found in the *APDEA* case, ACOA through its own grievance filing seems to acknowledge that the parties' contract language is not ambiguous. The step III filing states "The Association believes its position is defendable based on past practice, based on previous Alaska Labor Relations Agency Decisions and Orders, based on the disastrous impact this will have on Officers' lives and finances, and based on the risk of serious injuries or worse that Officers and prisoners alike will face during the eight hours out of each twenty-four period when the minimum staffing levels will be significantly reduced."[39] Nowhere in this list does it mention a misinterpretation of the agreement by the State. Nowhere in this list does it mention a contract violation. Whether or not this was a good idea is irrelevant to what the arbitrator is tasked with deciding.[40] The only question is whether or not the Employer was entitled to do what it did.

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[35] "The context rule holds that any determination of meaning or ambiguity should be made in view of relevant evidence of the language and conduct of the parties, the objects sought to be accomplished and the surrounding circumstances at the time the contract was negotiated." Id at 14.

[36] Id.

[37] Id at 6.

[38] The "past practice clause" in the APDEA contract read "If the Department implements a change in a current policy or procedure over which the Employer has a mandatory obligation to bargain, or a dispute arises under the light duty section of this Agreement, the designated Association Representative may grieve such change, in writing, to the Chief or his designee. Such grievance must be filed within three (3) working days of receipt of the proposed policy changed. To the extent possible, absent emergencies, notice of a policy or procedural change shall be issue done (1) week in advance of the anticipated effective date." Id at 5.

[39] *See* Association Exhibit 3(d).

[40] ACOA has submitted several exhibits, as well as presented testimony, that some legislators were opposed to the DOC's decision to implement the blended staffing. Legislators have to respond to the concerns of their constituents but management has to manage which sometimes means making the tough decisions with regards to the use of public funds.

VI. Conclusion

The Department understands that as an employer, its decisions have the potential to affect the lives of Officers for better or worse. The extent to which the Department is sensitive to its power is evident in the care it took when implementing the blended model. Senior management took the time to meet with the Officers and their representatives to discuss the business need for the plan and to gather feedback; in response to concerns raised by officers, implementation was delayed at one institution, not implemented at others, changes were made in the way training was assigned, and transfers were granted to address individual hardships not otherwise resolved.

The Department recognizes the Association has a duty to its members, and as an employer shares the Associations concerns of its employees. However, the Department has obligations the Association does not. The DOC must work with its staff to meet its organizational mission, while also fulfilling its broader obligation to Alaskans to manage limited public funds in the most efficient and economical way possible. The fact was that in order to increase the relief factor to appropriate levels, either 62 new positions would have to be created and funded, or a percentage of schedules would need to be adjusted. This is exactly the sort of decision the employer reserved its right, regardless of frequency, to exercise. If management cannot direct its affairs in this regard, the language of Article 4 would mean nothing at all.

For all the foregoing reasons, this grievance should be denied and all expenses should be assessed to the Association as set forth in Article 16.7(F) of the parties' agreement.

Kate Sheehan

Kate Sheehan
Division of Personnel & Labor Relations
State of Alaska

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