

IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

between

STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),

Employer,

CALIFORNIA CORRECTIONAL PEACE

OFFICERS ASSOCIATION,

Union.

OPINION AND AWARD

FRANKLIN SILVER,

ARBITRATOR

July 13, 1990

RE: HIV Pilot Project Grievance

This dispute arises under the Collective Bargaining Agreement between the parties, pursuant to which this Arbitrator was selected to hear and to render an expedited award. A hearing was conducted on May 8, 1990, in Sacramento, California, at which time the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. Both parties argued orally at the conclusion of the hearing, and the matter was submitted with the delivery of the transcript on or about May 18, 1990.

APPEARANCES:

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ISSUE

Has the Department of Corrections violated the MOU by implementation of the HIV Pilot Program and/or the Gates consent decree, 1 and, if so, what shall be the remedy? (Tr. 5-6.)

PERTINENT PROVISIONS OF THE AGREEMENT

ARTICLE IV - STATE RIGHTS

4.01 Management Rights

a. Except as expressly abridged by any provision of this Agreement, the State and the Departments reserve and retain all of their normal and inherent rights with respect to management of their affairs in all respects in accordance with their responsibilities, whether exercised or not, including, but not limited to, the rights to determine and, from time to time, to redetermine the number, location, and type of work forces, facilities, operations, and the methods, processes and equipment to be employed; the scope of services to be performed, the method of service, assignment of duties, and the schedule of work time and work hours, including overtime; . . . to alter, discontinue or vary past practices and otherwise to take such measures as the employer may determine to be necessary for the orderly, efficient and economical operation of the Departments of Youth Authority and Corrections.

b. The State has the sole authority to determine the purpose, mission and title of the Departments and the amount and allocations of the budget.

* * * * *

1 Gates v. Deukmejian, No. CIV S-87-1636 LKK-JFM, pending in the United States District Court, Eastern District of California.

ARTICLE XIX - APPLICATION AND DURATION

19.01 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 Sub-section 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 the Ralph C. Dills' Act.

(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 the Ralph C. Dills' Act.

FACTS

A. Chronology of events.

By a letter dated November 30, 1989, the Department gave notice to CCPOA that it intended to activate a pilot project for AIDS virus-infected inmates at three institutions: California Medical Facility, Vacaville (CMF), California Men's Colony, San Luis Obispo (CMC), and California Institution for Women, Frontera (CIW). The letter indicated that the project would be activated on January 1, 1990, and a draft copy of the project description was enclosed. (Er. Ex. 2, Item 2.) In essence, the project was designed to integrate selected Human Immunodeficiency Virus (HIV)-infected inmates into the general prison population, otherwise known as "mainlining" HIV-positive inmates.

An informational meeting was held between Department and CCPOA representatives on December 27, 1989. Department representatives explained how the project was designed to operate, and in response to questions from CCPOA stated that the AIDS segregation policy had been under study for three years, and that litigation, in particular the Gates case, had increased pressure to change the policy. During the course of the meeting Timothy Mahoney, CCPOA chief administrative officer, requested to meet and confer regarding workload changes, safety and staffing levels related to the project, and he asked that implementation of the project be delayed pending meeting and conferring. According to a memo from labor relations specialist Michael Jaime, no response was provided immediately, but the next day meetings were scheduled for January 8 and 9 based upon a revised implementation date of January 15. (Er. Ex. 2, Item 3.)

Seven negotiating meetings were held on the following dates: January 8, 9, 29, March 6, 7, April 24, 25. At the January 29 meeting CCPOA presented proposals relating to training, notification regarding HIV positive inmates, protective equipment, housing of inmates at CMF, and other issues. At the March 7 meeting, the Department was prepared to present counter-proposals, but the meeting was terminated as a result of a dispute regarding immediate implementation of the project. The nature of the dispute is not entirely clear, but apparently CCPOA learned that a larger number of HIV-positive inmates had already been mainlined at

CMF than it had previously understood. 2

2 The Gates consent decree, discussed below, anticipated the mainlining of 20 to 30 inmates

At that point CCPOA refused to accept the Department's counter-proposals, stating that it would file for immediate arbitration to restrain implementation of the pilot project pending completion of negotiations and would attempt to intervene in the Gates case.

In fact CCPOA took those two actions, and it also filed an action in superior court seeking a temporary restraining order against implementation of the pilot project pending arbitration. A TRO hearing was held in superior court on March 16, and the request for TRO was denied. CCPOA's motion to intervene in the Gates case was heard in federal district court on May 7, the day before the arbitration hearing. The judge denied CCPOA's motion on the basis of timeliness. This ruling followed a discussion of the possibility that the consent decree could be subject to collateral attack as a result of CCPOA's bargaining rights, with both the State and counsel for the plaintiffs taking the position that they were prepared to take that risk.

Although the March 7 negotiating meeting had ended in some discord, the parties resumed meeting over the impact of the pilot project on April 24 and 25. During those sessions tentative agreement was reached on most issues, and according to Jaime there was a possibility that, with a little more time, closure could have been reached on all outstanding issues. As of the time of the arbitration hearing (May 8) it was expected that further meetings would take place.

during the first three months, and as of March 7 approximately 36 inmates had been mainlined at the three institutions included in the pilot project, CMF, CMC, and CIW. At the time, however, there was a great deal of confusion on both sides as to how many inmates had been mainlined, and it appeared possible that a much larger number of inmates was involved. The consent decree was not actually approved and signed by the judge until March 8.

B. The Gates consent decree.

The First Amended Complaint was filed in the Gates case on January 6, 1988. It was filed as a class action on behalf of all inmates confined at CMF alleging violation of the Eighth and Fourteenth Amendments due denial of access to medical and mental health care, denial of access to attorneys, and segregation of HIV-infected inmates. ³ The Second Amended

Complaint added claims on behalf of handicapped inmates. The case has been certified as a class action with three subclasses: mobility impaired inmates confined to wheelchairs, mentally ill inmates, and HIV-infected inmates. The subclasses are represented by separate sets of attorneys, referred to collectively herein as the "Gates plaintiffs."

The consent decree, which was ultimately approved by the Court on March 8, 1990, was negotiated between the Gates plaintiffs and the State defendants, represented by the Attorney General's Office, beginning approximately in November or December, 1989. It requires the CMF to develop and implement procedures relating to the following areas: medical care for a number of different diseases; medical care and therapy for medically-disabled inmates; psychiatric screening and care for all prisoners, including a pilot program for housing of inmates in psychiatric classifications; a pilot program for mainlining HIV-positive inmates; and numerous general conditions, including housing assignments, double-celling, disciplinary and detention cells, exercise, and staffing.

³ In addition to the Gates case, which relates solely to CMF, litigation claiming similar rights on behalf of HIV-infected inmates at CIW is pending in the District Court for the Central District of California (Jane Doe v. CDC, SA CV 89598 JSL). The plaintiffs in that case initially obtained a TRO restraining implementation of the pilot program at CIW, but as of April 26, 1990, agreed to its implementation.

In more detail, the provisions of the consent decree relating to AIDS require the CMF to develop and implement a pilot program for mainlining HIV-positive inmates within 120 days from the effective date of the decree. It requires the screening of HIV-positive inmates for mainlining based on certain criteria. The inmates are to be drawn from those housed in the Special Housing Unit at CMF or newly-identified HIV-positive inmates. The decree "anticipates" that 20-30 inmates would be placed in the general prison population within the first three months of the program's operation and states, "Additional numbers of inmates may be added to the pilot program by defendants. "The pilot program is to be evaluated after nine months, and the CMF is to maintain confidentiality of HIV-positive inmates as required by law.⁴

For purposes of implementation, the consent decree provides for the appointment of a Mediator, and it

requires the parties to meet and confer with respect to the development or modification of any of the procedures required by the decree. If agreement cannot be reached, the Mediator is authorized to make written findings and recommendations to the Court regarding disputes over the adequacy of the plans of implementation. The defendants are required to provide the Mediator with periodic compliance reports regarding the progress toward implementation of the consent decree, and the Mediator is required to provide written reports to the Court and the parties regarding implementation. The Court retains jurisdiction until it is determined that the consent decree has been fully and faithfully implemented, with the goal of full implementation within 24 months.

4 The "Block initiative" (H&S Code, §§ 195.95 ff.) provides for notification of custodial officers of HIV-positive status of inmates, but makes it a misdemeanor to disclose such status to unauthorized persons. Notification procedures under the Block initiative were one area of negotiation between the Department and CCPOA, and was one of the issues upon which tentative agreement was reached in April.

C. Previous negotiations on AIDS-related issues and other issues.

The parties have previously negotiated and reached agreement on many AIDS-related issues. In February, 1986 the parties negotiated a series of side letters regarding implementation of a Department AIDS program, AIDS training and education, and safety clothing (Er. Ex. 3, Item 1). Subsequently the parties have reached agreement on at least six additional side letters, primarily dealing with issues at particular institutions. In addition, the parties have negotiated and reached a number of tentative agreements regarding AIDS-related issues at CIW.

There were, as of February 28, 1990, 386 identified HIV-positive inmates in the CDC system, and the Department estimates that there are many more unidentified HIV-positive inmates in the general prison population. The total number is estimated to be between 2500 and 5000. As a result correctional officers are necessarily responsible for many unidentified HIV-positive inmates as part of their normal job responsibilities, and the AIDS training emphasizes that officers should treat all inmates as potential HIV carriers (Tr. 76).

In addition to AIDS-related issues, Armand Burruel, the Department's assistant director of labor relations, testified that the Department has provided notice to CCPOA over the years of many operational changes. On many of the issues, there was no request by CCPOA to meet and confer. On some issues, there was such a request, but the changes were implemented prior to the completion of meeting and conferring. On some issues, CCPOA has demanded immediate arbitration prior to implementation, but in those cases there has generally been a settlement prior to arbitration.

D. History of Entire Agreement clause.

Prior to October, 1983, the language which currently appears in paragraph (b) of section 19.01 did not appear. Instead, the entire agreement clause contained the following language:

"If the employer deems it necessary to effect changes that have substantial impact upon matters within the scope of representation, other than those expressly referenced in this Agreement, it will meet and confer in good faith prior to making such changes, unless there is a legitimate business necessity.Ó

This language was the subject of two arbitrations. In the first decision, issued April 4, 1983, Arbitrator David Concepcion concluded that the Department had violated the provision by failing to meet and confer regarding changes in work shifts for correctional counselors implemented in response to legislation establishing a Work Incentive Program. In that case the Department contended it was mandated to implement the changes by the Work Incentive Program legislation, and that it had the right to make unilateral changes in hours and shifts under the language of the management rights clause, which gives management the right to determine "the schedule of work time and work hours.Ó5 The Department conceded only that it was required under the entire agreement clause to negotiate regarding the effects of the changes in shifts. Arbitrator Concepcion concluded:

"The Employer was obligated to meet and confer in good faith with the Union over the changes it made although not prior to implementation of the change."

As a remedy, the parties were directed to meet and confer for a period of sixty days, with the Arbitrator retaining jurisdiction in case no agreement was reached. The parties were unable to reach agreement, and in a subsequent letter decision dated August 9, 1983, Concepcion ordered the Department to restore the shifts that existed prior to the changes giving rise to the arbitration and to comply with the meet and confer provision of the entire agreement clause if it again sought to make changes in the shifts. (See Jt. Ex. 4, p. 11.)

5 The current management rights clause (section 4.01)remains the same as when originally negotiated.

The next case was decided on March 9, 1984 by Arbitrator Kathy Kelly. It involved the question of whether the Department had violated the contractual obligation to meet and confer regarding work shift changes at eight institutions not involved in the Concepcion decision, and if so, whether the Department was required to restore the status quo ante at those institutions in order to remedy the violation. Arbitrator Kelly concluded initially that management rights clause applied only "except as expressly abridged by any provision of this Agreement" and that the then-applicable meet and confer language of the entire agreement clause did expressly abridge management rights. The issue was squarely presented in this case whether the Department was required to meet and confer before implementing changes in work shifts. Arbitrator Kelly concluded that both the literal language of the Agreements and the 1983 bargaining history imposed such a requirement in the absence of a "legitimate business necessity," which she concluded was not present in this case. In determining the appropriate remedy, the Arbitrator recognized that a contractual requirement to negotiate prior to implementation assures good faith negotiation because the employer is deprived of the change it seeks pending completion of negotiations or impasse and tends to equalize bargaining strength (Jt. Ex. 4, p. 24). Therefore, the Arbitrator ordered restoration of the status quo ante and further good faith negotiations as a remedy for the Department's violation of the entire agreement clause.

Although the Kelly decision arose under the prior language of the entire agreement clause, the current language was negotiated and tentatively agreed upon on October 4, 1983, five months before that decision was issued (see Un. Ex. 2, 4, and 5). Those negotiations arose as a result of legislation enhancing retirement benefits for correctional officers and firefighters, conditioned upon meeting and conferring with the unions representing those two units. On the morning of October 4, a meeting took place between the California Department of Forestry Employees Association (CDFEA) and the State. The chief spokespersons at that meeting were Ron Yank, attorney for CDFEA, and Bob Bark of DPA.

The CDFEA contract at the time contained an entire, agreement clause virtually identical to that in the CCPOA contract, and those clauses were arguably more beneficial to the unions than in the State's contracts with other unions. Among the State's proposals to CDFEA was to revise the entire agreement clause to be more consistent with those in other contracts. According to Yank's testimony, which was not disputed, Bark stated that the change was intended essentially for cosmetic purposes, and did not change the basic intent of the provision. In particular, the record is clear that Bark committed that the new language meant that the State would not commit what otherwise would be an unfair practice under SEERA.⁶ CDFEA accepted the State's proposal on that basis.

That same afternoon, there was a meeting between the State and CCPOA, and Yank and Bark were again the chief spokespersons. The State made the same proposal to CCPOA regarding the entire agreement clause as it had made to CDFEA, and Yank and Bark each signed a paper agreeing to "same language (and history) as fire this morning." (Un. Ex. 2.)

POSITIONS OF THE PARTIES

The Union.

CCPOA argues that the undisputed evidence shows that the new language of the entire agreement clause (¶ 19.01) incorporates the meet and confer obligations of SEERA, and this means that absent an emergency the State may not implement a policy, such as the HIV pilot project or other policies to be developed under the consent decree, without completing the

6. See Un. Ex. 4; and see Hulse letter dated July 5, 1990.

meet and confer process. In this case, the State gave notice concerning the pilot project, without mentioning the litigation or the consent decree, and then in the middle of bargaining CCPOA discovered that the project had been implemented in numbers exceeding those required by the consent decree and at institutions not affected by the consent decree. In the absence of the consent decree, this would be an easy case; but the fact that there is a consent decree does not change the obligation to comply with the meet and confer provision of the Agreement. As has frequently occurred in Title VII cases, there may be tension between the Agreement and a consent decree, but an arbitrator's obligation is to enforce the provisions of the Agreement.

One factor that is different about this case, as compared with many Title VII cases, is that CCPOA tried to intervene in the district court litigation so that the collective bargaining issues could be determined along with issues raised by the parties in the Gates litigation. Although this would have been a much more efficient manner of handling these problems, the State along with the Gates plaintiffs opposed that procedure even after acknowledging the possibility of a collateral attack. Therefore, the State has made its bed in terms of how it must meet its obligations under the MOU.

Various provisions of the MOU are implicated in this case, including section 1.01 (Recognition), articles VII (Health and Safety), VIII (Training), XII (Work Loads), sections 17.03 and 17.08, as well as section 19.01. With respect to section 19.01, it is clear that there was no emergency requiring the State to go beyond the numbers and the facilities in the consent decree, and in fact the consent decree was not even signed until March 8. Therefore, the State violated the MOU.

With respect to remedy, CCPOA requests a remedy in the nature of ongoing injunctive relief establishing procedures for accommodating the bargaining process with the HIV pilot program as well as other aspects of the consent decree, and it suggests that after a finding of liability the parties could attempt to craft a remedial order. At any rate, the State should be ordered to meet with CCPOA both before and after meeting with the Gates plaintiffs regarding any proposed program under the consent decree. There are many aspects of the consent decree about which CCPOA has not yet been given notice and which will clearly impact on correctional officers' working conditions, such as psychiatric classification and its impact on safety and training. Although the State can make a decision to mainline inmates, it must be ordered to negotiate regarding the implications of such decisions with regard to safety, training, staffing, and other mandatory bargaining issues. In other cases, the State may agree to do something under the consent decree which in itself constitutes a negotiable subject, and the State should be enjoined from doing this.

The Employer.

The State argues that both the management rights clause and the entire agreement clause are involved in this case, and the State has reserved the right to manage its affairs in accordance with its responsibilities, and it has the sole authority to determine the mission of the Department. In his decision, Arbitrator Concepcion balanced the rights and obligations of the two provisions and concluded that management had the duty to meet and confer, but not before implementation. Thus, both sections of the Agreement suffered some limitation. Arbitrator Kelly rejected this even-handed approach and disregarded the fact that change of work hours was expressly referenced as a management right.

In 1983 or 84, the language of the entire agreement clause was changed to impose a 30-day notice requirement before implementation of any change. Although the evidence shows that the intent was to preserve the original intent of the language, the fact is that the Department has consistently provided CCPOA with notice of changes and the opportunity to negotiate. Here, the 30-day notice was given on November 30, and it was not until December 28 that CCPOA asked to meet and confer. After CCPOA discontinued negotiations on March 7 and unsuccessfully sought a TRO, the parties returned to the table

and have nearly concluded an agreement. All the Agreement requires is 30 days' notice prior to implementation, and that notice was given. The prior practice was that implementation often occurred prior to completion of negotiations, and the Concepcion decision was consistent with that practice. Therefore, the Department's actions were consistent with the entire agreement clause both before and after its change. The MOU provides for implementation prior to conclusion of meet and confer where there is a legitimate business necessity, and that necessity is absolutely clear in this case.

The evidence shows that there are only 386 identified HIV-positive inmates out of an estimated 2500-5000 HIV-positive inmates in the prison system. Obviously, correctional officers are already dealing with HIV-positive inmates on a very broad basis. In addition, HIV-positive inmates have constitutional and statutory rights with regard to equal access to prison programs and facilities, and the consent decree imposes obligations on the Department with time lines to provide that access. A similar suit is pending in southern California. Obviously, there is a legitimate business necessity to act and to act immediately. The federal consent decree imposes a duty to act, and the State cannot disregard that decree in any manner. Certainly, there could not be a return to the status quo or any limitation on the consent decree without defying the federal court's jurisdiction.

Here the threshold requirement of the entire agreement clause is that meeting and conferring is required only with respect to a mandatory subject of bargaining, and the Department's fundamental mission is to determine how and where it will house its inmates. Although the parties have undertaken impact negotiations, section 19.01(b) is not violated unless the subject matter of the change is within the scope of representation under SEERA. The HIV pilot project is not a mandatory subject of bargaining under SEERA.

For all of these reasons, the State argues that the grievance should be denied.

DISCUSSION

A. The obligation to meet and confer.

The dispute in this case is not over the Department's decision to adopt the HIV pilot project. CCPOA does not claim that the Department was obligated to meet and confer with regard to the wisdom or necessity of the decision to mainline HIV-infected inmates, and it is clear that this was a matter of fundamental management policy not subject to negotiation under normal labor law principles. Nevertheless, the adoption of the HIV pilot program impacts upon the working conditions of correctional employees with respect to safety, training, and other areas normally subject to bargaining between the parties, and traditional labor law principles provide the bargaining agent the right to negotiate over the effects of a non-negotiable management decision.⁷

The fact that the grievance involves bargaining over the effects of a management decision rather than the decision itself has several implications in terms of defining the scope of this dispute. First, unlike the issues in the Concepcion and Kelly decisions, it is not necessary

7. The impact of mainlining with regard to safety is less than would immediately appear, since the number of unidentified HIV-positive inmates who are already in the general prison population greatly exceeds the number of identified HIV-positive inmates who will be mainlined. Nevertheless, the pilot project represents a major policy change for the correctional system, and its effects are subject to negotiation.

to consider the tension between the management rights clause (¶ 4.01) and the entire agreements clause (¶ 19.01). There, the Department made a decision to change work shifts and CCPOA demanded to meet and confer over that decision itself. In part because "the schedule of work time and work hours" is specifically listed as a management right, the Department asserted that it was not obligated to bargain over the decision. Thus, both arbitrators were required to consider whether the management rights clause provided the Department with an absolute defense to the grievances, an argument which both arbitrators rejected. Since in this case, CCPOA is not attempting to negotiate over the basic management decision, but simply over its effects, the management rights clause is not directly implicated.

The issue here focuses on whether the Department is obligated under section 19.01(b) to meet and confer to agreement or impasse over the effects of a non-negotiable management decision before implementing the decision. The evidence is undisputed that although the language of the entire agreement clause was changed from that involved in the Concepcion and Kelly decisions, the negotiating history from October, 1983 establishes that the language changes were not directed at changing the prior intent of the section and that the new language meant that the State would not commit what would otherwise be an unfair labor practice under PERB.

Nevertheless, the State argues that since section 19.01(B) only requires the State to "notify CCPOA of the proposed change 30 days prior to its proposed implementation," it was not required to delay implementation beyond those 30 days pending completion of negotiations. No PERB decision has been cited as support for the proposition that an absolute 30-day limit may normally be placed on meeting and conferring, and as discussed in more detail below such a position appears inconsistent with the leading PERB decision in this area. Therefore, the State's argument raises a potential conflict between the contract language and the negotiating history, and although negotiating history is often relied upon to interpret language in collective bargaining agreements, negotiating history cannot alter clear and unambiguous contract language.

Here, however, the language relied upon by the State is ambiguous. Although it requires the State to give notice of a change "30 days before its proposed implementation" (emphasis added), it does not explicitly give the State the right to implement the change after 30 days irrespective of the status of negotiations. The reference to the "proposed" date of implementation implies that there is latitude to delay the implementation, and the provision in section 19.01(b) for impasses to be referred to mediation under SEERA section 3518 is consistent with an interpretation that implementation should be delayed pending agreement or impasse in negotiations. Because the contract language is ambiguous with respect to the effect of the 30-day notice, it is concluded that the contract should be interpreted in a manner consistent with the undisputed bargaining history, i.e. that SEERA standards apply to the obligation to meet and

confer under section 19.01(b).

The State also argues that as a matter of past practice the Department has often implemented decisions following 30 days' notice while negotiations have continued. The practice, however, has apparently been mixed. Burruel testified that while implementation customarily occurs during implementation, there have been times when CCPOA has requested a delay of implementation during negotiations and has filed demands for immediate arbitration, which have then been resolved by mutual agreement (Tr. 80-1). On other occasions, CCPOA has not demanded to meet and confer following 30 days' notice of a change. In some instances, the issue may not have been of sufficient importance to oppose immediate implementation, and in others there may have been a business necessity requiring implementation (e.g. Er. Ex. 5, item 4). Based on this evidence, although a number of changes have been implemented during negotiations in the absence of a demand for immediate arbitration, it cannot be concluded that there has been a clear and unequivocal practice that the Department necessarily has the right to implement a decision after 30 days.

In this case, although the record does not establish that CCPOA demanded a delay in implementation prior to the demand for immediate arbitration on March 7, when it took this action and sought an injunction against implementation pending arbitration the Department was on notice that there was a demand for a delay in further implementation of the pilot program pending settlement or completion of the arbitration.

At the time of the TRO hearing, approximately 28 HIV-positive inmates had been mainlined at CMF, and the Department planned to expand that number to approximately 74 as the needs of the system dictated (Un. Ex. 3, §8). At the TRO hearing, CCPOA asked that implementation at CMF be limited to 20-30 inmates as required during the first stage of the Gates consent decree, but the State took the position that the consent decree was not limited to 30 inmates and it would not agree to such a limitation pending arbitration (Er. Ex. 4, p. 30 ff.).

Since the parties intended that the entire agreement clause should be interpreted in a manner consistent with SEERA standards, it is necessary to consider PERB's interpretation of the State's obligations under these facts. In this area, PERB has adopted fairly specific standards.⁸ Those standards were summarized in Compton Community College District (1989) PERB Dec. No. 720, 13 PERC §20057:

8. See Zerger, et al., ed., California Public Sector Labor Relations (Matthew Bender, 1990), ¶ 10.06[1], pp. 10-29, 30.

"We believe that under some circumstances an employer, prior to agreement or exhaustion of impasse procedures, may implement a nonnegotiable decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. In such cases, we will apply the following requirements:

1. the implementation date is not an arbitrary one, but is based upon either an immutable deadline (such

as the one set by the Education Code or other laws not superseded by EERA) or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the nonnegotiable decision;

Ò2. notice of the decision and implementation date is given sufficiently in advance of the implementation to allow for meaningful negotiations prior to implementation; and

Ò3. the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.Ó

(Id., 14-15.)

Thus, with respect to "effects bargaining" PERB does not necessarily require delay of implementation pending agreement or impasse, so long as the three conditions are met. The first condition is analogous to the "legitimate business necessity" exception stated in the prior contract language. In essence, the condition is the implementation date must be based upon a legal deadline or upon something equivalent to a legitimate business necessity. Although the Gates consent decree sets forth some potential legal deadlines, the consent decree did not on its face preclude some delay in the full implementation of the HIV pilot project. The consent decree did not go into effect until March 8, 1990, and it did not require the mainlining of more than 30 inmates at CMF during the first three months, although the Department was permitted under the decree to mainline additional inmates (Er. Ex. 2, item 10, p. 26). Therefore, as of the TRO hearing on March 16, when CCPOA requested, and the State declined, to limit implementation at CMF to 30 inmates, the State was not faced with an immutable deadline of the type recognized by PERB. In addition, the consent decree did not affect CMC or CIW.⁹

The November 30 notice to CCPOA stated that the pilot project would be implemented at CMF, CMC, and CIW on January 1, although that date was later moved to January 15. Those implementation dates were not required by the Gates consent decree, the Jane Doe case involving CIW, or by any other legal deadline. Nor is there evidence of any consideration other than the litigation which would provide an arguable business necessity for immediate implementation. Certainly, there is nothing in the record to suggest that a delay beyond those dates would have undermined the Department's ability to make its policy decision to mainline HIV-positive inmates. Therefore, PERB's first condition was not met, and the Department was not justified in implementing the pilot program on or about January 15 or in refusing on March 16 to limit implementation at CMF to 30 inmates pending settlement or arbitration.

Although discussion of PERB's second and third conditions is not strictly necessary, since CCPOA has asked for prospective relief, some comment is appropriate. The second condition is that sufficient notice be given to permit meaningful negotiations prior to implementation. The contract, of course, requires 30 days' notice, and it must be presumed that this amount of notice will ordinarily meet the second condition.

Here, although notice was given on November 30, the informational meeting did not occur until

December 27 and there was no demand to meet and confer until that date. Probably there were

9. Until April 26, the Department was subject to a restraining order in the Jane Doe case against implementation of the pilot program at CIW. As of that date, however, as a result of the State's motion to lift the restraining order, the State had apparently committed itself to begin implementation at that facility.

scheduling problems which delayed the meeting, although the record is silent on this point. The existence of the 30-day notice provision, compounded by the time limits in the consent decree, impose an obligation on both parties to begin negotiations promptly and to attempt to reach agreement quickly with regard to issues raised by implementation of the consent decree. In this case, CCPOA has not established that 30 days was necessarily an insufficient time to complete negotiations, although the lack of a legal deadline or other business necessity for the implementation date establishes a contractual violation.

Finally, there is no issue raised as to the Department's good faith in negotiations both before and after implementation, and in fact the evidence was un rebutted that at the time of the arbitration hearing tentative agreement had been reached on most issues and complete agreement was near. Therefore, PERB's third condition was met.

In summary, the Department did not establish that it was required by the consent decree or by any other business necessity to implement the HIV pilot project on January 15 or to refuse to delay full implementation at the TRO hearing on March 16. Applying PERB standards, as impliedly incorporated in section 19.01(b), the Department violated the Agreement by its unilateral action.

B. The remedy.

The usual remedy when an employer unilaterally implements a program in violation of the meet and confer obligation is a restoration of the status quo ante. CCPOA has not requested such a remedy in this case, and in any case this would not be appropriate in view of the undisputed evidence that the parties had reached agreement on most issues prior to the arbitration hearing and were close to agreement on the remaining issues. In addition, such a remedy would obviously create a potential conflict with the consent decree, and although the contractual rights of employees

represented by CCPOA are not preempted by the existence of a consent decree,¹⁰ it is in the interest of all parties to avoid such a conflict.

CCPOA has, however, requested prospective relief as a result of the facts that the Department is required under the consent decree to negotiate with the Gates plaintiffs with regard to additional programs and procedures and that this raises the likelihood that such programs will impact on the working conditions of employees represented by CCPOA. The consent decree does in fact require development of new policies and procedures over a broad range of issues likely to affect safety, workload, and other concerns of correctional employees. The areas covered by the consent decree include procedures for classifying and

declassifying inmates with psychiatric problems along with the development of a pilot program for housing of inmates with psychiatric classifications, procedures for housing assignments, disciplinary and detention cells, exercise, and staffing.

There must be an accommodation between CCPOA's bargaining rights and the process of negotiating with the Gates plaintiffs in order to avoid conflicts between those two legally mandated processes. At the time of the arbitration hearing, neither party had clearly defined its own concerns with respect to the procedures to allow for this accommodation, and the record is inadequate to permit an order defining such procedures. The development of this procedure is best left to the parties in the first instance, with a reservation of jurisdiction if agreement cannot be reached.

10 See *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 770.

AWARD

1. The Department of Corrections violated section 19.01(b) of the Agreement by implementation of the HIV pilot project prior to completion of meeting and conferring with the California Correctional Peace Officers Association regarding the effects of the pilot project on the working conditions of employees represented by CCPOA.
2. As a remedy, the Department shall meet and confer with CCPOA, upon request, regarding procedures for accommodating the requirements of the consent decree in *Gates v. Deukmejian*, No. CIV S-87-1636 LKK-JFM (U.S.D.C., E.D.CA) with the rights and obligations established by section 19.01(b) of the Collective Bargaining Agreement between the parties. If agreement is reached as a result of meeting and conferring, it shall be reduced to writing and executed by the parties.
3. The Arbitrator reserves jurisdiction with regard to implementation of the remedy.

July 13, 1990

Signature of Franklin Silver

Franklin Silver, Arbitrator