

IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

DEPARTMENT OF CORRECTIONS, State)
of Washington,)
) ARBITRATOR'S
Employer,) DECISION AND AWARD
)
and) FMCS No. 101103-0395-8
)
TEAMSTERS DRIVER, SALES, and)
WAREHOUSE LOCAL UNION NO. 117,)
)
Union.)
)
(Overnight Out-of-Town Work Assignments))

For the Union:

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I. INTRODUCTION

Grievant John Orton is one of three Correctional Industries Supervisors (“CIS”) who supervise inmates working in the environmental services unit, chiefly removing and/or encapsulating asbestos and lead-based paint in public buildings and facilities owned by qualified nonprofit agencies. On many projects, inmate crews travel from the place of their incarceration to the work sites on a daily basis, returning to the correctional facility each evening. The parties have referred to these projects as “daily” work. On

some projects, however, the distances involved make it more economical to house the inmates overnight closer to the project itself, often in a local jail. On those occasions, the projects typically involve 12-hour days for up to a week or more, and a CIS assigned to supervise the crew is entitled to overtime for hours worked in excess of forty during the week. The Union contends that because out-of-town assignments inherently involve overtime hours, and because Article 17.2 of the CBA requires that if “qualifications and/or case familiarity are substantially equal,” available overtime must first be offered to the most senior CIS, overnight out-of-town assignments must be offered in seniority order.

On a project beginning on May 11, 2009 at Fort Warden in Port Townsend, Washington, however, the Department assigned CIS Gary Baldwin, who was junior to Mr. Orton, to supervise an inmate crew from the Cedar Creek facility located in Thurston County. The Union contends that Mr. Orton, as the senior CIS, should have been offered the assignment, not Baldwin. The Department, at the outset, concedes that Article 17.2 governs the assignment of overtime, but counters that on May 11, 2009 (when Baldwin was assigned to the Fort Warden project), no overtime was yet involved. In fact, there would have been no overtime until Thursday of that workweek because a CIS working 12-hour days would not be expected to exceed 40 hours for the week until Thursday. At that point, which is the point at which overtime is actually “assigned,” according to the Department, Article 17.7 authorizes the Department to “utilize an individual to complete a specific assignment” on overtime, notwithstanding the seniority provisions of Article 17.2.¹

¹ The Union responds, on the other hand, that everyone knows from the beginning of the week that the CIS will be working more than 40 hours. Therefore, says the Union, at the time it is made, the assignment is the

The Department also contends that Baldwin possessed greater “qualifications and/or case familiarity” than Grievant because Baldwin was assigned to Cedar Creek and regularly supervised the Cedar Creek inmate crews, whereas Grievant was assigned to the Monroe Correctional Complex and supervised a different environmental services inmate crew housed there. It is critical for public safety, argues the Department, that CIS’s be familiar with the individual inmates and their “baseline behaviors”—especially when working outside a correctional facility—because that familiarity better enables them to identify potential issues of escape, contraband drop, and similar security concerns, both while inmates are working in public areas and upon their return to the correctional facility.² Nor is there anything in the CBA, according to the Department, that would require the assignment of a particular environmental services project to a specific inmate crew based on the seniority of the CIS who happens to supervise that crew.

At a hearing held in Tacoma, Washington on June 16, 2010, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine each other’s witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully examined the transcript in the course of my consideration of the evidence. The advocates filed simultaneous electronic post-hearing briefs on September 13, 2010, and with my receipt of the briefs, the record closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

functional equivalent of an “assignment of overtime” which must be offered by seniority according to the clear terms of Article 17.2.

² The Department also argues that the regular supervisor of an inmate crew is in a better position to know the inmates’ performance strengths and weaknesses, as well as to carry out the job training mission of the environmental services unit, which is designed to give inmates the job skills necessary to become productive members of society upon release and thus to lessen the chances of recidivism.

II. STATEMENT OF THE ISSUE

The parties have stipulated that the issue before me should be stated as follows:

Did the Employer violate Article 17.2 of the parties' CBA when it assigned out of town overnight work to an employee with less seniority than Grievant as alleged in grievance 46-09? If so, what is the appropriate remedy?

Tr. at 5. The parties have also stipulated that the matter is arbitrable and properly before me for decision, and they have requested that I retain jurisdiction, in the event I find that some remedy is appropriate, solely to resolve any disputes in connection with remedy that the parties are unable to resolve on their own. *Id.*

III. CONTRACT PROVISIONS MOST INVOLVED

In considering the parties' respective contentions concerning this dispute, I find that the CBA provisions set forth below in their entirety are most critical to the analysis:

17.2 Determination and Assignment of Overtime

The provisions of Subsection 17.1 above do not apply to employees outside of custody, food service and medical. With respect to employees outside of those areas, the Employer will review qualifications and/or case familiarity in making overtime assignments. If qualifications and/or case familiarity are substantially equal, overtime will be offered in order of seniority and mandated by inverse seniority. Except in an emergency situation, an employee will not work overtime without prior authorization from the Employer.

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17.7 Employer Right to Assign

Nothing in this Article precludes the Employer from utilizing off-duty staff which requires the payment of callback, or utilizing an individual to complete a specific assignment.

Exh. J-1 at 47; 49.

IV. FACTS

The central facts are those outlined in the Introduction section of this Decision and Award. In addition, the Department believes it is important to understand that the environmental services operation is a creature of statute that must be managed in accordance with the requirements of RCW 72.090.100(2), i.e. that it is an inmate work program “designed primarily to reduce the cost of goods and services for tax-supported agencies and nonprofit organizations.” In addition, the statute requires that the program be “closely patterned after private sector industries but with the objective of reducing public support costs rather than making a profit.” In meeting those objectives, the Department has established two inmate crews which are housed at the Cedar Creek Corrections Center in Littlerock, Washington, and another which is located at the Monroe Correctional Complex in Monroe, Washington. Two CIS’s supervise the two Cedar Creek crews, Gary Baldwin and Roy Syrovoy, and Grievant John Orton supervises the Monroe crew. Orton is the most senior of the three CIS’s.

Mr. Orton has challenged three assignments to out-of-town overnight work as being in violation of Article 17.2. The first, involving work at Big Bend Community College in Eastern Washington, generated a grievance that the parties disposed of without resolving the underlying issue. The second involved a project at the Washington State Penitentiary (“WSP”) in Walla Walla.³ The third was the Fort Warden project previously described, the incident set forth in the written grievance which led to these proceedings. *See*, Exh. J-2 (grievance dated May 18, 2009). In each case, the Department assigned a CIS junior to Mr. Orton to supervise the inmate crew doing the work. Thus, the issue

³ The Union has argued the merits of the WSP assignment in its brief, whereas the Department contends that the grievance at issue is limited to the Fort Warden project. *See*, Exh. J-2 (Grievance No. 46-09 dated May 18, 2009).

before me is whether the Department violates Article 17.2 when it assigns a CIS junior to Mr. Orton to overnight out-of-town work (when that assignment is virtually certain to result in overtime) without first offering that opportunity to Mr. Orton.

IV. DECISION

In resolving this dispute, the first issue is whether Article 17.2 applies to this situation at all. The Department argues that it does not because, at least under these specific circumstances, there was no “assignment of overtime” at the time Baldwin was assigned to the Fort Warden project. Rather, the issue of overtime only arose several days into the workweek, at which point Article 17.7 authorized the Department to “utilize” Baldwin “to complete a specific assignment” to which he had already been assigned. The Grievant argues, by contrast, that Article 17.7 only applies to “the continuation of a daily work assignment, not an extended assignment that is known and planned for well in advance.” Union Brief at 6, fn. 2. The issue, thus framed, is a close one, but one that I find I need not decide in order to dispose of the dispute before me. That is so because, even if Mr. Orton is correct that Article 17.2 applies to overnight out-of-town assignments that are known in advance to involve overtime—a matter on which I express no opinion—I find persuasive the Department’s argument that Mr. Baldwin had greater “job qualifications and/or case familiarity” with respect to the Fort Warden project, and therefore that the Department could offer that project to him rather than to Mr. Orton under the plain language of Article 17.2.

In reaching that conclusion, I credit the Department’s assertion that it is in the public interest to have inmates monitored by supervisors and custodial personnel who are familiar with them, including familiarity with their “baseline behaviors” as well as with

their technical skills. Thus, once the Department determined that a crew from Cedar Creek should be assigned the work at Fort Warden, it follows that a CIS familiar with that crew would generally be better able to meet the Department's critical interest in protecting the safety and security of the inmates and the public during the project.⁴ That result does not necessarily mean that the same result would obtain in every specific case, nor does this result mean that seniority is irrelevant or that the seniority preference provisions of Article 17.2 could never come into play. In fact, in the Fort Warden case, the Department offered Mr. Baldwin the project in preference to Mr. Syrov, the other Cedar Creek CIS who would also be familiar with the assigned inmate crew, precisely because Baldwin possesses greater seniority than Syrov. Thus, contrary to the argument on Grievant's behalf, upholding the Department's Fort Warden decision does not result in granting the Department "unfettered discretion" in the assignment of overtime among CIS's. Union Brief at 7.

Nor do I agree that by not requiring the Department to offer the Fort Warden job to Mr. Orton, I am in effect creating an exception to Article 17.2's rule that the senior CIS has preference for overtime work—an exception not contained in the language of the Agreement itself. Union Brief at 5-7. It seems to me that Grievant is arguing, in essence, that the Department was required to offer the Fort Warden project to him on the basis of his seniority, and only *then* to determine which crew to assign to the work. According to this view, once having assigned Grievant to the project, the Department was free to assign the Monroe crew to do the work if it believed that it was desirable to have an

⁴ To the extent, if any, that the Union suggests that ability to monitor the particular inmate crew effectively is not part of "job qualifications and/or case familiarity," *see* Union Brief at 9, I disagree. While the Department concedes that the three CIS's possess equal technical skills in carrying out the CIS function, their "job" also includes the security monitoring and training of the inmates under their supervision on any specific project.

inmate crew with which Mr. Orton was familiar on the job. The fact that it might be more economical to use the Cedar Creek crew on the Fort Warden project, however, cannot justify a departure from the Department's contractual obligations to offer overtime to CIS's in seniority order.

In my view, the argument just outlined reads the language of Article 17.2 far too broadly. That Article says nothing about the assignment of inmate crews to projects, and it would take far more than the language of Article 17.2 for me to hold that the Department had given up its right to manage the environmental services operation, e.g. to "determine the method, technological means, number of resources and types of personnel by which work is performed." *See*, Article 3 ("Management Rights"), § 3.1(O). Under this suggested reading of Article 17.2, moreover, the Department would be required to offer Mr. Orton *every* overnight out-of-town assignment, and only after having done so could the Department determine which *inmate crew* could most effectively and economically be assigned to accomplish that work.

Given the statutory framework and the management rights provisions of the Agreement, however, I believe that the appropriate order of assigning an inmate crew and a CIS to a specific project is precisely the reverse. That is, even if the Union is correct that an overnight out-of-town assignment is an "assignment of overtime" within the meaning of Article 17.2, I find that the Department is first entitled to determine which inmate crew to assign, considering the relative economies and efficiencies under all the circumstances,⁵ and then to apply the terms of Article 17.2, including its "job

⁵ For example, with respect to the Fort Warden job, the Department reasonably believed that it was less expensive to the Department and more efficient for the customer to assign the work to a Cedar Creek crew rather than to the Monroe crew. That is so because had the Department assigned the Monroe crew to Fort

qualifications and/or case familiarity” language, in assigning an appropriate CIS. That approach, it seems to me, is part and parcel of operating the Department’s environmental services function in a manner consistent with the Department’s statutory obligation to conduct operations “closely patterned after private sector industries but with the objective of reducing public support costs rather than making a profit.” RCW 72.09.100(2)(b)(i).

As noted, however, the Union argues on Grievant’s behalf that “economic considerations do not and cannot justify” a violation of the Agreement’s seniority provisions. Union Brief at 7-8. As a general statement of the principles developed by labor arbitrators over the last eighty years, I have no quarrel with that assertion. Here, on the other hand, the Department has considered issues of economy and efficiency not in *the allocation of overtime assignments among the CIS’s*, but rather in determining *which inmate crew should be assigned to a particular job*. Nothing in the Agreement precludes economic considerations at that stage of the analysis, and the governing statutes clearly authorize it—indeed, they seem to require it. It may well be that once a particular inmate crew has been assigned to an overnight out-of-town project, the “job qualifications and/or case familiarity” standard of Article 17.2 will favor a CIS who regularly supervises that crew. This *indirect* effect of applying economic considerations, however, is an entirely different matter from an employer’s *direct* attempt to justify avoidance of contractual seniority protections by appealing to claims of greater efficiency and economy.

In sum, under these precise circumstances, I cannot say that the Department erred in determining that one of the Cedar Creek CIS’s was better suited to supervise the Cedar Creek inmates at Fort Warden. That is so because, for the reasons already set forth, I

Warden, “daily” projects that could have been completed out of Monroe would have had to be assigned to a Cedar Creek crew, resulting in greater travel time and fewer productive work hours each day.

believe the “job qualifications and/or case familiarity” were not substantially equal between Mr. Orton and the Cedar Creek CIS’s on that particular project. Nor is there sufficient evidence in the record to establish that the Department incorrectly assigned Mr. Syrovoy to the WSP project, judged in light of the same considerations. Therefore, even if the WSP issue is properly before me, a matter I do not decide, my ruling on that grievance would also be for the Department.

The grievance must be denied.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The Department did not violate the provisions of Article 17.2 when it assigned out of town overnight work to an employee with less seniority than Grievant as alleged in grievance 46-09; therefore,
2. The grievance must be denied; and
3. Pursuant to the terms of the parties’ Agreement, Article 9.6, they shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 4th day of October, 2010



Michael E. Cavanaugh, J.D.
Arbitrator