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| **In the Matter of Arbitration** | § | |
| **between** | § | |
| | § | **84-Hour Leave Restriction** |
| **State of Alaska** | § | |
| | § | |
| **and** | § | **State Grievance No. 13-C-234** |
| | § | |
| **Alaska Corrections Officers Association** | § | **Union Grievance No. 13-003** |
| | § | |

**BEFORE: Kathy Fragnoli, J.D.**

**APPEARANCES:**

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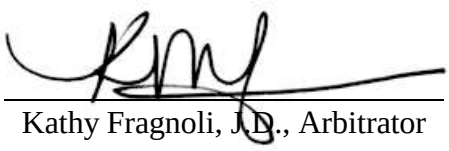
| **For the Union:** | **Joshua Wilson, Business Agent** |
| **For the State:** | **John Fechter, Labor Relations Analyst** |
| **Place of Hearing** | **Juneau, AK** |
| **Date of Hearing:** | **May 20, 2014** |
| **Date Record Closed** | **June 23, 2014** |
| **Date of Award:** | **July 17, 2014** |
| **Type of Grievance:** | **Contract** |

## Award Summary

The grievance is sustained. The Department violated the parties' Collective Bargaining Agreement when it unilaterally implemented an 84-hour leave restriction for all Correctional Officers without first bargaining with the Union. The State shall cease and desist application of the 84-hour leave restriction.



Kathy Fragnoli, J.D., Arbitrator

## Issue

The issue is whether the State of Alaska violated the Collective Bargaining Agreement by unilaterally implementing a leave restriction of 84 work hours at a time for all Correctional Officers without first bargaining with the Union and, if so, what is the appropriate remedy?

## Background

The Union represents non-supervisory Correctional Officers ("COs") who work at prisons and jails operated by the Alaska Department of Corrections (the "Department"). Most COs work schedules consisting of 12 hours per day for seven days, then have seven days off. In addition to working every other week, COs receive substantial leave accrual annually with no cap on leave accrual. In most facilities, bargaining unit members bid for vacation leave in one-week increments in order of seniority[1] in round-robin fashion.

The parties agree that until November 2012, there had been no cap on the amount of leave an employee could take at one time. In November 2012, at the direction of Director of Institutions, Bryan Brandenburg, the Department implemented a new restriction on all staff working week-on/week-off 84-hour schedules. The new restriction limited employees to taking a maximum of 84 hours, or one week, off at a time. Superintendent Steven Brunger sent all email to all MSPT, stating:

> Director Brandenburg has placed a leave restriction on all staff who are working the week-on/week-off, 84 hour schedule. You will be limited to only 84 hours of leave per month. What this means is that you will only be allowed to take one week off at any given time, which equates to a total of three weeks off at a time. For all others, leave will be determined based on the needs of the facility.

Prior to this new restriction, some COs (particularly the more senior officers) were able to utilize leave selection in order to have as many as five consecutive weeks off work.

Director Brandenburg did not communicate with the Union prior to ordering this new policy. At the hearing, when asked whether he spoke to the Union, he answered, "Why would I talk to the

[1] The requirement that leave selection be based on seniority is the result of a March 2006 interest arbitration award by Arbitrator William Greer, which resolved the July 1, 2006 CBA.

Union?" Brandenburg explained that he implemented the new policy as part of his efforts to reduce overtime[2] and to improve morale among junior officers by ensuring that they could get time off during hunting and fishing seasons. He stated that the Department still considers requests for leave in excess of 84 hours on a case-by-case basis for officers who have special circumstances.

Upon implementation of the new policy, supervisors were directed to speak with COs who had already scheduled more than one consecutive week of vacation and to tell those officers they would have to choose which week they wanted to keep. Director Brandenburg testified that he made sure leave was not unreasonably rescinded stating, "I'm a pretty reasonable guy and will work with folks."

At the hearing, Officer Arnie Ler testified that he had been approved two weeks leave (a total of five weeks off in combination with his work schedule) in order to drive to the Lower 48 to help his brother move into an assisted living facility. He said that the Department rescinded one of the two weeks and refused to consider a hardship because he had not purchased a plane ticket. Officers William Parker and John Tidwell also testified that they had blocks of leave scheduled in order to travel to see family, which was rescinded under the new policy. Officer Parker stated that the new rule has affected morale. Union Representative Brad Wilson testified that the inability of junior officers to obtain good vacation slots had never been raised as an issue by the Department prior to the hearing. He said that the parties could have negotiated a solution to that problem if the Department had approached the Union about it.

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[2] Brandenburg said that he reduced overtime from 180,000 hours per year to 80,000 after being appointed Director. He stated that it was partly due to blended staffing policies and partly due to the new 84-hour leave policy. The Union cited documentation showing that that reduction in overtime had already been achieved before the 84-hour leave policy was implemented; a DOC response to a Legislative Audit stated that the Department had reduced overtime from 174,974 hours in 2006 to 80,074 hours in 2009. Brandenburg stated that overtime was further reduced to 60,000 hours in 2012. Other than the Director stating that allowing officers to take five weeks off work at a time affects overtime, the Department did not offer any proof of how the unlimited leave policy contributed to excessive overtime. Managers testified that there is a temptation for officers who cannot obtain scheduled leave at desirable times of the year (holidays, hunting and fishing seasons, etc.) to ask for unscheduled leave at those times; however, they admitted that this is a "marginal" problem.

## Relevant Contract Provisions

### 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 of 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 20 – LEAVE

**20.1 Personal Leave**

C. Personal leave may be taken by an employee at any time business permits, upon prior permission by the facility supervisor or designee. An employee's request for personal leave will not be unreasonably denied. However for employees on the 84-hour schedule, approval will not normally be granted for non-emergency personal business or medical appointments. This does not preclude approval of personal leave for vacation purposes, which is contiguous with the employee's days off.

E. Each facility will develop procedures for scheduling leave on an annual basis ensuring that leave selection is based on seniority.

### 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.

## Position of the Union

The Union argues that the Department violated Articles 4, 20 and 36 of the CBA, as well as long-standing past practice, when it unilaterally restricted the leave of COs without first bargaining. It contends that the Management's Rights provision at Article 4 of the CBA does not give the Department the authority to supersede rights expressly granted to officers elsewhere in the contract. According to the Union, the right not to have leave unreasonably denied is expressly conveyed under Article 21.1.C, which clearly and unambiguously states that "an employee's request for personal leave will not be unreasonably denied" and that nothing in the Article precludes the approval of vacation leave which is contiguous with the employee's days off. The

Union asserts that the denial of leave of more than 84 hours is unreasonable, arbitrary and capricious, absent the Department's ability to demonstrate a legitimate business reason.

The Union disputes the Department's claim that there is any legitimate business reason for the 84-hour restriction. It urges that there was no evidence to support that restricting the amount of leave results in costs savings vis-à-vis overtime. The Union explains that each institution determines how many officers can be on leave at any given time in order to maintain the safety and security of the institution. According to the Union, if the facilities are properly staffed, scheduled leave should never affect the need for overtime.

The Union also cites the email from Superintendent Brunger, which stated that the blanket restriction applied to all COs on the seven-on/seven-off shift schedule, while "For all others, leave will be determined based on the needs of the facility." It asserts that this shows that the blanket rule on employees working seven days on/seven days off was not made based on the needs of the facility.

The Union also challenges the Department's explanation that the 84-hour restriction was implemented to make the ability to obtain desirable leave slots more equitable. It contends this was a violation of Article 20 itself because that Article expressly states (as a result of Arbitrator Greer's interest award) that leave selection must be based on seniority. The Union further argues that leave is already distributed equitably because it is assessed in one-week increments, round-robin style.

The Union next claims that the Department violated Article 36 of the CBA when it failed to negotiate before implementing the new leave restriction. It claims that leave is a mandatory subject of bargaining, and thus the Department had an obligation to bargain in good faith before modifying the existing policy. The Union insists that it never waived the right to bargain over changes to the leave policy. It explains that as soon as the Department implemented the change at issue in this grievance, it immediately filed a grievance and demanded bargaining. Finally, the Union urges that Article 4 does not support the argument of waiver, because it expressly states that the Department retains rights "Except–and only to the extent–that specific provisions of this Agreement expressly provide otherwise."

## Position of the State

The State argues that the Union has failed to establish any violation of the CBA. As a threshold matter, it claims that Article 21.1.C is inapplicable to this dispute because it deals with unscheduled, not scheduled, leave. According to the State, the ability to limit the number of weeks of leave that an employee may take at one time is specifically reserved to management under Article 4 of the contract. The Department contends that the rule did not result in leave being unreasonably denied to any employee, except in a "handful" of situations that resulted from "miscommunications" and/or the officers' failure to submit requested documentation.

The Department explains that the 84-hour limitation more equitably spreads pre-scheduled weeks off across all employees over the year. It continues that when officers are able to receive time off at desirable times of the year, it reduces the temptation for them to request unscheduled leave during popular periods, which is a problem that exists at the Department. The State further points out that nothing in the CBA mandates that any employee be entitled to unlimited vacation lengths.

The Department urges that its decision to restrict leave to 84 hours was not unreasonable or discriminatory and thus should be upheld as a legitimate exercise of Management's rights. It cites the fact that officers are not limited in the total amount of leave they may schedule, only for the number of weeks of leave.

The State alleges that there was no violation of any obligation to bargain because the CBA contains a zipper clause in Article 30, where it states that

> Each [party] 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.

The Department contends that it continues to adhere to a policy of not denying unreasonably any particular leave request, which is all the CBA requires. It insists that the new policy respects seniority while still giving officers the chance to bid for time off at different times of the year and that it allows for additional leave for exigent circumstances. Because the rule is reasonable, the State argues that there was no violation of the CBA.

## Discussion

In any dispute over the interpretation and application of a provision of a collective bargaining agreement, the Arbitrator's task is to ascertain and apply the mutual intent of the parties. The most reliable indicator of mutual intent is the plain language of the contract itself. When the terms of the agreement are clear, the Arbitrator must give full effect to the meaning of those terms.

Here, the language of the CBA is not ambiguous. Article 21.1.C states in relevant part:

> Personal leave may be taken by an employee at any time business permits, upon prior permission by the facility supervisor or designee. An employee's request for personal leave will not be unreasonably denied.

Although the State argues that this provision only applies to unscheduled leave, that interpretation is inconsistent with the clear language of that section. The section states that personal leave may be taken *any time business permits* and will not be unreasonably denied but that unscheduled leave will not normally be approved. This clearly indicates that "personal leave" must be interpreted to include scheduled as well as unscheduled leave. If 20.1.C applied only to unscheduled leave, the language suggesting liberal approval would be inconsistent with the language about unscheduled leave not normally being approved. Thus, the Arbitrator concludes that the CBA requires the Department to grant requests for scheduled leave "at any time business permits," unless there is a legitimate reason to deny the request.

The language of Section 20.1.C is mandatory. Despite the State's contention that it had the right to restrict leave to 84 hours at a time pursuant to Article 4 of the CBA, the inclusion of Article 20.1.C in the CBA removes from the State the discretion to unilaterally exercise its Article 4 rights with respect to the approval of scheduled leave in a blanket fashion.

The State contends that it did not violate Article 20.1.C because it did have a legitimate reason for restricting each officer to 84 hours of leave at a time. Although the Union carries the burden of proof to establish a violation of the CBA, the existence of a legitimate reason for denying leave is a so-called affirmative defense that must be proved by the State by a preponderance of the evidence. Although the State argues, and its witnesses testified, that granting employees large blocks of leave at one time contributes to excessive overtime, there was no actual evidence

to support this claim. Instead, the evidence showed that most of the reduction in overtime in the last eight years or so was achieved prior to the implementation of the 84-hour rule at issue in this case. Further, the Union correctly points out that the Department may take different steps to ensure that scheduled leave does not drive overtime. Such alternatives include making sure facilities are adequately staffed, refusing to grant unscheduled leave requests during desirable vacation periods and, if necessary and reasonable, reducing the number of employees who can take scheduled leave at any one time during peak vacation periods.

The other justification offered by the State—the equalization of vacation opportunities among COs of varying seniority—is not a legitimate reason to restrict leave because it also violates the contract. Article 20.1.E specifically states that leave selection is based on seniority. It is thus clearly the intent of the parties (or, in this case, of the "interest "Arbitrator selected by the parties) that vacation leave be distributed based on seniority. The evidence indicated that the parties have utilized methods of leave selection (namely, the round robin) that achieve some level of equalization; any other unilateral attempts by the Department to undercut seniority as the primary basis for allotting scheduled leave violate Article 20.1.E.

Director Brandenburg's testimony at the hearing evidenced what may have been the driving reason for his announcement of the 84-hour rule. He asserted, "These guys make a hundred grand a year and only work six months." Because most COs work seven days on/seven days off schedules, it logically follows that they only work half of the weeks in a year, or six months. Indeed, they work less than six months once accrued leave is factored in. However, the State has obviously decided that it is advantageous to have COs work the seven-on/seven-off schedules, rather than continuous weekly schedules with fewer hours per week. The State cannot complain, or penalize employees because its desired schedule arrangement results in COs having more than 26 full weeks off work per year.

By unilaterally implementing a new policy that modified the express existing language of Article 20.1.C, the State also violated its obligation to bargain with the Union in good faith prior to making changes to mandatory subjects of bargaining. The fact that the CBA contains what might be considered a "zipper clause" in Article 30 does not relieve the State of its obligation to bargain over this change. Zipper clauses are construed very narrowly and clearly do not remove the need

to bargain when an employer implements a new policy that directly contravenes bargained-for conditions of employment. Further, if officers were complaining about not being able to take choice times for vacation, it would seem logical that they would have complained to the Union, not management, about the issue

The Union presented evidence to show how specific COs were affected by the Department's imposition of the 84-hour restriction. However, it acknowledges that there is no way to make those employees whole for their inconvenience and it does not seek a specific remedy for those officers. The remedy the Union does request is that the State immediately cease and desist implementation of the 84-hour scheduled leave restriction; that shall be granted.

## Award

The grievance is sustained. The Department violated the parties' Collective Bargaining Agreement when it unilaterally implemented an 84-hour leave restriction for all Correctional Officers without first bargaining with the Union. The State shall cease and desist application of the 84-hour leave restriction.