

**BEFORE THE FEDERAL MEDIATION AND CONCLINATION SERVICE
Washington D.C 20427**

In the Matter of:

TEAMSTERS LOCAL UNION NO. 117

Union,

AND

STATE OF WASHINGTON, DEPARTMENT
OF CORRECTIONS,

Employer.

Union/Group Grievance –Improper Denial of
Personal Holidays and “CBA Days”)

FMCS Case No. 091119-00642-8

OPINION AND AWARD OF THE ARBITRATOR

For the Union: Anna A Jancewicz, Esq.
 Tukwila, Washington

For the Employer: Patricia Boday, Labor Relations Consultant
 Olympia, Washington

Statement of the Case.

This matter came on for hearing on April 23, 2009, at the Airway Heights Correctional Center, (hereinafter "DOC") Airway Heights, Washington. The correctional facility is a state operated detention center for convicted offenders in the State of Washington. This matter arises because of a decision to deny the use of certain CBA/Personal Holiday leave days to Jeremy Garberg and Lance Hall, (hereinafter "Grievants, or Grievant"). Both men are Corrections Officers. Both men have direct contact with and direct supervisory responsibility for inmate offenders at this Correction Center.

Grievant Hall requested that he be allowed to take a CBA day on July 26, 2008 and August 15, 2008. Grievant Garberg requested a CBA/Personal Holiday to be taken on August 3, 2008. Both grievants were denied the use of CBA/Personal Holidays. Both were denied for the same reason; the staffing level of corrections officers had reached the limit of "4 above available relief" and as a result, no other officers could be released for a CBA/Personal Holiday.

Teamsters Union, Local 117 (hereinafter "Union")is the authorized bargaining unit representative for the Corrections Officers who work at the Airway Heights facility. On behalf of the Grievants, the Union challenged the denials by filing a grievance.¹ It alleged that the denial of requests for CBA/Personal Holidays to be taken on by officers Garberg and Hall violated Articles 20.4 and 21.12 of the Agreement.

The Union and the DOC attempted to adjust and resolve this grievance through the Grievance Procedure outlined at Article 9 of the Collective Bargaining Agreement (hereinafter " Agreement") then in effect between the parties.² These attempts at adjustment were not successful. As a result, under the authority of Article 9.3, Step 4, the Union filed a demand for binding arbitration. The undersigned was selected as the neutral to hear and decide the issues presented in this grievance.

The oral portion of the arbitration hearing was declared closed on April 23, 2009. The parties submitted post hearing briefs on or about July, 21, 2009. This Opinion

¹ See Joint Exhibit 3.

² See Joint Exhibit 1

and Award is submitted to the parties under the Rules of the Federal Mediation and Conciliation Service and under the authority granted to the Arbitrator by the parties at Article 9.4 of the Agreement.

Statement of the Facts.

The Airway Heights Correctional Center is in the business of housing convicted offenders who are confined in medium and minimum level custody. The Correctional Officers are the critical first line “face to face” supervision for these offenders on a daily basis. The Union assumed the duty of bargaining representative for the Correctional officers in 2003 when a predecessor union announced that it could no longer shoulder that responsibility. In 2004 and in 2006 Local 117, the successor union, engaged in collective bargaining negotiations which resulted in an agreement between the parties.³

Among the benefits contained in the Agreement are entitlements to annual holidays. Those holidays include a separate entitlement to the equivalent of one additional personal holiday to be taken without justification. The benefits also include an entitlement to annual vacation leave. In addition to annual approved vacation leave, the Agreement contains an entitlement to the equivalent of two “CBA” leave days. The use of Annual Vacation Leave is apportioned during a bid process, based on seniority.⁴

Once this bid process is concluded at the end of March of each year, the Corrections Officers submit requests on a “first come, first served” basis to utilize the additional CBA days and personal holidays.⁵ The use of these entitlements are conditioned upon the satisfaction of certain eligibility criteria. A Corrections Officer may elect the equivalent of two shifts of off time and one (1) personal holiday during the calendar year. These are the days for which Grievants Garber and Hall submitted their requests. Both requests were denied by the DOC roster manager.

Issue Presented for Decision?

Whether the DOC violated Articles 21.12 and 20.4 when it denied CBA/Personal holidays for the Grievants on July 26, 2008, August 3, 2008 and August 15, 2008? If

³ Ibid.

⁴ See Joint Exhibit 1, Article 21.6.

⁵ Ibid, at Article 20.4.

so, what shall the remedy be?⁶

Relevant Provisions of the Agreement.

Article 3 Management Rights:

Management Rights.

It is understood and agreed that the Employer possesses the sole right and authority to operate the institutions/offices and to direct all employees, subject to the provisions of this Agreement and federal and state law. These rights include, but are not limited to the right to:

- A. Determine the Employer's mission, strategic plan, policies and procedures;
- B. Determine and control the Employer's budget;
- C. Plan, direct, control and determine the operations or services to be conducted by employees;
- D. Determine the size, composition and direct the work force;
- E. Hire, assign, reassign, evaluate, transfer, promote, or retain employees;
- F. Discipline or discharge for just cause;
- G. Effect a layoff;
- H. Make, publish and enforce reasonable rules and regulations;
- I. Implement new or improved methods, equipment or facilities;
- J. Determine reasonable performance requirements, including quality and quantity of work;
- K. Determine training needs and methods of training, and train employees;
- L. Take any and all actions as may be necessary to carry out the mission of the Department in emergency situations.
- M. Utilize non-permanent and on-call employees;
- N. Schedule days and hours of work and overtime as necessary;
- O. Determine the method, technological means, number of resources and types of personnel by which work is performed by the Department; and
- P. Establish, allocate, reallocate or abolish positions, and determine the skills and abilities necessary to perform the duties of such positions.

The Employer's non-exercise of any right, prerogative or function will not be deemed a waiver of such right or establishment of a practice.

⁶ The leave denials in question took place before the dates requested. Had the leave requests been granted, they would have been taken on the dates requested by the Grievants.

Article 10. Grievance Resolution Panel.

10.1. Authority of the Panel.

The Employer and the Union will continue to maintain a permanent committee for the resolution of grievances, referred to as the Grievance Resolution Panel (“the Panel”). The Panel will have the authority to interpret the provisions of this Agreement, only to the extent that the interpretation is necessary to render a decision on the case being heard. The Panel will not have the authority to contradict, add to, subtract from, or otherwise modify the terms and conditions of this Agreement.

Article 20. Holidays.

20.4 Personal Holidays.

A. Eligibility.

An employee may choose one (1) workday as a personal holiday to take off with pay during the calendar year if the employee has been or is scheduled to be continuously employed by the state for more than four (4) months.

B. Release for Personal Holiday.

An employee who is scheduled to work less than six (6) continuous months over a period covering two (2) calendar years will receive only one (1) personal holiday during this period. The Employer will release the employee from work on the day selected as the personal holiday if:

1. The employee has given at least fourteen (14) calendar days’ written notice to the supervisor, provided however, the employee and the supervisor may agree upon an earlier date; and
2. The number of employees selecting a particular day off does not prevent the agency from providing continued public service.

Article 21. Vacation Leave.

21.12. Additional Approved Vacation Leave (“CBA Days”).

Accrued vacation time not to exceed two (2) shifts in any calendar year, will be granted to an employee with thirty (30) calendar days written notification by the employee. Such time off must normally be granted provided:

- A. Such leave will be used in increments of not less than one (1) shift.
- B. Denials of the use of such leave are subject to the review of the Appointing Authority at the employee’s written request.

The Burden of Proof.

In this case, the Union is challenging a decision by the DOC to deny CBA/Personal holidays to the Grievants. Therefore, the Union has the ultimate burden to persuade the arbitrator that indeed, the DOC did commit just such a violation. This is not a matter of discharge and discipline, but a matter of contract interpretation under Article 9.5 of the Agreement which provides limits on the interpretative authority of the arbitrator. The proper quantum of proof to apply in this instance is that the Union is required to prove the alleged violations by a preponderance of the evidence. This means that when all else is said, the arbitrator must be persuaded that it is more likely than not that the DOC violated Articles 21.12 and 20.4 when it denied the above CBA/Personal holiday requests.

The Appropriate Standard of Review of the DOC Decisions.

For purposes of this arbitration, and as a general matter, the authority to grant or deny these leave requests is vested in the DOC, and not the arbitrator. This means that when deciding whether a contract violation occurred, the arbitrator must avoid the mistake of substituting his judgment for that of the DOC. This deferential standard does not serve to reduce the arbitrator to a “potted plant” that confuses deference with lack of inquiry. The decision making authority of the DOC is not without its limits or standards. Should the arbitrator find that the DOC exercised or applied its judgment in an arbitrary or capricious manner, the arbitrator will, and indeed must overturn the denials of leave. Whether or not this happens to be the finding, the result must turn on a reasoned analysis of the language of the Agreement as applied to the evidence.

Discussion and Analysis.

The evidence and testimony presented in this case was wide ranging and legitimately contentious at certain junctures in the oral hearing. In summary, the Union presented testimony designed to demonstrate to the arbitrator how the language in Article 21.12 (“CBA days”) and Article 20.4 (personal holidays) should be interpreted. Spencer Thal, the General Counsel for the Union testified. Thal had been present and actively involved in the 2004 and 2006 negotiations. This included acting as Chief spokesperson for the Union at the negotiations.

Thal testified based on a series of exhibits that purported to show the progression of the negotiations across the table between the parties prior to reaching

Agreement on Article 21.12. This was evidence of precontract negotiations. The central point of proof stressed by Thal was that the parties had reached a mutual understanding on how Article 21.12 should be interpreted and applied. On the question of interpretation and application, Thal testified that the parties had reached mutual agreement that CBA day leaves would be granted with the prescription that the decision to deny a day would not be arbitrary and/or capricious.

On this question, he testified that the parties reached mutual understanding that the only valid reasons for the denial of a CBA day request were 1. The existence of an “all hands on deck emergency” in the Corrections Center, or 2. That so many Corrections Officers selected the same day for leave they could not all be granted. Thal also testified that the parties agreed that cost would not be a factor in the decision to grant or deny a CBA/Personal Holiday leave request.

Both Grievants testified that their requests for CBA/Personal Holiday leaves were denied. Both testified that the sole reason for the denial of the requests for leave was that 4 (four) correctional officers above the authorized staffing relief (“4 above relief”) had already been given a CBA/Personal Holiday leave on the same dates as requested by the grievants. Since that “4 above authorized relief” limit had been reached, no other CBA day/Personal Holiday leaves would be granted. The official response to the grievants was “Sorry.....Already 4 above available relief”.⁷

The objective of their proof presentation was to establish that the mutual understanding of the parties did not include 4 above available relief as an agreed reason to deny a CBA day/Personal holiday leave request. Additionally, both officers testified that the DOC had a list of officers who volunteered for overtime each day and also had access to intermittent part time personal and the authority to resort to mandatory leave assignments. Thus, based on this evidence, it was apparent that the assertions that 4 above relief were the limit for allowing officers to take off were sham assertions not borne out by the facts and the DOC should have resorted to the volunteer overtime list and granted the requests of the grievants in this case.

⁷ See Union Exhibit 20.

The DOC presented testimony that the highest priority in the operation of the corrections center was the safety and security of the staff, the offenders and the surrounding community. The Superintendent of the Corrections Center is Ms Maggie Miller Stout. She testified that this priority is a 24 hour a day issue for her and she could not afford mistakes with regard to adequate staffing. She recounted incidents of riots and lockdowns. She placed great reliance on the 4 above available relief formula for staffing Corrections Officers for the reason that it provided her with the management flexibility and discretion to assure consistent officer staffing by senior, seasoned corrections officers who had built relationships with the offenders and who had the ability to react quickly and knowledgeably to emergencies in the facility such as riots and lockdowns.

The Superintendent conceded that on any given day, including the days in question in this grievance, she had the ability to call intermittent part time personnel, volunteers for overtime and, if required, authority to require mandatory overtime to staff positions to go 5 or beyond available relief as the Union argued was required by Article 21.12. She took the position that while these management tools were available, the disadvantage was the danger of staffing with less senior, less seasoned and less experienced personnel. Stout testified that the 4 above relief formula gives her the case by case flexibility to examine a CBA day leave request against center staffing concerns. She stressed the importance of understanding that the denials in this case were made not by her but by the responsible staffing roster manager for the shift. She also testified that the denials were not appealed to the Superintendent, a right under the Agreement. Superintendent Stout testified that when such denials were appealed, after consideration of certain factors, fifty (50%) percent of the appeals made to her were approved.

The Superintendent also testified that the 4 above available relief formula had been in effect as a “practice” between the parties when she assumed her duties in 2005. It was her belief that the application of the 4 above relief standard was sanctioned by the management rights clause in the agreement and state law. She

acknowledged that when she responded in writing to the grievances in this case, her sole justification for denying the CBA day was the “practice of granting CBA days (four beyond relief)”, and that no other justification had been asserted in that response.

Discussion and Analysis-The Admissibility of the PreContract Negotiations between the DOC and the Union.

The centerpiece of the Union’s proof in this case is the testimony and exhibits presented to establish that during precontract negotiations, the parties reached clear mutual agreement that all hands on deck emergencies and numerous and unmanageable requests for leave on the same date would be the sole reasons to deny a CBA day leave request. Evidence of comments and agreements reached during such pre contract negotiations is certainly an important aid in interpreting ambiguous terms in an agreement.⁸

History and past practice are also commonly relied upon by arbitrators to decipher ambiguities in collective bargaining agreements.⁹ In the case at hand, the arbitrator has reviewed both Articles 21.12 and 20.4 and finds that reasonable readers or interpreters of the Agreement could not come to different conclusions on the meanings of these clauses. Therefore, they are not ambiguous. The pre contract negotiation history, offered by the Union to support their assertions cannot alter the clear meaning of Articles 21.12 and 20.4 since such history can only be admitted to support the interpretation of ambiguous terms in the agreement. Again, the arbitrator finds that these clauses in the agreement are not ambiguous.

The Arbitrator’s Interpretation of Articles 21.12 and 20.4 of the Agreement.

Section 21.12, grants the equivalent of two shifts of CBA day time off, or two days, depending upon the length of the shift. This time off “must normally” be

⁸ See Elkouri and Elkouri-How Arbitration Works-Interpreting Contract Language-Rules to Aid Interpretation-Pre Contract Negotiations and Bargaining History,2008 Supplement at Pp. 300. See also supporting case citations at Pp. 300 et. Seq.

⁹ Ibid.

granted provided the time is not used in increments of less than one working shift. The arbitrator interprets the term “must normally” to have a meaning that is plain and ascertainable from the phrase itself. Requests for CBA days should be granted unless there is a reasonable, good faith, job related reason to deny a CBA day request. The term “normally” also indicates a strong rebuttable presumption in favor of the requesting employee that a CBA leave day must be granted. This strong presumption is rebuttable by a good faith, reasonable, job related reason to deny a requested CBA day. Such a showing must be made on a case by case basis at the time that the request is denied.

Article 20.4 is equally clear and unambiguous. Assuming the eligibility criteria is met; the operation of this clause will release the employee from work if the number of employees selecting that day does not prevent the DOC from providing continued public service. The imperative character of the word “will” in that clause means “expected or required to”. In the context of Article 20.4, “will” means an absence of discretion in the DOC to deny with one exception.

In order deny the requests the DOC is required to make a reasonable good faith job related showing that granting the requested day would prevent the DOC from continuing public service. In this case, the public service provided is the safe housing and monitoring of offender inmates at the Airway Heights Correctional facility and all of the operational requirements necessary and proper to accomplishing that public service. These requirements cannot be generalized in nature. They must have some relation to the number of employees who have selected the same date on which to take their holiday and to the performance of duties necessary and proper to continuing public service.

The DOC does not have to show that granting the personal holiday would bring the functions of the Center to a halt. However, there must be at least a showing, in light of the number of employees already selecting the day that allowing the day to a particular employee would prevent the facility from maintaining the daily safety and security of the officers, the staff, offenders, or the surrounding

community. This showing must be linked to the particular circumstances of the request, including operational and managerial factors that are affected by the number of employees who have already selected that date. If the DOC can make such a showing, an issue on which this arbitrator advances no opinion, it will have rebutted the strong presumption contained in Article 20.4.

The Applicability of the Grievance Panel Finding

The Union also argued that the precise facts and issues which confront this arbitrator had been decided in a Grievance Panel Finding dated September, 27, 2007. As a result, that finding should control the outcome of this arbitration. In a one paragraph decision, the Panel held as follows:

“It is the decision of the Panel that as there was an absence of circumstances to warrant denial of Daniel Ray’s CBA day request, Article 21.12 was violated. The Panel further determines that Mr. Ray will not be compensated for the time he spent at the GRP or travel to and from. He will also not be granted a day of his choice as a remedy.”¹⁰”

This was the sum and substance of the written decision. It was devoid of facts presented, arguments considered, findings based on the facts and any reasoning alerting the reader to the foundation for its determination that there was an “absence of circumstances to warrant denial...” This finding is not comprehensive enough in the writing to reveal clear factual similarity, that is who denied the CBA day and why?; It did not reveal issue similarity, that is, was this a denial by the roster manager and why?; Did the denial by the roster manager reach appeal to the superintendent and what was the result?; what was the rationale for the conclusion that an absence of circumstances existed to warrant denial of the CBA day. The answer to these question are not self evident from the face of the finding.¹¹

¹⁰ See Union Exhibit 14.

¹¹ See Joint Exhibit 1 at Article 10.10 which provides that the DOC and the Union may make opening statements, present evidence supporting specific alleged violations and present a closing argument.

The DOC is correct when it argues that beyond an assertion that fact and issue identity existed, there was no evidence in the record outlining the facts and issues in the prior grievance sufficient to allow this arbitrator to reach an independent conclusion on fact and issue identity. The application of the estoppel principle, as argued by the Union would require a decision record in the panel grievance that clearly delineates the facts and issues as the panel saw them, some indication of arguments made around these issues and a reasoned rationale for the conclusion that an absence of circumstances existed to warrant denial of the CBA day.

Moreover, in a larger sense, the panel finding is offered as an aid in interpreting the intent of the parties and the meaning of the language of Articles 21.12 and 20.4. The Panel decision is offered as support for the proposition that during negotiations the parties reached agreement on two reasons to deny a CBA day and 4 above relief was not one of those reasons. In the mind of the Union, the existence of this panel decision buttresses the precontract negotiation history which indicates that the only reasons for denial of a CBA day were an all hands on deck emergency and a day of requests so voluminous that all could not be granted.

If the arbitrator were to find the language of Articles 21.12 and 20.4 ambiguous, a more comprehensive recital of the sum and substance of this Grievance Panel Finding would be a valuable aid in interpreting the intent of the parties. However, the arbitrator does not find these provisions to be ambiguous. The Union correctly points out that the first arbitral rule is to follow the intent of the parties. The question for this arbitrator is can the intent of the parties be gleaned from the plain language of the agreement? If the answer is yes, there is no need to resort to extrinsic evidence to interpret clear contract language because the contract language is not ambiguous. This much the Union acknowledges when it argues that “The language in Article 21.12 is clear and unambiguous.” The arbitrator agrees with this conclusion and his analysis of Articles 21.12 and 20.4 is based squarely on the conclusions and the plain meanings to be drawn from the

articles without reference to the Grievance Panel finding.

Assuming the ambiguity rationale laid out above has no application to the to the argument of the Union, there exists an additional overarching reason that the argument of the Union is not persuasive. Article 10. 1 of the Agreement encapsulates the authority of the Grievance Panel. It provides that “The panel will have authority to interpret the provisions of the agreement, only to the extent that the interpretation is necessary to render a decision on the case being heard. This language is crystal clear. The findings of the Grievance Panel are binding as to the case being heard but not beyond the case being heard. The estoppel argument of the Union collides head on with the plain language of the Article 10.1 and cannot supersede this language in order to be applied to this grievance.

The Interpretations of Articles 21.12 and 20.4 as applied to the reasons for denial of the CBA/Personal Holiday leave requests by the DOC.

The testimony and evidence offered by the DOC as support for the leave request denials in this case consisted of generalized assertions of safety and security as a reason for the application of the 4 above relief staffing formula to the leave requests of the grievants. The prospect of a prison riot, the need to be prepared 24 hours a day, the acute concern over being forced to staff with less senior, less seasoned personnel who are either, intermittent part time, or voluntary or mandatory overtime personnel selections are all very powerful generalized considerations. This is especially so given the potentially explosive context in which offender supervision is carried out.

However, to accept these generalized assertions as reasonable good faith job related justifications for particular cases would relieve the DOC of its obligations under these clauses to justify, on a case by case basis, the denial to a particular employee who applies. It would transform the 4 above relief staffing formula into an “incantation” which, simply upon invocation, becomes an unassailable justification. In this case, the generalized assertions of the DOC, no matter how

serious, did not justify the denial of these leaves.

The absence of particularized justifications in this case leaves the denials without a rational basis in the record. Without such a rational basis the denials were arbitrary and capricious and must be reversed. The arbitrator is well aware that this finding will require the DOC, at the appropriate decision making level, to justify each denial with good faith job related reasons. However, this obligation is not a unilateral imposition by the arbitrator without basis in the Agreement. It is required by the clear and unambiguous language of the Articles 21.12 and 20.4.

This case turned upon the cross examination of Maggie Miller Stout. When questioned, Stout had scant knowledge of the basis for denial of the grievances other than the generalized “4 above available relief” justification. As discussed earlier, such justifications are insufficient. Stout testified competently and in good faith. However, as the arbitrator assessed both the direct and cross examination testimony, they revealed the absence of a good faith job related rationale for the denials. Indeed, given the fact that Stout had not been the decision maker with respect to the denials, and did not have the opportunity to review the denials, the fact that she could offer only generalized assertions to support the denial is unsurprising even though offered in good faith and with sincerity. This is where the Union met its burden to prove that “more likely than not, the DOC violated Articles 21.12 and 20.4.

Findings of the Arbitrator.

1. Evidence of the precontract negotiations between the parties could not be admitted to ascertain the intentions of the parties with respect to an interpretation of Articles 21.12 and 20.4 of the Agreement for the reason that these articles are clear and unambiguous and can be interpreted by resort to the plain meaning of the language of the Articles.
2. The sum and substance of the Grievance Panel Finding is without sufficient analysis and reasoning to establish the fact and issue identity required to bind

the DOC in this case on the ground of estoppel.

3. The plain language of Article 10.1 of the Agreement limits the applicability of the Grievance Panel finding to a decision on the specific case being heard and the finding may not be applied to this arbitration.

4. Articles 21.12 and 20.4 create strong but rebuttable presumptions that the leave entitlement reflected in both articles should be granted simply upon request. If the DOC can establish good faith job related reasons for denial with particularized showings under the language of each article as outlined above, it will have rebutted the strong presumptions contained in each article that such leaves be granted upon request.

5. The generalized assertions offered in support of denial of CBA day and Personal Holiday leave days to the grievants in this case do not support the denial and, therefore the arbitrator finds that there is an absence of a rational basis in the record to support the denials. The denials are therefore, arbitrary and capricious and in violation of Articles 21.12 and 20.4. **The grievance of the Union is hereby GRANTED.**¹²

What Shall the Remedy Be?

The testimony indicated that each grievant desired to take the CBA or Personal holiday for reasons related to enjoyment of time with family. Indeed, these reasons relate to the necessity for stress relief for officers who toil daily in a highly stressful environment accompanied by the shadow of violence. Once denied, the therapeutic value of the day sought cannot be recaptured. On the other hand, a remedial finding that the grievants have the unfettered right to select a day in the future as a remedy would deny to the DOC its managerial right under the

¹² The arbitrator reviewed all evidence and testimony presented at the oral hearing. To the extent that evidence and testimony is not discussed in this award, the arbitrator found such evidence and testimony not relevant to the ultimate questions in this case. To the extent that the Union styled this matter as a "Group Grievance", the findings of the arbitrator apply to all bargaining unit members represented by this Union.

agreement to review such leave requests and make rational job related decisions on granting or denying such days based on the language of Articles 21:12 and 20.4. The Arbitrator orders that both grievants receive compensation equal to the days of CBA and Personal Holiday leave denied by the DOC.

IT IS SO ORDERED

A handwritten signature in black ink, appearing to read "Richard M. Humphreys", is written over a light gray grid background.

Richard M. Humphreys, Neutral Arbitrator

Dated: August 14, 2009

Award issued at Seattle, Washington.