

#795

In The Matter of the Arbitration

OPINION AND AWARD
Cross Shift Relief Matter

-between-

Ohio Civil Service Employees
Association/AFSCME, Local 11

-and-

The State of Ohio,
Department of Rehabilitation
and Correction

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE EMPLOYER: Michael P. Duco
Office of Collective Bargaining
State of Ohio
100 East Broad Street, 18th Floor
Columbus, Ohio 43215

Also present: Kate Stires, 2nd Chair
Labor Relations Specialist

Witnesses: Teri Decker Terry Collins
Eric Dahlberg

FOR THE UNION: George L. Yerkes
OCSEA Staff Representative
390 Worthington Road, Suite A
Westerville, Ohio 43085

Also present: Michael Hill, 2nd Chair
OCSEA Staff Representative

Witnesses: Michael Hill Ronald Sixt
Tim Roberts David Slone
Tim Jones Tim Shafer

FACTUAL BACKGROUND:

The current contract became effective March 1, 2000, and the agency specific portion of the contract for the Department of Rehabilitation and Correction contains certain mandates that the Pick-A-Post Oversight Committee had to follow. One required that the Committee meet monthly during the term of the agreement. The Committee composed of six Employer and six Union representatives was co-chaired by G. Yerkes (Union) and T. Decker (Employer).

The Committee began the task of discussing the parameters to be followed by local committees in reaching local Pick-A-Post agreements for different institutions. The purpose of setting the parameters was to make certain local agreements comply with the agency specific portion of the Contract, and also to permit the Oversight Committee to acquit itself of its responsibility to review and approve the local agreements.

The parameters were set forth in a three-page document signed by Decker and Yerkes on May 23, 2000. The introduction noted that the "following parameters were developed by the Pick-A-Post Oversight Committee and must be used by the local committee to develop the Pick-A-Post Agreement for your institution." The introduction continued by stating verbatim some of the requirements set forth in the agency specific portion of the contract applicable to Pick-A-Post. Finally, the document contained definitions of "Relief" and "Established Posts." The former was "an assignment wherein the officer is subject to being placed on any post . . .";

the latter, "the guaranteed number of posts that shall be filled on a weekly basis as established by the post allocation issued by the Office of Prisons."

The full three-page document did state that the number of relief slots should be designated by shift in the local agreement, and that while relief slots were not established posts, employees could bid into these slots. The document did not discuss the subject of the assignment of relief officers to posts.

Generally there are four shifts that operate a correction facility—first, second, third, and special duty shift. The first three shifts are for posts that are required around the clock, such as the housing unit. Generally, the first shift begins at 2:00 a.m. and ends at 10:00 a.m.; second shift, 10:00 a.m. to 6:00 p.m.; third shift, 6:00 p.m. to 2:00 a.m. The special duty shift relates to posts that are not required around the clock, such as mailroom or transportation of inmates. Generally, the special duty shift begins at 8:00 a.m. and ends at 4:00 p.m.

The subject of the assignment of relief officers to posts on other shifts had been discussed by the Oversight Committee as early as March 15, 2000, and at several other meetings. However, a particular draft on this subject was discussed by the Oversight Committee at its October 24-25, 2000 meetings. That discussion led to the adoption by the Committee of another document that was signed by each and every one of the twelve members of the Committee—six for the Union and six for the Ohio Department of

Rehabilitation and Correction. The portions of this document, together with its heading, that are relevant to this case are set forth below:

**ADDENDUM TO PICK-A-POST PARAMETERS
October 30, 2000**

The Department of Rehabilitation and Correction and OCSEA, Local 11 agree that the following language, regarding the usage of correction officers designated as **relief** and **utility**, will be added to all Pick-A-Post agreements.

1. Officers designated as **relief** will be utilized first on their assigned shift.
2. Any **relief** officer not utilized to fill in for an established post on their shift can be utilized to perform Correction Officer duties, as long as their hours are not changed.
3. Management agrees not to hold open an **established post**, at the beginning of the shift, to wait for a **relief** officer from another shift to arrive.
i.e: ♦ 1st shift starts at 6:00 a.m. and 4th starts at 8:00 a.m.
 - ♦ Established post on first has a call off
 - ♦ No **relief** available at 6:00 a.m.
 - ♦ At start of shift, all established posts must be filledTherefore, overtime must be called in this case to fill the **established post** on 1st shift.

....

For the ODRC

For OCSEA

Each member of the Committee signed his or her name on the lines following the name of the parties. The portions omitted from the document were the 4th, 5th, and 6th paragraphs, all of which were devoted to the subject of "utility." The parties at this arbitration agreed that their dispute (if any) concerning the

subject of "utility" is a separate case requiring a separate hearing and decision.

There then followed a fateful decision by the Oversight Committee. The Committee decided it would hold the distribution of the document entitled "Addendum to Pick-A-Post Parameters" to allow some institutions to reach Pick-A-Post local agreements under the document entitled "Pick-A-Post Parameters" without having to consider the Addendum. The Addendum deals with the extent to which a relief officer who has a relief slot on one shift may be assigned to a post on a different shift. The "parameters" document was based upon new language in the collective bargaining contract and institutions had trouble with the changeover in the contract on the Pick-A-Post process itself. Therefore, the Oversight Committee did not want to distribute the Addendum to Pick-A-Post Parameters to institutions that had a difficult time dealing with the "parameters" document. The Oversight Committee thought that the release of the "Addendum to Pick-A-Post Parameters" would further exacerbate the problem. The Oversight Committee had an approval function over local agreements and would disapprove any provision in the local agreement that conflicted with the unreleased "addendum." If local agreements were silent on the assignment of relief officers to posts on another shift, the Oversight Committee would approve the local agreement if the agreement met the requirements of the "parameters" document.

All local agreements, except one, were silent on assignment of relief officers to posts on a different shift. All but two local agreements had been approved by the Oversight Committee on January 3, 2001 and all local agreements had the "addendum" as terms of the local agreement.

On January 3, 2001, T. Decker, the Employer co-chair of the Oversight Committee, sent a memorandum to all wardens with copy to the members of the Oversight Committee, chapter presidents, local pick-a-post committees, Union staff representatives, and others. Attached to the memorandum was the document entitled "Addendum to Pick-A-Post Parameters" with a date of October 30, 2000 as part of the title. The document also displayed the handwritten signatures of all twelve Union members of the Oversight Committee.

The memorandum contained an explanation of why the addendum dated October 30, 2000 had not been distributed until January 3, 2001. It was also noted that it was not necessary to have the local pick-a-post committees sign the addendum as a term in the local agreement. It noted that the addendum had already been signed by the Oversight Committee and was, therefore, incorporated by reference into all local agreements.

Attached to this memo you will find an addendum to the original parameters, which was adopted by the oversight committee. The addendum was signed in late October 2000. It has not been distributed until now due to the delay by several prisons in the signing of local agreements. It is not necessary to sign the addendum locally to have it included in the local agreement. The addendum has already been signed by the oversight committee, and incorporated by reference into all agreements.

The author of the memorandum did not rely on the attached "Addendum to Pick-A-Post Parameters" to speak for itself. The memorandum stated:

I will not repeat verbatim the language contained in the addendum; however, probably the most important points to remember are as follows:

- ◆ Relief officers will first be used on their regular shift.
- ◆ Established posts must be filled at the beginning of the shift, either with the regular officer, a relief officer from the same shift, or overtime.

. . .

The portions omitted above refer to the subject of "utility."

Towards the end of February 2001, G. Yerkes, the Union co-chair of the Oversight Committee, raised the subject of T. Decker's memorandum dated January 3, 2001 during a telephone conversation with T. Decker. He noted the second bullet that appeared in Decker's memorandum concerning relief officers, and asked why the vacant established posts were not filled by overtime under this second bullet. Decker said the second bullet was a misstatement and that she would correct it.

Before T. Decker issued a corrective memorandum on March 12, 2001, an Oversight Committee meeting occurred on March 7. The subject of the assignment of relief officers to a post on a different shift was raised. T. Decker noted in an Email that "the Management members of the oversight committee were also not helpful in the discussion, as they sided with the Union in Management's not being able to use an officer from another shift."

On March 12, 2001, T. Decker sent a memorandum to wardens with copies to labor relations officers, majors, and BLR staff. Attached to the memorandum were a worksheet and a complete copy of the one-page document entitled "Addendum to Pick-A-Post Parameters" with the date October 30, 2000 in the heading. The memorandum noted that T. Decker distributed the addendum dated October 30, 2000 on January 3, 2001 as an attachment to a memorandum "detailing the specifics of the Addendum." T. Decker then acknowledged that "a misstatement was made regarding the interpretation of the addendum."

There then followed a specification of the language that was the center of the misstatement.

- ◆ Relief officers will first be used on their regular shift.
- ◆ Established posts must be filled at the beginning of the shift, either with the regular officer, a relief officer from the same shift, or overtime.

The memorandum notes that "the language under bullet 2 expands the addendum and is an incorrect statement." In bold print there then follows a sentence rescinding the underlined language. **"The underlined portion of the previous memorandum is hereby rescinded."**

The memorandum then recognizes the controversy that prompted this arbitration. It recognized that there was "a difference of opinion between OCSEA and the Department with regards to when and how a relief officer can be used to provide coverage for another shift." The memorandum then declares the position of Management. "Management's position is we must follow the Addendum language."

The parties defined the controversy in this case as state-wide in scope. Approximately 124 separately numbered grievances on the issue in this case were made part of the record. Provision has been made by the parties for other grievances on this issue not listed in this record to be resolved by this arbitration.

STIPULATED ISSUE:

To what extent, can Management use cross-shift relief, if any?

The parties also agreed that, should the grievance be sustained, the arbitrator should retain jurisdiction for the purpose of ascertaining the remedy. The stipulation stated:

If the grievance is sustained, the parties will jointly review the grievances encompassed in this arbitration, and determine the amount of overtime that should be paid according to the remedy requested. The parties will respectfully request the arbitrator retain jurisdiction for the purposes of this issue.

CONTENTIONS OF THE PARTIES:

To understand the contentions of the parties, it would be helpful to set the context in which this dispute arose. Each of the four shifts has a certain number of established posts—a guaranteed number of posts that must be filled on a weekly basis. In addition, there are a number of relief slots. An example was the local agreement made part of the record by the Union for the Oakwood Correctional Facility. The first shift had 16 established posts and 16 relief slots.

Officers who had bid for a relief slot on the first shift generally will fill vacant established posts on the first shift--vacant through such reasons as vacation or leaves or an officer

becomes ill during the shift. A vacancy can also occur when an officer calls in to report his planned absence for the shift. Generally, an institution has a 60 or 90-minute prior-to-shift call-in requirement. If an officer does not call in his planned absence prior to the 90 or 60 minutes before the shift, this is called a "late call-off."

The reason for the 90 or 60 minute call-in requirement was to permit a supervisor to examine the roster to see if a relief were available or, if not, call-in over time. Also, the local Chapter wanted to avoid mandated stay-over to cover vacancies.

A.) Union Position

The Union joined the Employer in considering the document entitled "Addendum to Pick-A-Post Parameters" to be an agreement between the parties. The Union argues, however, that the agreement is ambiguous and standards of interpretation should be applied to reach the following result: a relief officer may be assigned during his shift working hours to a post in a different shift in one of two instances. The first involves a correctional officer who leaves unexpectedly during the other shift. The second would involve a late call-off. "The 'line-in-the-sand' was drawn at the call-off period. It's quite simple, if there is a late call-off or a need during the shift for a true extra to be utilized on another shift, then that can be done." (Union post-hearing brief at 12).

The Union found ambiguity in the document in several ways. First, a definition section was not included and certain words such

as "cross-shift relief" and "true relief officer" were not defined.

A definition section is included in contracts to make language clear. With respect to the sentence after the number 1, it is clear that relief officers must be used first on their assigned shift, but the "language is cloudy on whether Cross-Shift can be accomplished." (Union post-hearing brief at 7).

With respect to the language after line number 2, there is no specific language that states that a relief officer can be used for Correction Officer duties on another shift as long as their hours are not changed. This must be inferred. Finally, the example set forth after line number 3 does little to clarify if and when Cross-Shift Relief is to be done.

Ambiguity can also be found in the fact that this document does not exhaustively list when cross-shift relief can be done. The material following line number 3 states when cross-shift relief cannot be done, but that is the extent of the document. Ambiguity can also be seen by virtue of the fact that Management felt the need to issue a second memorandum on January 3, 2001 to explain the language in the document.

According to the Union, prior to this document cross-shift relief could only occur for vacancies occurring during the shift. There is no practice of using cross-shift relief for late or early call offs. (Union post-hearing brief at 5).

T. Decker agreed that consensus was the way of reaching decision by the Oversight Committee. Nevertheless, by her own

Email, she noted that Employer representatives on the committee disagreed with her at the March 7, 2001 meeting.

Finally, the document is clearly explained by the T. Decker memorandum of January 3, 2001. The Union did agree to the use of cross-shift relief in this document. The sentence after bullet point 2 in the Decker memorandum of January 3, 2001 "could just have easily be read in the context of the Union's interpretation and fit quite nicely, especially when one adds the call-off period to the equation." (Union post-hearing brief at 12-13).

B.) Employer Position

The Employer joined the Union in accepting the document entitled "Addendum to Pick-A-Post Parameters" as an agreement between the parties. The Employer, however, argued that the agreement is not ambiguous. Therefore, any evidence of past practice or bargaining history do not come into play.

The language following the number 1 is clear. The word "first" should be given its reasonable and normal meaning, and that implies that relief officers can be used on other shifts. The written agreement makes no mention of limiting relief officers to their own shift, and it makes "no reference to the need to call overtime when a relief officer is available at the beginning of a shift and an established post is vacant due to a call-off or no show." (Employer post-hearing brief at 3).

The agreement does set two limits on the Employer's ability to use cross-shift relief. The agreement limits the Employer's

ability to change the hours for a relief officer when the Employer uses the relief officer to cover an established post on another shift. In addition, the agreement sets forth another limitation following the number 3. The expression of these two specific limitations excludes any other limitations by the standard of contract interpretation.

The Union relies on the Oversight Committee meeting of March 7, 2001 where the Union claims some of the Employer representatives agreed with the Union's interpretation of when cross-shift relief could be used. This "may all be accurate" (Employer post-hearing brief at 5), but the document finalized over five months prior to that meeting--October 30, 2000. The events of the March 7, 2001 meeting are not "the determining factor in this dispute."

The pre-contract (prior to October 30, 2000) negotiation activity or bargaining history "shows that there were discussions regarding the 90-minute call-in window as the trigger for cross-shift relief. However, it also shows that both the Union and Employer representatives signed an agreement that does not contain any such threshold or limitation." (Employer post-hearing brief at 6). The Union negotiators were experienced and active in Union negotiation efforts for years.

OPINION:

A.) The Status of the Document Entitled
"Addendum to Pick-A-Post Parameters"

The Union and Employer agreed that the document with this title constituted an agreement between the parties and that the

Union and Employer representatives constituting the Oversight Committee had the authority to enter into this agreement. Among the grievances that are part of this record include one by a chapter that challenged authority of the Oversight Committee to enter into the agreement. This raises the question of the status of this agreement.

Based upon the language of the collective bargaining agreement, particularly in Article 43.01, and the agency specific language found in Appendix P to the collective bargaining contract, this document is an agreement between the parties and the Oversight Committee had the authority to enter into this agreement.

Article 43.01 of the collective bargaining agreement states in pertinent part:

This Agreement concludes the collective bargaining for its term, subject only to a desire by both parties to agree mutually to amend or supplemented at any time. No verbal statements shall supersede any provisions of this Agreement.

This language clearly authorizes the parties to amend or supplement the collective bargaining agreement "at any time." Such mutually agreed amendments or supplements have the same full force and effect as the provisions found in the collective bargaining agreement, and are to be considered part of the collective bargaining agreement.

The parties agreed to use their six representatives on the Pick-A-Post Oversight Committee to express their intent to

supplement the collective bargaining agreement by the mutually agreed document entitled Addendum to Pick-A-Post Parameters.

In addition, the collective bargaining agreement contained as an appendix an agency specific agreement entitled "Department of Rehabilitation and Correction." This agreement--part of the collective bargaining agreement--stated that "the Pick-A-Post Oversight Committee shall continue to function . . .". It also set forth an approval function by the Pick-A-Post Oversight Committee with respect to local Pick-A-Post agreements. This function clearly implies authority in Committee to set forth by its agreement the marks by which local agreements would be evaluated. This is the function of the document entitled "Addendum to Pick-A-Post Parameters--a function of the committee clearly envisioned by the collective bargaining contract.

B.) The Matter of Ambiguity

We first deal with the general bases of the Union's claim that the document is ambiguous. First, the Union noted that there was no definitional section in the document and, as a result, phrases such as cross-shift relief and true relief are not defined. There is no rule of interpretation that renders agreements ambiguous by the absence of a definitional section. Such sections are atypical in short agreements. In addition, definitional sections define words used in an agreement. The phrases noted by the Union--"cross-shift relief" and "true" relief are not used in the agreement. Those portions of the agreement that relate to

assignment of relief officers do set forth two words in bold print- "**relief**" and "**established post.**" From the very title of the document, the document is set forth as an addendum to the previous document adopted by the Oversight Committee on May 22, 2000 entitled Pick-A-Post Parameters. The May 22, 2000 document sets forth specific definitions for "relief" and "established posts." Since the document operates as an amendment to the May 22, 2000 document, these definitions are incorporated by reference.

The second general claim for ambiguity of the document centers on the proposition that the document does not include an exhaustive list of when a relief officer may be assigned to correction officer duties on a different shift. "[T]here is no clear enumeration of times when cross-shift relief can be done."

There is, however, no contract rule of interpretation that requires that any general right granted in a contract to a party be accompanied by a list of specific situations in which the right may be exercised. Indeed, contracts grant general rights such as a right to assign employees (without specification) and then, normally, subject the general right to limitations found in provisions throughout the contract. Consequently, the absence of an exhaustive list of occasions when a relief officer may be assigned to a post on a different shift does not render the document ambiguous.

This raises the basic question of whether the document does authorize the assignment of relief officers to posts in different

shifts. The first sentence in the document states: "Officers designated as relief will be utilized first on their assigned shift." The ordinary meaning of the word "first" clearly opens relief officers to be utilized on posts in shifts other than their assigned shift. "First" is an adverb modifying the verb "utilized." When "first" is used as an adverb, it means "before or in preference to some other person or thing." Webster's Third New International Dictionary at p. 856. The class of things that are ranked in preference is the class of shifts--first, second, third, and special duty shift. The first preference for utilization of relief officers is a post on their assigned shift, but it is only a preference. This sentence clearly opens relief officers to assignment to posts on shifts other than their assigned shift.

This is a general right granted to the Employer on the matter of the assignment of relief officers. But, as is typical, the document proceeds to set forth two specific limitations. The first is contained in the language containing the number 2; the second, is number 3. An assignment to a post on a shift other than their assigned shift may not change their regular work hours--"as long as their hours are not changed."

The Union argued mightily that the document should be read to include a third limitation: assignment of a relief officer to a different shift may not occur in the case of an early call-in. This would be a call-in on a planned vacancy by another officer,

which is received by the Employer prior to the 90 or 60 minutes before the beginning of the shift.

This argument is rejected for a number of reasons. First, there is no ambiguity in the document that would open the record to consideration of bargaining history. Second, the evidence in this record does show that the subject of limiting the assignment of relief officers was discussed by the Oversight Committee. The record includes written notations to that effect for the Oversight Committee of March 15, 2000. However, the record is devoid of evidence showing mutual agreement by the parties on this subject prior to the adoption of the document. Third, the document shows that the parties did discuss this limitation on the Employer's right to assign relief officers to other shifts. However, two other specific limitations were placed in the document, suggestive of an absence of an agreement on a third limitation that is not expressly included in the document.

There is a final reason for rejecting the Union's claim of an additional limitation on the assignment of relief officers to late call-offs. The record does show the Union did raise such a limitation in the discussion of the Oversight Committee. The Union wished to prevent cross-shift assignments for relief officers when the call-off occurred prior to the 60 or 90 minutes. This is clear in the record, and is admitted in the Employer's brief. (Employer post-hearing brief at 6). Nevertheless, no language was placed in the October 30, 2000 document. The record shows that a draft of

this document was discussed at two meetings of the committee on October 24, and 25. There was joint discussion of all twelve members of the committee. There was close attention to the language of the proposal and a few changes were adopted. At the Union's request, additional lines were drawn on the bottom of the document under the title of the two parties. This enabled all members of the committee to sign off on the document. This obviously is a function that signifies the importance of the document, and, indeed, did not occur when the parties adopted the preceding PARAMETERS Document on May 23, 2000.

Apart from the fact that the Union representatives on the Oversight Committee were, for the most part, experienced negotiators, the record does show that language to include these Union's position was available to them. The record includes the PARAMETERS Document that preceded the one issued on May 23, 2000 by the current Oversight Committee. That document refers to a right to pull and move posts, which has been eliminated by the current contract. However, the immediately preceding PARAMETERS Document contained a limitation on the Employer's decision to pull and move. It stated:

The decision to pull and move should not be made prior to the designated call-off period before the start of the shift.

C.) The Matter of T. Decker's Memoranda of
March 3, 2001 and March 12, 2001

It would be an understatement to say that T. Decker's memorandum of January 3, 2001 was unfortunate. Instead of

relying on the negotiated language contained in a short agreement (an attachment to the memorandum), the author of the memorandum chose to summarize "the most important points." The author stated in the memorandum:

- ◆ Relief officers will first be used on their regular shift.
- ◆ Established posts must be filled at the beginning of the shift either with the regular officers, a relief officer from the same shift, or overtime.

As the author had agreed, the language in the second bullet was a mistake and was inconsistent with the language in the negotiated agreement. In addition, the language in the second bullet is inconsistent with the language set forth under the first bullet.

The damage caused by this memorandum was exacerbated by the decision of the Oversight Committee (although understandable) made on November 1, 2000 not to distribute the negotiated ADDENDUM TO PICK-A-POST PARAMETERS. It is reasonable to conclude that many of the recipients of the January 3, 2001 memorandum received for the first time the negotiated agreement and T. Decker's mistaken summary of the negotiated agreement. This, obviously, does not include the members of the Oversight Committee who participated in negotiating the agreement and who individually signed the agreement.

T. Decker's unilateral, and mistaken, summary of the negotiated agreement does not constitute a valid supplement or amendment to the agreement. By the above analysis, the negotiated agreement was clear and unambiguous. T. Decker's mistaken interpretation of the agreement, coupled with the Oversight

Committee's decision to withhold the written agreement did contribute to the chaos and misunderstanding that brought about this arbitration.

The January 3, 2001 memorandum did prompt a meeting of the Oversight Committee on March 7, 2001 during which the Union's position on late and early call-off was discussed. By this time, however, as noted above, the negotiated agreement on amendment to Pick-A-Post parameters constituted a valid supplement to the collective bargaining agreement. It was in writing and signed individually by each of the twelve Union and Employer representatives on the Oversight Committee. While the Union points to the fact that certain Management representatives agreed with the Union's position at the March 7 meeting, such verbal statements cannot raise to the level of a change in the negotiated written agreement. As Article 43.01 of the collective bargaining agreement notes, "no verbal statements shall supersede any provisions of this Agreement."

AWARD:

It is difficult to state an award because all of the approximately 124 grievances identified in the record were identified by institution, grievant's name and grievance number. The particular factual claim was not included. It is perhaps sufficient to declare that the portions of the document entitled Addendum to Pick-A-Post parameters dated October 30, 2000 that deal with relief are clear and unambiguous. Relief officers must be

utilized first on their assigned shift, but then can be assigned to posts on other shifts subject only to the two limitations set forth in the second and third numbered paragraphs of the document.

Date: June 23, 2002



John J. Murphy
Arbitrator