

Arbitration

State of Connecticut
Department of Correction

Article 20 Dispute

and

Decision: January 12, 2010

Connecticut State Employees Association
SEIU, Local 2001 (NP-8)

Arbitrator: Roberta Golick, Esq.

Hearing: September 2, 2009

Appearances: For the State
Ellen Carter, Esq.

For the Union
Robert J. Krzys, Esq.

The Issue

The parties presented the following issue:

What is the process for filling vacancies at correctional facilities for Line Lieutenants and for Captains and Counselor Supervisors?

Introduction

The parties' agreement to submit the disputed question to arbitration at this time is a reflection of their mature and sensible collective bargaining relationship. In brief, the parties recognize that they disagree about how portions of newly modified Article 20 of their contract should be implemented. The parties recognize that if the State applies

Article 20 as it believes it should be applied, and if the Union at some future date were to prevail on a grievance protesting that methodology, it would be, if not hopelessly impossible, than extraordinarily difficult and impractical to attempt to *undo* the putative damage.

Accordingly, when the disagreement came to light,¹ the parties, rather than press forward in litigation, entered into a dispute-resolution procedure that maintains status quo, for now, and seeks a prospective ruling on what comes next.

Article 20 in the 2008-2012 Contract

SHIFT TRANSFER PROGRAM:

Section 1. Each facility shall maintain a shift transfer list which shall be updated on a quarterly basis. Seniority will be applied as the determining factor in shift assignment for line supervisors when all other factors are equal. Management retains the right to determine when all other factors are equal. If a Line Supervisor is denied his/her shift preference under this section, he/she shall receive a written explanation of the reason for denial. The Union may grieve a pattern of denials of shift assignment by seniority.

Section 2. Discipline. Shift transfer can be denied or limited for disciplinary reasons subject to just cause.

Section 3. Administrative Denial. Shift transfer can be denied or limited to a line supervisor for administrative purposes such as reassignment to another facility (e.g., line supervisor must learn and be familiar with new facility operations.) This type of assignment is limited to two weeks.

Section 4. Denial of Shift Transfer Evaluations. Management may deny or limit a line supervisor the option to elect a shift transfer if that supervisor in his/her

¹ The word “light” here is used in two senses: The disagreement came to light in the usual sense, meaning the parties became aware of it; but it also came to “light” in the sense described at arbitration by DOC Director of Human Resources Daniel Callahan, who testified that when the disagreement emerged in casual conversation with Union President Catherine Osten, it not only “lit the match” to the dispute, but it “blew up the gas tank.”

most current service evaluation is rated “unsatisfactory” in any one or more categories or who is rated “needs improvement” in two or more categories.

Section 5. Captains working as Shift Commanders shall participate within their classification in the shift transfer program described above.

FACILITY AND SCHEDULE TRANSFERS

Section 6. An employee may only be transferred from one facility to another facility by the employer under the following circumstances:

- (a) Where the approved staffing levels of his/her present unit have been reduced through reorganization action, budgetary action, or other approved governmental actions recognized by state statutes; or
- (b) Where changes in staffing assignments are required to accommodate agency operational needs; or
- (c) At his/her request, pursuant to a voluntary transfer request granted by the employer.

Except as provided herein or as otherwise provided in this agreement, inverse class seniority shall be the basis for selecting employees for non-disciplinary involuntary transfers from one facility to another.

A permanent transfer is defined as a transfer where the intent is that the employee will not return to his/her previous facility.

All other transfers shall be considered temporary.

When a permanent or temporary transfer is to be made, the employer shall notify the employee of said transfer and the nature of the transfer at least fifteen (15) working days in advance of such transfer except in cases of an emergency.

Section 7. In the case of voluntary transfers and voluntary transfer requests, the following shall apply:

An employee requesting transfer to another facility and/or another shift must put his/her name on the departmental transfer list in accordance with the departmental procedures in order to be considered. The employee will indicate the facility or facilities for which he/she wishes to be considered. Such departmental list will be updated quarterly and an employee must submit his/her transfer request form at least fifteen (15) days prior to the start of the next transfer period.

As the correctional facilities develop vacancies, the senior employee in the same classification whose name appears on the departmental transfer list for a particular facility will be transferred. For purposes of the departmental transfer list, the UConn Health Center will be considered a separate facility from the Hartford Correctional Center and the Central Transportation Unit (specifically the positions

of the shift supervisors in the base locations, but not the positions in the specialized or administrative assignments) will be considered as a correctional facility for purposes of the departmental transfer list.

An employee must have completed the working test period in a bargaining unit classification to be eligible to be transferred to other facilities.

Employees are not eligible for transfer under this Article if they have been granted, rejected or constructively rejected a prior transfer within the previous six (6) month period.

Employees may remove their names from the transfer list at any time prior to being notified of an opening at the facility of their choice. The employee must notify the employer within twenty-four (24) hours upon receipt of an offer of transfer of his or her intention to accept or reject such offer. Failure to comply with this provision shall be considered a constructive rejection of the offer of transfer.

An employee on workers compensation or medical or personal leave will be eligible to transfer to another facility under this procedure, provided that his/her return to work date is within thirty (30) calendar days of the offer of transfer.

Bargaining unit members will have the right to transfer to vacant positions before these positions are filled from outside the bargaining unit.

For positions that will be vacant for six (6) months or less, only bargaining unit members assigned to the same facility will be eligible for transfer from the departmental transfer list.

If a vacancy occurs in a line supervisor position and the vacancy is expected to be longer than six (6) months, all line supervisors in the bargaining unit are eligible for transfer from the departmental transfer list.

If two or more line supervisors are on the departmental transfer list for the vacant position of either less than six (6) months or more than six (6) months, the position will be assigned to the most senior employee as defined in Section One of the Article pertaining to seniority.

Seniority will be the determining factor in the assignment to vacant positions when all other factors are equal. Management retains the right to determine when all other factors are equal, if a line supervisor is denied his/her bid to a vacant position, he/she shall receive a written explanation of the reason for the denial. The Union may grieve a pattern of denial of assignment to vacant positions by seniority.

If and when the employee whose absence created the vacancy returns to his/her

position, the employee who filled the vacancy shall return to his/her previous assignment.

The Union and the State may agree to a particular facility or shift transfer in special circumstances. In such case, a written agreement shall be reached by the parties and signed by the Union Executive Director and the Agency Human Resources Director.

Section 8. Except as otherwise provided for in this Agreement, all shift and facility assignments are permanent and may not be changed involuntarily.

Section 9. The Captains and Counselor Supervisors shall be covered by Section 6 and Section 8 but shall not be covered by Section 7 of this Article.

In the case of voluntary transfers and voluntary transfer requests concerning Captains and Counselor Supervisors, the following shall apply:

Captains and Counselor Supervisors may request a transfer to another facility but not to a specific assignment at another facility.

An employee requesting a transfer to another facility must put his or her name on the departmental transfer list in accordance with departmental procedures in order to be considered. Such departmental list will be updated quarterly.

As the correctional facilities develop vacancies in a position occupied by either a Captain or a Counselor Supervisor, the Employer shall transfer Captains and Counselor Supervisors according to the following procedure.

When a vacancy at the facility occurs, the remaining facility Captains and Counselor Supervisors assignments may be reevaluated and changed at the discretion of the Unit Administrator including the classification of the vacant position to be filled before the transfer list is utilized. If any change results in a shift change, seniority shall govern any shift change as to captains who are shift commanders at the facility. Then, the applicable transfer list will be utilized to fill the vacancy. Notwithstanding the above, no captain who is serving as a shift commander at the facility may be involuntarily placed on another shift as a result of the process to fill the vacancy at the facility under this section.

Thus, seniority will be the determining factor in the assignment to vacant positions when all other factors are equal. Management, however, retains the right to determine when all other factors are equal and if the senior employee on the transfer list is denied a transfer to the vacant position, he or she shall receive a written explanation of the reason for the denial and the Union may only grieve a pattern of denials for transfers to vacant positions by seniority.

An employee must have completed the working test period in a bargaining unit

classification to be eligible to be transferred to other facilities.

Employees are not eligible for transfer under this section if they have been granted, rejected or constructively rejected a prior transfer within the previous six (6) month period.

Employees may remove their names from the transfer list at any time prior to being notified of an opening at the facility of their choice. The employee must notify the employer within twenty-four (24) hours upon receipt of an offer of transfer of his or her intention to accept or reject such offer. Failure to comply with this provision shall be considered a constructive rejection of the offer of transfer.

An employee on workers compensation or medical or personal leave will be eligible to transfer to another facility under this procedure, provided that his or her return to work date is within ninety (90) calendar days of the offer of transfer.

Bargaining unit members will have the right to transfer to vacant positions before these positions are filled from outside the bargaining unit.

For positions that will be vacant for six (6) months or less, only bargaining unit members assigned to the same facility will be eligible for transfer from the departmental transfer list.

If a vacancy occurs and the vacancy is expected to be longer than six(6) months, all Captains and Counselor Supervisors in the bargaining unit are eligible for transfer from the departmental transfer list in accordance with the provisions of this section.

If two or more Captains or Counselor Supervisors are on the departmental transfer list for the vacant position of either less than six (6) months or more than six (6) months, the position will be assigned to the most senior employee as defined in Section One of the Article pertaining to seniority.

The Union and the State may agree to a particular facility transfer in special circumstances. In such case, a written agreement shall be reached by the parties and signed by the Union Executive Director and the Agency Human Resources Director.

Section 10. Dual Assignments. For employees who are assigned to multiple facilities, the employee's official work site shall be the facility at which the employee is assigned to work the majority of the work week. Employees shall be eligible for mileage reimbursement for traveling between the sites during the work day and for the additional mileage for reporting to the secondary sites (i.e. mileage in excess of that necessary for reporting to the official work site).

Overview

The dispute is about the order in which things are supposed to happen. Newly modified Article 20 addresses (among other things) voluntary transfers among shifts within a facility (vertical transfers among first, second and third shifts) and voluntary transfers among different facilities (lateral transfers, which may or may not also involve a change of shift). Under Article 20 there are now two entities: a “departmental transfer list,” which has been in existence for many years, and a “shift transfer list,” which is brand new in this contract. The introduction into the collective bargaining agreement of the shift transfer list came about by Arbitrator Thomas Rinaldo’s interest arbitration award of April 6, 2009, wherein he selected the State’s Last Best Offer on what is now known as “Issue #11.” The dispute, simply, is whether, when a vacancy is to be filled in a correctional facility, Article 20 contemplates that the State will first utilize the shift transfer list to enable an eligible facility-based unit member to move to a better shift *before* the State offers the position to an eligible person on the departmental transfer list. That is what the State intended in its LBO to Arbitrator Rinaldo. The Union contends that the State’s reading of Article 20, even if intended by the State, a) is not supported by the language of Article 20; b) was never communicated to the Union during negotiations; and c) is at odds with written agreements made at negotiations to continue the departmental transfer procedure as it was.

The “what comes first” question is not a small matter, as will be discussed. In brief, the State’s reading elevates facility-based classification seniority over department-based

classification seniority for purposes of filling permanent vacancies. The Union's reading preserves department-based classification seniority for such purposes.

Background

The Parties

The Employer here is the State of Connecticut on behalf of the State's Department of Correction. There are 18 DOC facilities in the State. Some are quite near each other; others are a long distance apart.

The bargaining unit is CSEA, SEIU, Local 2001(NP-8). The unit was first certified in 2001, and comprised employees in the titles Correctional Lieutenant and Correctional Training Officer. Within the Lieutenant classification, there is a class called "Line Supervisors." These are lieutenants serving as shift supervisors (also referred to as Line Lieutenants) on the three shifts. Line Supervisors work a 5/3 schedule (five days on, three days off). Other Lieutenants are essentially "administrative" Lieutenants. They work a 5/2 schedule in administrative roles.

In 2005, the unit was modified to include Correctional Captains and Correctional Counselor Supervisors. Correctional Captains serve as Shift Commanders on the three shifts. At present, all Correctional Counselor Supervisors work the first shift.²

² Captains and Counselor Supervisors are different classifications, but they have equal rank, and are paid at the same level.

The Evolution of Article 20

The parties' first collective bargaining agreement was finalized in 2003 following an Interest Arbitration conducted by Arbitrator Barbara Zausner. In her interest arbitration award (for the period December 3, 2001 through June 30, 2005), Arbitrator Zausner selected the Union's LBOs in two areas of relevance to today's dispute. One such area involved a "bid shift" program for Line Supervisors. The bid shift program provided for a facility by facility election once every 336³ days when, by seniority (with some protective caveats for management) Line Supervisors chose the shift within their facility that they wished to work on. For the most part, Line Supervisors with the greatest seniority would opt for the most desirable day shift. Once the shift assignments were bid, they could not be changed involuntarily until the next bid.

The other area of relevance involved the filling of Line Supervisor vacancies. Zausner recognized two types of vacancies – ones lasting more than 6 months (deemed permanent); and ones intended to last 6 months or less (deemed temporary). Permanent vacancies are typically those where an employee retires or quits. Temporary vacancies are typically those where an employee is out on a disability or other leave. The Zausner award established that for positions that would be vacant for 6 months or less, bidding would be limited to facility-assigned bargaining unit members and would go by seniority (all other factors being equal).⁴ The filling of permanent vacancies, according to the Zausner award, would be open for bidding by seniority (all other factors being equal) by *all* Line Supervisors in the bargaining unit.

³ The number coincided with the conclusion of six 56-day scheduling cycles.

⁴ Once the "permanent" person returned from leave, the line supervisor filling the temporary vacancy would return to his/her previous shift.

All the language pertaining to the bid shift program and temporary and permanent transfers was housed in original Article 20 of the parties' collective bargaining agreement.

Following the Zausner award, the Employer developed what had been referred to in the Union's LBO as a "departmental transfer list." Line Supervisors who wished to transfer from one facility to another placed their names and preferences on the list. When permanent vacancies arose, the Employer consulted the transfer list and offered opportunities to transfer in accordance with the terms established in the Zausner award. In accordance with the LBO, the departmental list was updated quarterly.

In 2005, the parties went to Interest Arbitration over the terms and conditions applicable to Correctional Lieutenants and Correctional Training Officers. The positions of Captain and Correctional Counselor Supervisor had recently been added to the unit, but by agreement, the parties deferred matters relative to the accreted positions to a later process. In March 2006, Arbitrator Joel Weisblatt issued his award covering Lieutenants and Training Officers (for a duration of July 2005 through June 30, 2008). There were *no* issues brought to Weisblatt relative to then-Article 20. In the negotiations process *prior to* arbitration, the parties themselves agreed to certain modifications in the areas of the bid shift program and transfers.

Of significance in the bid shift area, the parties agreed to conduct the bid shift once per year rather than once every 336 days. Of significance in the transfer area, the parties

agreed that lieutenants would be able to indicate on the departmental transfer list the shift or shifts they would wish to transfer to. So, for example, if a line supervisor at the York facility wished to transfer to Willard-Cybulski, he/she could indicate on the departmental transfer list a willingness to accept transfer to just the first shift, or as a second choice, a willingness to accept transfer there on the second shift, or as a third choice, a willingness to accept transfer there on the third shift. Similarly, if a line supervisor on third shift at York wished to remain at York but move to a different shift, he/she could indicate on the departmental transfer list a desire to transfer to York's first shift, and/or York's second shift. This integrated departmental transfer list was thereafter used during the year to fill permanent vacancies.⁵ Union President Catherine Osten testified that when it came to filling so-called temporary vacancies (from within the same facility), administrators generally did not even consult the departmental transfer list because so few individuals were involved.⁶

In late 2006, the parties returned to Arbitrator Weisblatt in an Interest Arbitration process for terms and conditions applicable to the accreted Captains and Counselor Supervisors in the NP-8 bargaining unit. Of relevance here, the Union was seeking to include Captains working as Shift Commanders in the bid shift program as set forth in the 2005-2008 contract. In addition, the Union proposed to include Captains and Counselor Supervisors

⁵ As of the 2005 contract, a "permanent" transfer is defined as one where the intent is that the employee will not return to his/her previous facility. All other transfers are considered "temporary." The article still has references to the more than six months/six months or less periods, which by and large correspond to permanent/temporary vacancies.

⁶ Ms. Osten acknowledged in her testimony that the Department is not under an obligation to fill a temporary vacancy. The Department could leave the original shift open; the Department could move a lieutenant from another shift and leave that lieutenant's shift open; the Department could promote a correction officer to temporary service in a higher class to function as a lieutenant. None of these points is at issue here.

in the previously established departmental transfer procedures. The State was opposed to including Shift Commanders in the bid shift program; it was similarly opposed to providing transfer rights to Captains and Counselor Supervisors.

In April 2007, Arbitrator Weisblatt issued his award. He selected the Union's LBO regarding adding Captains working as Shift Commanders to the annual bid shift program. He selected the State's LBO on the transfer issue. The 2005-2008 "merged" collective bargaining agreement covering the whole NP-8 unit states explicitly that Captains working as Shift Commanders shall participate within their classification in the bid shift program; the contract also states explicitly that Captains and Counselor Supervisors are not covered by the voluntary transfer provisions applicable to Line Supervisors.

The parties entered negotiations in late 2007 for a successor to the 2005-2008 collective bargaining agreement. Among its proposals, the State presented the Union a detailed proposal for deleting the bid shift program and replacing it with a "shift transfer list" to be applicable to Line Supervisors and Captains working as Shift Commanders. The main features of the State's initial proposal were as follows:

Each facility shall maintain a shift transfer list which shall be updated on a semi-annual basis (January 1 and July 1). Seniority will be applied as the determining factor in shift assignment for line supervisors when all other factors are equal. Management retains the right to determine when all other factors are equal. If a Line Supervisor is denied his/her shift preference under this section, he/she shall receive a written explanation of the reason for denial. The Union may grieve a pattern of denials of shift assignment by seniority...

...Captains working as Shift Commanders shall participate within their classification in the shift transfer program...

The State's proposal adopted a number of the provisions that had been applicable to the bid shift program (i.e., the bases for denying an employee a shift transfer) but changed the reference from "bid shift" to "shift transfer." The Union was opposed to the State's proposal and it sought to retain the bid shift program.

Among its proposals, the Union presented the State with a detailed transfer procedure to be applicable to Captains and Counselor Supervisors. The State was opposed to the Union's transfer proposal.

In the course of their negotiations, the parties agreed that there would be *no change* in certain portions of Article 20. Of note for purposes of the current dispute are certain of the transfer provisions in Article 20 that the parties agreed to continue for Line Supervisors:⁷

In the case of voluntary transfers and voluntary transfer requests, the following shall apply:

An employee requesting transfer to another facility and/or another shift must put his/her name on the departmental transfer list in accordance with the departmental procedures in order to be considered...

...

As the correctional facilities develop vacancies, the senior employee in the same classification whose name appears on the departmental transfer list for a particular facility will be transferred...

...

Bargaining unit members will have the right to transfer to vacant positions before these positions are filled from outside the bargaining unit.

⁷ By 2007, Article 20 was a composite of provisions awarded by Zausner, modifications agreed to by the parties in subsequent negotiations, and provisions awarded by Weisblatt.

For positions that will be vacant for six (6) months or less, only bargaining unit members assigned to the same facility will be eligible for transfer from the departmental transfer list.

If a vacancy occurs in a line supervisor position and the vacancy is expected to be longer than six (6) months, all line supervisors in the bargaining unit are eligible for transfer from the departmental transfer list.

If two or more line supervisors are on the departmental transfer list for the vacant position of either less than six (6) months or more than six (6) months, the position will be assigned to the most senior employee as defined in Section One of the Article pertaining to seniority.⁸

Seniority will be the determining factor in the assignment to vacant positions when all other factors are equal...

The parties eventually reached impasse on numerous unresolved issues, including the State's proposal to substitute a shift transfer program in place of the bid shift program and the Union's proposal to extend transfer rights to Captains and Counselor Supervisors.

The parties participated in an Interest Arbitration proceeding before Arbitrator Thomas Rinaldo beginning in February 2008. Arbitrator Rinaldo held seven days of hearing and received LBOs on 49 unresolved issues, including the State's final proposal to delete the bid shift program and to replace it with the shift transfer program (Issue #11) and the Union's final proposal for a transfer program for Captains and Counselor Supervisors (Issue #15). In its final position on transfers for Captains and Counselor Supervisors, the Union had modified its initial proposal so as to afford the facility Warden latitude to re-evaluate and change assignments before utilizing the departmental transfer list.

⁸ In the 2005-2008 collective bargaining agreement, the article pertaining to seniority was Article 15. Section 1 defined seniority as follows: "Seniority will be considered...as total service in an employee's current job classification."

Arbitrator Rinaldo selected the State's LBO on Issue #11, and the Union's LBO on issue #15. The result is the "new" Article 20.

The Disagreement

Not long after the issuance of the Rinaldo award, DOC Director of Human Resources Dan Callahan and Union President Catherine Osten were conversing about the filling of vacancies left by a spate of recent retirements. In the course of that conversation, Mr. Callahan and Ms. Osten realized that they had different understandings about the new shift transfer mechanism awarded in the Rinaldo arbitration. Though the disagreement was as simple as "What comes first?" the impact of the question would have obvious repercussions across the bargaining unit. Whereas before, a vacancy in a first-shift Line Supervisor position would be offered to the most senior Lieutenant *in the bargaining unit* who had indicated a desire for such a transfer on the departmental transfer list, post-Rinaldo, in Mr. Callahan's view, the first-shift vacancy would first be offered to the most senior Lieutenant *in the facility* who had indicated a desire for such shift transfer, and the resulting vacancy on the arguably less desirable shift would then be filled via the departmental transfer list.

As already indicated, the parties agreed to maintain status quo vis-à-vis old Article 20's transfer procedure pending the outcome of this arbitration. Following the hearing of September 2, where Ms. Osten, Mr. Callahan, CSEA Executive Director Robert Rinker and CSEA Vice-President Mark Verdone testified, the parties submitted briefs and reply

briefs. They seek a prospective ruling on how vacancies for Line Lieutenants and Captains and Counselor Supervisors are to be filled.

The Parties' Positions

The Union contends that there is nothing in the language of Article 20 or in the parties' bargaining process or in the arbitration leading to Article 20 that permits the State to eclipse or reduce the established transfer rights of bargaining unit members. The State's LBO in Issue #11 was written to eliminate the annual Bid Shift Program and to institute an individual, case-by-case opportunity for employees to bid on shift vacancies. The State never explained that its intent was to inject a step into the facility transfer procedures that would, in effect, dramatically undercut the prior agreements. The State's proposed application of the shift transfer list would lead to an unintended forfeiture of important bargaining unit member rights.

The State contends that the changes to Article 20 awarded by Rinaldo in Issue #11 provide that Line Supervisor or Shift Commander vacancies would first be filled by seniority from the lieutenants or shift commanders in the same facility who have indicated their interest in changing to the particular shift. Once that process is completed, or if there are no such interested in-facility unit members, then the remaining vacancy would be filled by use of the department transfer list. The State's intent was made clear to the Union in negotiations and at Interest Arbitration, and Arbitrator Rinaldo was explicit in his comprehension and endorsement of the State's goal. Under normal

contract interpretation principles, the State's interpretation of new Article 20 must be sustained.

Discussion

There was some discussion at the outset of the arbitration hearing as to whether, given the phrasing of the issue and the unusual route the dispute took to reach arbitration, the parties regarded this case as a rights arbitration or as an interest arbitration. If it's the former, the task is strictly a matter of interpreting new Article 20. If it's the latter, the task is to apply the statutory criteria to determine what the process "ought to be." The Union characterized this proceeding as something of a "hybrid," that is, "an attempt to solve a problem before it occurs." The State more accurately characterized the proceeding as a "proactive grievance arbitration, an anticipatory one." Now that I have heard the matter and read the parties' briefs and reply briefs, I agree that while the joint request for guidance invites a pragmatic approach to the inquiry, the dispute is essentially one of contract interpretation.

As with any ordinary contract interpretation arbitration, I begin with the contract language itself.⁹

The Language of Article 20

The language of Article 20, on its face, supports the Union's position. A person reading the contract without information about the evolution of the provision, the bargaining

⁹ For ease of reference, I will discuss the issue in the context of Line Supervisors. The analysis extends equally, however, to Captains and Counselor Supervisors, though of course the facility transfer process for Captains and Counselor Supervisors is different from and more restrictive than that of Line Supervisors.

history and Arbitrator Rinaldo's explication of his 2009 award would note the existence of something called a "shift transfer program" but would have no specific information as to its relationship, if any, to the Article's "Facility and Schedule Transfers" provisions. There is nothing in the Shift Transfer language that tells the reader when and how the shift transfer program is supposed to work. The shift transfer language does not address vacancies *at all*. There is nothing in the shift transfer language to indicate that when permanent vacancies occur, the first thing called for under Article 20 is a reshuffling of personnel within the facility before tapping the departmental transfer list. That Article 20 opens with a description of the shift transfer list cannot be regarded as a signal that the filling of a permanent vacancy must begin with a shift transfer opportunity for employees in the affected facility.

While Article 20 is silent as to when and how the shift transfer list should operate, the Article is perfectly explicit as to how the departmental transfer list operates. Under the heading "Facility and Schedule Transfers," Article 20, Section 7 states that "an employee requesting transfer to another facility and/or another shift must put his/her name on the departmental transfer list." The language continues: "As the correctional facilities develop vacancies, the senior employee in the same classification whose name appears on the departmental transfer list for a particular facility will be transferred." This language instructs that as vacancies develop, they will be filled by the senior eligible employee on the departmental transfer list. There can be no dispute about the meaning of the word "senior" here; Section 7 expressly incorporates the meaning of seniority set forth in the contract's Seniority provision, and that is classification seniority, not facility seniority.

Section 7 states in perfectly clear language that “if a vacancy occurs in a line supervisor position and the vacancy is expected to be longer than six (6) months, all line supervisors in the bargaining unit are eligible for transfer from the departmental transfer list.” There is nothing in the shift transfer language that invites or permits a narrowing of Section 7’s guarantees.

In short, then, without more, one really is at a loss as to how the parties intended to make use of the shift transfer language. A shift transfer list could certainly be useful in the filling of *temporary* vacancies, since those are required to be filled from within the facility.¹⁰ A shift transfer list could also be useful if the departmental list fails to produce a candidate for transfer. The words themselves are not ambiguous, but the parties’ shared intentions, to the extent there were any, are indecipherable.

Accordingly, it is appropriate to expand the lens to look beyond the words to external factors.

Negotiations for the 2008-2012 Contract

From the parties’ first collective bargaining agreement until the Rinaldo award, Article 20 housed two significant and independent benefits for unit members. There was the Bid Shift Program described earlier. That arrangement became the once-per-year event whereby individuals got to bid by seniority on their preferred shift within their own facility. The bid shift program had nothing to do with vacancies; it was an annual

¹⁰ Even in that regard, though, Section 7 directs that the departmental transfer list is the go-to document, but a shift transfer list *drawn from* the departmental transfer list for use in-house could contribute some operational efficiency.

reshuffling exercise. There was also the Facility and Schedule Transfer program. That system had everything to do with vacancies, and it provided, as already discussed, a unit-wide method of filling vacancies by means of a departmental transfer list. In 2005, the parties, by agreement, expanded the departmental transfer list to include inter and intra facility shift preferences.

The record indicates that a key objective of the State in the negotiations for the current contract was the elimination of the annual bid shift program. Individual facilities found the annual exercise cumbersome, and the State made that point to the Union at the bargaining table. The State told the Union during negotiations that in place of the bid shift, it wished to implement the same system used for employees covered by the NP-4 contract. At interest arbitration, these goals were reiterated.

The Union's negotiators fully understood what the State meant by eliminating the bid shift program, and the Union was vigorously opposed. What was seemingly not so fully understood by the Union was the State's articulated desire to have the NP-8 unit adopt the NP-4 system. It appears that at no point during negotiations or in testimony before Arbitrator Rinaldo did the State expressly clarify that the substitution of a Shift Transfer Program for the Bid Shift Program would result in a substantial change in the existing Facility and Schedule Transfer Program. Other than the reference to the NP-4 shift transfer procedure, the actual implications of which were apparently lost on the Union, there was nothing in the State's written proposal or the discussions at the bargaining table or the testimony before Rinaldo to forewarn the Union of the intended impact of its Shift

Transfer language.¹¹ The language was billed as a “replacement” for a procedure that theretofore had nothing to do with vacancies, yet the State intended the new language to have everything to do with vacancies. It would, in practice, dramatically modify the Facility and Schedule Transfers provisions of Article 20 by inserting a preferential transfer opportunity for employees in the facility where the vacancies occurred. Until the conversation between President Osten and H.R. Director Callahan, the Union had not grasped the possible import of the State’s victory on Issue #11.

The Rinaldo Award

The State argues that the only reason this dispute erupted after Arbitrator Rinaldo’s award is that the Union was not paying attention to the State’s position. The Union argues that the only reason this dispute erupted is that during bargaining the State never pointed out the intended interplay between its proposed shift transfer language and existing departmental transfer rights. There is perhaps some truth to both observations. What cannot be denied, however, is that Arbitrator Rinaldo did fully grasp what the State intended by its LBO on Issue #11, and he awarded it. Even if the State was less than explicit during bargaining and less than crystal clear in testimony before Rinaldo, its post-hearing brief spelled out in unmistakable terms what its LBO was intended to accomplish:

The State is proposing to eliminate the current Bid Shift Program and to replace it with a system in which vacancies are first filled by other employees in the same facility with consideration of seniority. The State’s proposal would mean that the same process of filling vacancies would be used in the NP-8 unit as exists in the Correction NP-4 unit.

¹¹ There is no suggestion here that the State was *hiding* anything. It is just that the focus was on the proposed elimination of the bid shift program and not on how the “replacement” program could modify other established contractual rights.

...The NP-4 contract does not have a bid shift program but instead each facility has a shift transfer process by which a vacant shift would first be offered to facility employees in the same job classification from other shifts based on seniority. The resulting vacancy (after facility shift transfers are made) would be filled by using the NP-4 facility transfer list or by promotion or new hire, considering the seniority language in that contract. The State's proposal would use that same system for the NP-8 positions, with the line lieutenants and captain/shift commanders at the facility able to change shifts to vacancies based on seniority. The remaining line lieutenant vacancy would be filled by the NP-8 facility transfer process or by promotion and the remaining captain/shift commander vacancy would be filled by the DOC reassignment list or by promotion.

The State's brief continued:

Mr. Callahan explained that the line lieutenant transfer process in the current NP-8 contract did not have any preference for employees of the same facility. He pointed out that there was a benefit to the facility in terms of continuity if employees familiar with the facility could advance to better shifts at the same facility...

Arbitrator Rinaldo agreed. He wrote:

According to the State, the system it proposes is one by which vacancies first are filled by other employees in the same facility with the consideration of seniority. The State claims that its proposal would result in the parties having the same process for filling vacancies that now exists in the Correction NP-4 Unit.

The State points to the testimony of Dan Callahan and his explanation of the NP-4 system as well as the fact that, under the Parties' current system, the line Lieutenant transfer process does not have any preference for employees in the same facility. The State relies on Mr. Callahan's explanation that a benefit would result to the facility if employees familiar with the facility were able to advance to better shifts in the same facility. As it stands now, the State observes, a more senior Lieutenant in another facility has the ability to claim a preferential shift at a different facility and a long term employee may be obligated to seek a facility transfer simply to obtain a chance at a better shift...

...The State insists that its proposal "continues seniority as the deciding factor in determining shift assignments but limits the initial pool of candidates to those working at the Facility."

In awarding the State's LBO, Rinaldo wrote that the State's position was justified:

By eliminating the Bid Shift Program and replacing it with a system that would find vacancies first filled by other employees in the same facility, the Parties would be following the same process of filling shift vacancies currently used in the NP-4 unit.

It's doubtful that Arbitrator Rinaldo did a reality check of the State's LBO on Issue #11 against existing provisions in the Facility and Schedule Transfers section that the parties had agreed prior to arbitration to continue unchanged. If the potential disagreement between the parties had been at the forefront of the arbitration process, the arbitrator would have dealt with it. But since the disagreement over the interplay between shift transfer and facility transfer hadn't even percolated up to the Union's consciousness, Rinaldo, dealing with 49 unresolved issues, most likely did not consider questions that were not specifically asked.

Interestingly, though, Rinaldo did award the Union its LBO on Issue #15, which created transfer rights for Captains and Counselor Supervisors. Rinaldo endorsed the notion that "Captains and Counselor Supervisors...are entitled to a process by which transfers can be sought based on seniority without the State forfeiting any operational concerns." He found that the Union's proposed transfer procedure, which for Captains and Counselors differed from the Line Supervisors' procedure by permitting the Warden to adjust assignments before the transfer list is utilized, adequately protected the State's operational concerns. Thus, while Rinaldo would not likely have anticipated the conflict that would later emerge between the parties, he did award new contract language

covering Captains/Counselors that mirrored existing language covering Lieutenants, namely:

For positions that will be vacant for six (6) months or less, only bargaining unit members assigned to the same facility will be eligible for transfer from the departmental transfer list.

If a vacancy occurs and the vacancy is expected to be longer than six (6) months, all Captains and Counselor Supervisors in the bargaining unit are eligible for transfer from the departmental transfer list in accordance with the provisions of this section.

If two or more Captains or Counselor Supervisors are on the departmental transfer list for the vacant position of either less than six (6) months or more than six (6) months, the position will be assigned to the most senior employee as defined in Section One of the Article pertaining to seniority.

This newly awarded Article 20 language is the very same language previously discussed (in connection with Section 7) that provides without provisos or other limiting conditions that for vacancies greater than six months (meaning, essentially, permanent vacancies), all bargaining unit members in the classification are eligible for transfer from the departmental transfer list.¹²

If Rinaldo detected the potential for future discord by his awards in Issue #11 and Issue #15, he did not mention it.

Where Do We Go From Here?

There are merits to both parties' positions here. It is not a matter of simply considering the new language of Article 20, nor is it a matter of simply considering Rinaldo's award on Issue #11. The question of where we go from here must take into consideration the whole gestalt.

¹² It is not clear whether there are separate departmental transfer lists for the different classifications.

Overall, the following considerations favor the Union:

1. As written, Article 20 Section 7 contains a transfer procedure for Line Supervisors that provides department-wide transfer rights for both facility transfers and shift transfers. Although the State prevailed in its LBO on Issue #11, the language that the parties previously agreed would remain must preserve those explicit department-wide transfer rights, and there is no language in the new shift transfer provision to compel a modification of those rights.
2. The Rinaldo award on Issue #15 (new Section 9) contains a transfer procedure for Captains and Counselor Supervisors that is similar in many respects to the procedure set forth in Section 7 for Lieutenants. Rinaldo expressly awarded language that provides department-wide eligibility (subject to the Warden's discretion to make assignment changes) in the filling of Captain/Counselor Supervisor vacancies expected to be longer than six months.
3. There is nothing actually ambiguous about the language of Article 20. There are no overt conflicts between the wording of the Shift Transfer provisions and the wording of the Facility and Schedule Transfer provisions, because the Shift Transfer provisions are silent as to how or when the Shift Transfer Program is supposed to operate, whereas the Facility and Schedule Transfer provisions are specific as to how vacancies are to be filled.
4. To the extent the new shift transfer language is latently ambiguous, the ambiguity should be construed against the drafter, which is the State. Moreover, where the language can be applied in two ways, one of which preserves existing contract rights and the other of which detracts or modifies existing contract rights, the

former application is preferable absent clear mutual intent to the contrary. In this case, there was no mutual intent; the provision was awarded by the Interest Arbitrator.

5. The parties apparently had no discussion across the table about how the State envisioned its shift transfer proposal would modify the existing department transfer procedure for Lieutenants.
6. The effect of the so-called “replacement” for the bid shift program (which had nothing to do with vacancies) upon the previously existing vacancy-filling procedures constitutes a dramatic departure from status quo and would have a significant impact on the seniority rights of unit members. Such a change in the system should not come about as an unannounced by-product of language characterized as a replacement for the bid shift program.
7. The lack of clarity as to the intended impact of the shift transfer language prior to the State’s post-hearing brief to Rinaldo deprived the Union of a meaningful opportunity to argue to the arbitrator the importance of maintaining department-wide rights as they previously existed. The Union also had no opportunity to present witness testimony on that particular question.

Overall, the following considerations favor the State:

1. Arbitrator Rinaldo issued an LBO award on Issue #11 in which he not only accepted the State’s proposed language regarding the shift transfer program, but he articulated in his written decision his understanding as to how the language would be implemented. His understanding is in accord with the State’s intent,

- and was gleaned directly from the State's explanation furnished in its post-hearing brief.
2. Rinaldo's award on Issue #15 is less conspicuously at odds with his award on Issue #11 because the Union's LBO for transfer rights for Captains/Counselor Supervisors did not have the same reference to requests to transfer to "another shift" that appears in the retained language of Section 7 ("An employee requesting transfer to another facility and/or another shift..."). The Union's LBO on Issue #15, while it has important departmental transfer rights embedded in it, is couched in terms of transfers "to another facility" and makes no specific mention of shifts.
 3. The Union's proposed application of the State's LBO on Issue #11 would have minimal value in the collective bargaining agreement. Under the Union's interpretation, if an employee places his/her name on a shift transfer list but *not* on the departmental transfer list, the employee will not be considered for a shift transfer to a vacant permanent position until the departmental list is exhausted. If the employee places his/her name on *both* lists, there is no need to get to the shift transfer list because the departmental list will take care of the shift transfer within a facility. The main value of the shift transfer list will be in filling temporary vacancies.

The Final Analysis

In the final analysis, I find that the language of the contract must be applied for the duration of the agreement as it reads, with permanent vacancies filled via the departmental transfer list as before (without first applying the shift transfer provision).

Under all the unusual circumstances of this case, Arbitrator Rinaldo's 'intent' should not be read into the contract provision when that intent is neither expressed nor discernible in any fashion in the contract language. The Union must be afforded a meaningful opportunity to address the substantive merits of the two-stage transfer procedure contemplated by the State and derivatively intended by Rinaldo without incurring the interim "harm" that would come by implementing the State's vision during this contract term. Because the intended linkage between the shift transfer program and the existing departmental transfer program was not plainly communicated until the State's post-hearing brief, the Union was not in a position to present witness testimony to the arbitrator, modify its own LBO, or educate the arbitrator as to how and why the State's LBO would disturb long-held and otherwise protected seniority rights.

The State, though, is entitled to some benefit in having prevailed on Issue #11. Although the language of Article 20, for the reasons discussed, supports the Union's interpretation, it is significant that Rinaldo approved of the State's desire to afford preference for vacancies to employees in the classification within a facility (provided they have so indicated on the shift transfer list) before offering transfer opportunities to employees in other facilities.

I direct, therefore, that the status quo currently being observed relative to the filling of vacancies continue for the duration of this contract term. However, at the next round of bargaining, in light of Arbitrator Rinaldo's clearly stated endorsement of the State's position, the State may well argue that the prior Interest Arbitrator has already applied the

statutory factors and found that the vacancy-filling procedure should afford preference in the first instance to employees within a facility.

A Separate Issue


As this dispute demonstrates, even the most carefully drafted language can lead to disagreements about how it should be implemented. In the course of this arbitration, an altogether different disagreement between the parties seems to have surfaced: the question of how many “reassignments” a Warden is free to make before filling a vacancy from the statewide transfer list of Captains and Counselor Supervisors. The Union says one; the State says there is nothing in the language to limit the Warden’s discretion so long as no captain is involuntarily changed to another shift.

Not only was this disagreement *not* the dispute that was brought to this proceeding, but the parties’ disagreement about it is not even reflected in the transcript of the hearing because it occurred in off-the-record colloquy. The State addressed the issue in its post-hearing brief, and the Union responded in its reply brief, but no evidence was adduced or testimony presented to enable me to speak with authority. Moreover, as the State acknowledged, it is a disagreement that may never actually materialize into a controversy. Therefore, I offer no judgment on the matter.

Award

The process for filling vacancies at correctional facilities for Line Lieutenants and for Captains and Counselor Supervisors shall be as follows:

Until changed by a successor agreement, the status quo vis-à-vis the filling of vacancies from departmental transfer lists, as set forth in §7 and §9 of Article 20, shall continue. The shift transfer list may be utilized as a resource for filling temporary vacancies. It may be used for filling a permanent vacancy only after the departmental transfer list has been exhausted.



Roberta Golick, Esq.
Arbitrator

Date: January 12, 2010