

<p>In the Matter of an Arbitration Between</p> <p>CALIFORNIA CORRECTIONAL PEACE</p> <p>OFFICERS ASSOCIATION</p> <p>STATE OF CALIFORNIA, DEPARTMENT OF</p> <p>CORRECTIONS</p>	<p>AWARD & OPINION</p> <p>and Case Number</p> <p>86-06-0036</p>
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Grievance: Overtime Pay

Before: Norman Brand, Arbitrator

Appearances

For the California Correctional Peace Officers Association

Neyhart, Anderson, Nussbaum, Reilly & Freitas

by Ronald Yank, Esq.

For the State of California, Department of Corrections

Christine Bologna, General Counsel

By Kenneth R. Hulse, Labor Relations Counsel

BACKGROUND

On August 25, 1986, Manon Johnson ("Grievant") filed a first step grievance in accordance with the parties' collective bargaining agreement. The State of California ("State") denied the grievance at the lower steps of the grievance procedure. The California Correctional Peace Officers Association ("CCPOA" or "Union") demanded arbitration. The parties subsequently agreed to consolidate this case with another case (Gomez). The parties also agreed that this was a class action that would be binding on the Youth Authority.

Hearings were held at the offices of CCPOA in Sacramento, California, on July 21, September 23, and October 20, 1987. Both sides were represented by counsel. Each was given a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither side objected to the

conduct of the hearing. A stenographic transcript of the proceedings was made. At the close of the proceedings, the parties made oral arguments, after which I declared the hearing closed.

ISSUE

At the hearing the parties stipulated the following issue:

Has the State, by compensating certain employees for overtime with compensatory time off instead of cash violated the Memorandum of Understanding?

If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

Section 11.11 - Overtime

All Unit 6 employees, except YOPB Coordinating Parole Agents and Community Services Consultants, working more than forty (40) hours per week shall receive compensation at time and one-half.

Section 17.03 - Fair Labor Standards Act Reopener

At the request of either the State or CCPOA, the parties agree negotiate the impact of the implementation of the Fair Labor Standards Act (FLSA) on Unit 6 employees.

Section 18.01 - Entire Agreement

a. This Agreement sets forth the full and entire understanding of the parties regarding the matters contained herein and any other prior or existing understandings or agreements by the parties, whether formal or informal regarding any such matters are hereby superseded. Except as provided in this agreement, it is agreed and understood that each party to this Agreement voluntarily waives its rights to negotiate with respect to any matter raised in

negotiations or covered in this Agreement, for the duration of the Agreement.

With respect to other matters within scope of negotiations, negotiations may be required during the term of this agreement as provided in Subsection b. below.

b. The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this agreement.

The parties recognize that during the term of this Agreement, it may be necessary for the State to make

changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify CCPOA of the proposed change 30 days prior to its proposed implementation.

The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 6 where all three of the following exist:

(1)Where such changes would affect the working conditions of a significant number of employees in Unit 6.

(2)Where the subject matter of the change is within scope of representation pursuant to SEERA.

(3)Where CCPOA requests to negotiate with the State.

Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this Agreement. If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted to mediation pursuant to Section 3518 of SEERA.

Unless otherwise provided herein, or unless changed by mutual agreement, there shall be no diminution of existing wage rates and substantial monetary employee benefits during the term of this agreement. Provided, however, the parties agree to meet and confer over alternatives to layoff and/or other unforeseen economic crises.

54. OVERTIME (1984-85 MOU)

a.All Unit 6 employees, with the exception of field Parole Agents, working more than forty (40) hours per week shall receive compensation in money or compensating time off

at time and one-half.

b.Overtime shall be administered in accordance with existing laws, rules and policies.

Positions of the Parties

Union

The Union asserts that Section 11.11 requires compensation at time and one-half -- in cash only -- for all overtime worked by covered employees.1 It makes two major

arguments in support of its position. First, it argues that the parties agreed that the word "compensation" meant cash only, unless one of the parties exercised the Fair Labor Standards Act ("FLSA") reopener contained in the contract. This agreement occurred in a sidebar discussion between CCPOA Chief Counsel Buddingh' and State Chief Negotiator Bark, before the "conceptual agreement" was signed on August 27, 1986. During that discussion Buddingh' said: "... there was really no other definition that could be given to it. ["compensation"] The law mandated cash only."(Tr 245:2627) Thereafter, the State did not expressly assert that it was "reneging" or going back to compensating in cash or CTO at its option, as it had under the previous contract. Thus, in the Union's view, there was an explicit agreement that compensation in Section 11.11 meant "cash only."

Second, CCPOA asserts that at the time of negotiations there was a practice of paying cash only for overtime. This practice, which has existed since sometime in the Spring -or at the latest July of 1985-- was unilaterally adopted by the State, well known to both parties at the

The union originally asserted that the State had agreed that employees would have the option of choosing between cash and CTO for the first 11 hours of overtime worked in a pay period. This agreement was allegedly embodied in a document which called itself a "conceptual agreement" and was not included in the MOU. CCPOA later modified its initial position, in light of its Chief Counsel's recollection of the negotiations.

bargaining table, and thoroughly discussed. Since it was an existing practice at the time of the negotiations, and since it involves a monetary benefit, it could not be changed by the State without violating the "Entire Agreement" section of the MOU.

State

The State asserts that Section 11.11 only requires it to compensate covered employees at time and one-half, for all overtime worked. Nothing in Section 11.11 requires that the compensation be in cash only. It makes five arguments in support of this position. First, it asserts that the accepted meaning of the previous contract language was that the State had the right to decide between cash compensation and CTO. All of the Union demands for the new Section 11.11 specifically required payment in money, or an employee option to choose cash or CTO. None of these demands was agreed to by the State. Thus, the State never agreed to change the meaning of "compensation" from employer option to cash only."

Second, there was never any discussion at the table in which the Union asked for compensation in "cash only." Rather, the discussions were about providing overtime for more Unit 6 employees and allowing employees to choose between cash and CTO. When the State offered a proposal permitting employees some choice between cash and CTO (1150SP15), it was rejected because it did not extend overtime to Youth Authority parole agents. Ultimately, the State agreed to a Union proposal which included parole agents but eliminated any reference to cash, CTO, or employee choice. Thus, in the State's view, the Union failed to change the method of compensation to cash only. Rather, it was left at the State's option, as it had been in the previous contract.

Third, the State argues that the "conceptual agreement" (U-1; 1171d) was just that. It was an agreement as to what would be the starting point for negotiations if the State requested a 7k exemption and the Union reopened under the FLSA reopener section. Since the State never requested a 7k exemption, and since neither side exercised its right to reopen, it has no effect on how the contract language which was actually agreed to should be interpreted.

Fourth, the State argues that it consistently took the position that it would do whatever FLSA allowed. During the negotiations the parties knew that amendments to FLSA were being discussed in Washington and both were concerned with whether CTO would be permitted. Several new provisions regarding CTO were negotiated, with the understanding that they would be effective if CTO were permitted to continue. When the amendments to FLSA were passed, the State went back to compensating employees in cash or CTO, at its discretion. Thus, the State never misled the Union into believing it was agreeing to "cash only." Rather, it paid in cash when it thought it was obliged to by existing law and went back to exercising its discretion when it was permitted to by law.

Fifth, the State argues that there never was a "practice" of paying cash only for overtime. Rather, the State voluntarily came into compliance with the law before enforcement began. As soon as it was permitted to use CTO, it went back to exercising discretion. Thus, in its view, it had a consistent practice which was suspended for a time because it became illegal, but was reinstated as soon as it became legal again. Consequently, nothing occurred to trigger the Entire Agreement section of the MOU.

The Negotiations

The negotiations for the current MOU took place amidst the uncertainty created by the United States Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit District*, 105 S.Ct. 1005 (1985). In overturning *National League of Cities v Usery*, 426 U.S. 833 (1976), the Court applied the Fair Labor Standards Act to -- among others -- state governments. This meant that the State was now required to pay overtime to covered classes of employees. The Court stayed implementation until April 1, 1985. Subsequently, the Department of Labor ("DOL") announced that it would not begin enforcement until October 15th. Some time in the late Spring the Governor directed the Department of Personnel Administration to have agencies buy out existing CTO and pay cash for overtime for all covered classes of employees. According to the testimony, there was a State surplus and the Governor wanted to liquidate any potential liability with that money. In addition, according to the testimony, overtime in the Youth Authority was kept at an absolute minimum.

It was against this background, in March, that the parties began negotiating their new MOU. The Union's first proposal on overtime read:

All Unit 6 employees working more than 40 hours per week shall receive compensation in money or compensating time off at time and one-half for the first four hours of overtime, and at double time for any additional hours. The choice of compensation in money or CTO should be at the employee's option.

Furthermore, employees shall receive double time for any hours worked on Saturdays, Sundays or holidays. (E-1, 46CP1)

The State's first proposal was to keep the language on overtime exactly as it was.

According to the testimony, CCPOA's major goals on overtime were to get field parole agents compensated at time and one-half, and to give employees the choice of cash or CTO for overtime compensation.(Tr. 137) These goals were expressed in a variety of proposals (U-1; 504CP3, 558CP1, 694CP1, 786CP1, 922CP3, 999CP2) all of which explicitly required either cash compensation only, or an employee option to receive cash or CTO. On August 13, 1985, the Union introduced a slightly different concept:

All Unit 6 employees working more than forty (40) hours per week shall receive compensation at time and one-half. For the first eleven (11) hours of overtime worked in a pay period, the employee may elect to be compensated for the employee's overtime in either money or compensating time off. Beginning with the twelfth (12th) hour of overtime worked in a pay period, the employee shall no longer have the option to be compensated in CTO, but shall be paid cash for the overtime that the employee works. (U-1; 1056CP1)

Under this proposal, the employee option was limited to the first 11 hours, but the State was required to pay cash for the rest of the overtime in a pay period. The Union continued with this proposal (U-1; 1133CP14, 1149CP16) and the State eventually was willing to accept part of it. On August 26, 1985, the State offered a counterproposal that changed the first line of the CCPOA proposal to read:

All Unit 6 employees, except CYA Field Parole Agents, Board Hearing Parole Agents, and Community Service Consultants working more than forty (40) hours per week shall receive compensation at time and one-half.(U-1; 1150SP15)

The rest of the counterproposal was identical to the CCPOA position, providing 11 hours of employee option and cash only beginning with the 12th hour. CCPOA rejected this proposal because it did not include the CYA Field Parole Agents. (See, e.g.Tr.139)

Later that same day CCPOA modified its proposal to read:

All Unit 6 employees, except YOPB Coordinating Parole Agents and Community Services Consultants, working more than forty (40) hours per week shall receive compensation at time and one-half. For the first eleven (11) hours of overtime worked in a pay period, the employee may elect to be compensated for the employee's overtime in either money or compensating time off. Beginning with the twelfth (12th) hour of overtime worked in a pay period, the employee shall no longer have the option to be compensated in CTO, but shall be paid cash for the overtime that the employee works. (U1; 1163CP13)

On August 27, 1985, the State offered the following counterproposal, as part of a "last, best, and final

offer) (U-1; 1171):

All Unit 6 employees, except YOPB Coordinating Parole Agents and Community Services Consultants, working more than forty (40) hours per week shall receive compensation at time and one-half. (U-1; 1184CP13)

This proposal, which was accepted by CCPOA (it was actually signed on August 29) included CYA Field Parole Agents, but contained no commitments on cash payment for overtime, or employee options for cash or CTO. Bark, in removing the entire second paragraph, said that if they were going to deal with it, they would do so in an FLSA reopener.²

The negotiating notes are devoid of any reference to the State paying cash only for overtime. It was apparently never discussed at the table. According to Buddingh', there was a private conversation on August 27³ between himself and Bark in which Buddingh' said:

... it would have two potential definitions. One is that the word "compensation" in 1184CP13 would initially be defined by cash only, and there was discussion about that, because there was really no other definition that could be given to it. The law mandated cash only. We had discussion about that, and in the give-and-take between Bob and myself, I had said, look, Bob, it means cash until we reopen. (Tr.245-6)

That, according to the evidence, is the only conversation about "compensation" meaning "cash only" during the negotiations.

On August: 27th, the parties also had conversations about the State seeking a 7K exemption. Bark indicated that the Governor only wanted to negotiate about FLSA, at the table, in the fire unit. FLSA matters were to be handled by a reopener in this Unit. The parties agreed to a reopener.

² The "it" Bark referred to was a possible 7K exemption. The eleven hours in the CCPOA proposal tracked what would be available to the employer as straight time under a 7K exemption.

³ The conversation must have taken place on the 27th, since the State made its counterproposal on that day and the "conceptual agreement" was signed that day. Buddingh' testified that the conversation occurred before the conceptual agreement" was signed.

In addition, on the 27th Bark concurred with the following language proposed by Buddingh':

AGREEMENT BETWEEN CCPOA AND DPA

REGARDING OVERTIME AND 7K EXEMPTION

All Unit 6 employees, except YOPB Coordinating Parole Agents and Community Service Consultants, working more than forty (40) hours per week already receive compensation at time and one-half under

the current contract between CCPOA and the State. In exchange for a 7K partial exemption under the FLSA, Unit 6 employees shall be paid overtime at time and one-half in accordance with the following formula; on a 28 day pay period:

For the first eleven (11) hours of overtime worked in a pay period, the employee may elect to be compensated for the employee's overtime in either money or compensating time off. Beginning with the twelfth (12th) hour of overtime worked in a pay period, the employee shall no longer have the option to be compensated in CTO, but shall be paid cash for the overtime that the employee works. (U1; 1171d)

Bark did not simply agree to this language. Rather, he wrote: "In conceptual agreement to be negotiated on FLSA reopener." (U-1; 1171d) "Conceptual" was underscored twice. Subsequently, according to Buddingh', Bark agreed that this conceptual agreement" set a floor from which negotiations would occur if there was an FLSA reopener and the State requested a 7K exemption.

Analysis

The Union, in bringing this grievance, has the burden of showing the State violated the MOU by compensating Grievant with compensatory time off instead of cash. It has failed to do so. While there was significant ambiguity surrounding the negotiations as a result of the Garcia decision-- the Union has not shown by a preponderance of the evidence that the intent of the parties was to have the word compensation in Section 11.11 mean "cash only." There are four reasons for reaching this conclusion.

First, both sides recognized that under the old MOU the State had the option of compensating covered classes of employees for overtime in cash or CTO. Both sides agreed that the elimination of section b. of the old language did not affect this State option. Thus, it was incumbent upon CCPOA to negotiate a change, if it wanted the MOU to require compensation in cash only.

It could, of course, rely upon the FLSA to impose "cash only" compensation on the State. That is, if the State had an option to compensate in cash or CTO in the MOU, but federal law prohibited CTO, the State would effectively be forced to pay cash only, without CCPOA negotiating any change. In fact, for a period of time, this is precisely what happened. Prior to changes in the FLSA the State voluntarily complied with its requirements, despite DOL postponing actual enforcement. But such compliance is not evidence that the MOU has changed.

Second, in all of its proposals CCPOA asked for cash only, or employee option for cash or CTO. CCPOA rejected a State offer combining employee option and cash only because it did not cover Youth Authority Parole Agents. The State's subsequent counterproposal included the Parole Agents, but eliminated any language providing employees with a cash/CTO option or "cash only" compensation. Ultimately, CCPOA agreed to this State counterproposal. Having done so, it cannot now assert that it got both Parole Agent coverage and "cash only." Nor can it assert that the negotiating history was negated by some equivocal statements in a sidebar

discussion. 4

4 I have characterized the comments as "equivocal" because Buddingh~ reported only what he said, and part of what he said was that the law required cash only. Bark indicated that throughout he had insisted that the State would do what FLSA required. At the time of his discussion with Buddingh', it required cash compensation only. Thus, it would be unlikely that he could disagree when Buddingh' said that compensation meant "cash only" at the time of their discussion.

Moreover, it is somewhat disingenuous to assert that the Union did not include "cash only," or an employee option, in Section 11.11 because it did not want the contract to be inaccurate if the parties reopened on FLSA. The assertion was that if the contract was reopened and employees given an option for the first 11 hours the Union would only have to send out an "interpretation" of Section 11.11, rather than a bulletin saying it was changed. That would hardly be a convincing reason for excluding something that had been won in negotiations from the MOU. At least I do not find it convincing.

Third, the "conceptual agreement" has no bearing on interpreting what the parties agreed to in Section 11.11. There can be no question but that the "conceptual agreement" is not the same as a tentative agreement. It is a promise to provide a floor to negotiations if there is a reopener. The agreement itself is contingent upon the State seeking a 7K exemption. In effect, the agreement removes any incentive for the State to seek a 7K exemption. The starting point for reopened negotiations is that the State will compensate the first 11 hours of overtime at the time and one-half rate. A 7K exemption normally permits the first 11 hours of overtime in a 28 day work period to be compensated at straight time. Thus, the "conceptual agreement" was a significant victory for the Union. But it did not define "compensation" in Section 11.11.

The Union argues, however, that because the State offered both cash and a CTO option in 1150SP15 (which the Union rejected), and because the "conceptual agreement" gave overtime compensation to Youth Authority Parole Agents, it would not be fair to say that employer choice on compensation continued. In the Union's view, the State should have had to specifically call the Union's attention to this "change." Since it did not do so, Section 11.11 must be interpreted as requiring "cash only" compensation. The argument is unconvincing. The Union cannot rely upon a combination of a counterproposal it rejected and a "conceptual agreement" which never came to fruition to shift some negotiating burden to the State. It could have no legitimate expectation, as a result of those documents, which would require the State to negotiate to "restore" the meaning of "compensation" to what it had always meant.

Fourth, by paying for all overtime in cash after the Garcia decision and before the amendments to FLSA permitting CTO were passed, the State did not establish a "practice" which could not be changed without negotiations. Nor did it violate the Entire Agreement section of the MOU when it resumed compensating overtime in CTO. The State had the right, under the old MOU, to exercise its discretion in deciding whether to compensate overtime in cash or CTO. When the law required it to do so, it compensated overtime in cash only. It is irrelevant that the State chose to follow the law, as it was applied in the

Garcia decision, before the date DOL threatened enforcement. Since it had discretion to compensate in cash or CTO, its exercise of discretion in a particular way -- for a limited time -- does not establish a practice which the Union is entitled to rely on for purposes of the Entire Agreement section.

By reason of the foregoing I make the following:

AWARD

The State did not violate the Memorandum of Understanding by compensating certain employees with compensatory time off instead of cash. The grievance is denied.

Davis, California Signed by Norman Brand

November 20, 1987 Norman Brand

NORMAN BRAND

ARBITRATOR - MEDIATOR

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November 20, 1987

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FOR PROFESSIONAL SERVICES:

RE:DPA/CCPOA (Dept. of Corrections)

Grievance: Overtime Pay

DPA Case No. 86-06-0036

NB 660

HEARINGS: 3 days\$1500.00

7/21, 9/23 and 10/20/87

STUDY & PREPARATION OF AWARD: 5 days2500.00

TOTAL AMOUNT DUE:\$4000.00

PAYABLE BY EMPLOYER: \$2,000.00

PAYABLE BY UNION: \$2,000.00

Social Security No. 111-34-8940

DPA Contract Nos. 400-86-82 and 400-87-01

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