

IN ARBITRATION PROCEEDINGS PURSUANT TO
PATTERN AND PRACTICE ARBITRATION AWARD

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In the Matter of a Controversy

between

CALIFORNIA CORRECTIONAL PEACE

OFFICERS ASSOCIATION,

Complainant,

and

STATE OF CALIFORNIA,

Respondent,

Involving San Quentin Hospital

Staffing.

Board Room

San Quentin Prison

San Quentin, California

Thursday, July 23, 1992

Met, pursuant to notice, at 10:20 A.M.

BEFORE:

FRANKLIN SILVER, Esquire, Attorney at Law,

266 Grand Avenue, Suite 200, Oakland, California

94610; The Arbitrator.

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Reported by Star R. Chapman, CSR No. 3247

APPEARANCES:

ON BEHALF OF THE ASSOCIATION:

CARROLL, BURDICK & McDONOUGH, by MARTIN R. GRAN, Esquire, 44 Montgomery Street,
Suite 400,

San Francisco, California 94104.

CARROLL, BURDICK & McDONOUGH, by RONALD YANK ,Esquire, 44 Montgomery Street, Suite
400,

San Francisco, California 94104.

ON BEHALF OF THE STATE:

K. WILLIAM CURTIS, Deputy Chief Counsel,

Department of Personnel Administration, Legal Division,

State of California,

1515 S Street,

North Building, Suite 400, Sacramento, California 95814-7243.

ALSO PRESENT:

MARK VEATCH, Field Representative, CCPOA.

DOUGLAS E. HINES, President, CCPOA, San Quentin Chapter.

R. P. FERROGGIARO, Chief Job Steward, San Quentin.

FRANK M. McNEAL, Correctional officer.

LEE P. BECK, Correctional Officer.

RICHARD HAWKINS, Labor Relations Specialist, CDC.

LIEUTENANT TED SHELTON, LRO, San Quentin.

SERGEANT IRENE AVILES, San Quentin.

STAR R. CHAPMAN, Certified Shorthand Reporter, #3247.

PROCEEDINGS

THE ARBITRATOR: We're back on the record.

Let me ask -- before I go into the award, I'd like to request on the record a stipulation of the parties that the transcription prepared by the court reporter of this the written award that is referred to award will serve as the written award that is referred to in the agreement in lieu of my preparing a separate award.

MR. YANK: So agreed.

MR. CURTIS: So stipulated.

THE ARBITRATOR: Fine. Thank you.

I guess the first thing I need to refer to, as always, is the contract provisions that govern this dispute.

I'm in the rather odd position in this case to refer to my own previous arbitration award, which, in effect, has been adopted as a contract between the parties at least that portion of it which discusses the business necessity defense.

I feel a little odd referring to my own decision, however, it is certainly relevant that the parties very consciously adopted that in the settlement agreement in a subsequent arbitration case and had that and provided for the confirmation of that settlement agreement by the superior court, in effect, elevating my prior arbitration decision to a binding contract between the parties.

So I take no personal responsibility for it. This is the parties' decision. The parties have adopted the standard governing this dispute and the standard is that the -- with respect to impact bargaining, the state has an obligation -- the department has an obligation to bargain to agreement or good faith impasse prior to implementation, subject to the business necessity defense as stated in the Compton Community

College District case of PERB.

So with that prologue, let me move to the specific issues in the case.

First of all, although the governing decision, the contract language, basically deals with the question of whether or not there has been a legitimate business necessity defense which has been asserted by the state, there has also been asserted in this case a defense that, in fact, staffing is not negotiable or that the state has never conceded the negotiating of staffing in this situation. And I just want to comment briefly on that defense.

I feel -- I'm not sure that issue is necessarily raised in the statement of issues stipulated by the parties, but nevertheless, I want to address it, because this has been one of the very difficult gray areas in terms of negotiations which has existed in labor relations and particularly in California public sector labor relations for at least since the fire fighters and Vallejo case.

One of the crucial issues in the Vallejo case had to do with the manning of fire engines, and the city in that case asserted under the Myers-Milias-Brown Act or actually in reality, the Vallejo city charter, which tracked the Myers-Milias-Brown Act, that the level of manning of fire engines was not negotiable since it was a matter of the city's own determination as to how best to accomplish its mission in terms of providing fire protection for its citizens and that it was, therefore, a matter of management prerogative and not a matter of negotiation.

The Supreme Court decided in that case that, in fact, this is a very difficult sort of borderline issue in terms of negotiating, that there are areas of very significant management concern or management discretion in terms of staffing, but that this also clearly impacts the interests of the bargaining unit, negotiable interests in part, because it affects the safety of fire fighters.

That is, of course, very closely analogous to the situation we have here since the staffing in the security wing has some fairly clear implications in terms of staffing of correctional officers.

And so the manner in which the Supreme Court resolved that at the time was to note that, in fact, the areas of negotiability and non-negotiability simply have to be resolved through the bargaining process itself through the process of proposal and counterproposal in which the management carves out its area of management discretion and the union has the ability to protect the interests of its members, the legitimate interest of its members.

And, therefore, for that reason, the Supreme Court ordered in that case arbitration of the issue of manning. So I take it that that issue has been resolved by the Vallejo decision, that to the extent that manning and staffing affects the negotiable subjects, including safety, that it is subject to negotiation.

And for that reason, I am not prepared to accept the state's blanket assertion from the state that staffing is not negotiable. Again, acknowledging that there is significant area of management discretion involved,

but it's not such as to preclude negotiation entirely.

So now addressing the state's business necessity defense, first of all, I guess addressing the Compton standards, I have to conclude that the state has not established a business necessity defense.

For one thing, the implementation date which was set -- the June 22nd implementation date which was set and was then modified was not one that was legally compelled or something that was of such fundamental interests to the department that to delay implementation beyond June 22nd or beyond July 6th would have undermined the department's ability to make the decision, and the basic decision, of course, being to establish a security wing.

I don't see that there has ever been any opposition certainly to -- from CCPOA to the notion that a security wing should be established and that it was prepared to negotiate with the department over the procedures for implementing that wing.

Therefore, I just don't see that there was -- that the date set by the department was an immutable deadline, nor was there notice of the implementation date given sufficiently in advance to allow for meaningful negotiations.

Let me address momentarily -- and I don't want to drag this out forever, but I want to address momentarily the discussions that occurred in the afternoon of July 19th -- I'm sorry, June 19th. And I don't think that there's really a great deal of dispute about this.

I think that Mr. Hawkins at the outset of this particular session made his point that the hospital should not bear the brunt of the parties' failure to agree and he was in great part basing that argument on the fact that the hospital had -- was ready for occupancy, it was -- and that no doubt part of his thinking -- I'm not sure whether it was expressed or not, but part of his thinking was that the hospital was anxious to get on with this for the reasons expressed by Ms. Hosfeld when she testified, that the hospital was not satisfied with the manner in which things had been going prior to that time with what the hospital considered the excessive number of officers that were present in the hospital.

And so there was an express desire for the -- to accommodate the hospital. I don't believe that rises to the level of an immutable legal deadline or immutable deadline of any sort, but it does provide some very unique concerns, which I will address actually in terms of the remedy. But for now, it's just -- I just want to note that I do not believe that this rose to the level of establishing a business necessity defense at that point.

Mr. Hawkins acknowledged that they had a good dialogue and he apparently was somewhat disappointed that they had not reached agreement, but he certainly did not foreclose further negotiations, and as a matter of fact, he definitely suggested that the parties continue to meet.

Then he made the statement -- and reading from the department's notes -- that he hoped to open the

hospital as a security wing Monday, June 22.

Now, I note also that pretty well tracks the language of what he said in the association's notes, the notes being taken by its official note taker, that security needs must be served and hope to open hospital effective June 22 1992. Will open on that date and impact will be further discussed.

So Mr. Hawkins at least was trying to avoid stating it as a -- an absolute ultimatum. On the other hand, the effect of it was to be an ultimatum. He was not willing to delay -- to make a commitment to delay the opening of the wing past June 22. And as a matter of fact, looking again at the department's notes, when the issue arose later about the seven day notice position, what is stated in the department's notes is that, "We may not walk in on Monday." That certainly falls a lot short of a commitment by the department to delay implementation past June 22.

So, in effect, what had happened -- and I do agree from the evidence that's been presented here that although Hawkins had expressed the impact on the budget and the cost concerns that the department had earlier, that this really did come up suddenly, the implementation date came up very suddenly at the end of the day on June 19th.

There had been, as contended by the association, a somewhat laggard approach to negotiation by the department in that the association had expressed its willingness to meet and negotiate to agreement back in March and the department had requested a delay, which ultimately wound up bringing the negotiations into June. So it wasn't really until -- I think on the record of this case, it wasn't until June 19th that there was any real need to rush this implementation that was expressed by the department. And at that time, they gave the date of June 22nd, which simply did not provide adequate time to meet and reach agreement at that point.

Therefore, I don't think that the standards of the Compton decision have been met and that, therefore, there has been no business necessity defense that has been established and the department, therefore, has violated what section is it? Section 19.01 of the agreement? Is that the number?

MR. YANK: Yes.

THE ARBITRATOR: -- by its implementation of the security wing procedures on July 6th of 1992.

Now, with respect to the remedy, I want to just sort of explain a couple of things and then I have hopefully written the remedy out in clear enough language so that it can be implemented.

First of all, what I'm going to order is a reimplementaion, but in modified form, of the full -- of the staffing pattern that was in existence prior to July 6th.

And in this particular instance, the thing that I'm very cognizant of is that I do not want to be in a position of creating an impact on the hospital such that it would significantly burden the hospital's ability to

perform its normal services. This is a unique situation since we have an outside third party that has contracted with the department to provide these services, and that outside third party has significant responsibilities, of course, to the community it serves and so this is not purely and simply a dispute between the department and the association, but it does have impact beyond that.

So what I'm going to order is that the economic aspects of the staffing pattern that existed prior to July 6th be reimplemented.

In other words, I'm going to order that the department compensate bargaining unit members in the numbers and in the amounts and -- the numbers and amounts that it would have had the staffing patterns in existence prior to July 6th remained in effect.

However, I am going to further allow the department to -- at its election, to not assign the full number of officers to the security wing that it would have prior to July 6th, because I'm again concerned about the problems of congestion and so on that were expressed by the department and, therefore, the -- and also, I understand that the last formal proposal of CCPOA, in fact, allowed modified staffing to levels significantly below those which were in effect on July 6th. And so I'm going to allow the department, at its election, to only assign the number of officers to work in the security wing as would have been required under the association's existing offer as of the last negotiating session on June 19th. And by that, I'm referring to its formal offer, not the informal discussion that took place. Now, I understand -- I'm not quite sure what the numbers are, except that I do believe -- I understand from the record that that does not require the department to assign two officers for every inmate.

Now, also I want to explain, before I go into the formal part of the remedy, my decision with respect to back pay.

Normally, of course, when there's been a finding that a unilateral action has been taken by an employer without proper negotiation that requires a status quo ante order with back pay. There are a couple of considerations here which calls me to have some concern about ordering full back pay.

First of all, my understanding is that this is an unusual situation in that the CCPOA proposal that was on the table at the time would not have required the same level of staffing, therefore, it would not have required the department to continue to expend money for compensation in the same amount as it had under the procedures prior to July 6th. And so I believe that to an extent, it would almost provide a windfall to order full back pay since the department could have accepted CCPOA's offer and could have saved that money.

Also, I am somewhat concerned, and the record is unclear about this, but there was this hiatus that occurred for over two weeks between June 22nd, which was the announced tentative implementation date, and the actual implementation date of July 6th. I don't know. The parties have not gone into any explanation for why there was not further negotiation during that period. But, in fact, you know, it does appear to me that there was time to negotiate during that period if the parties had elected to do so.

And for those two primary reasons, I am going to decline to order back pay in this case.

So let me move on to what hopefully is a fairly clear statement of the remedy which I am going to require.

I am going to, and by this order, I do require the department, number one, to immediately restore the staffing pattern as it existed prior to July 6th 1992, except that the department may elect to compensate bargaining unit members in the manner and amount as it would have under the staffing procedures in existence as of July 6th 1992, but to limit the actual number of bargaining unit members assigned to the -- and I have the CTC. Are those the correct initials? -- the CTC to the number contained in the association's existing formal proposal as of June 19 ,1992.

And also, I want to clarify that nothing here requires the department to deimplement the security wing of the Novato Community Hospital.

Number two, the department shall meet and negotiate on demand with the association with regard to security wing staffing and shall negotiate to agreement or good faith impasse. And with respect to this portion of the order, I will clarify, as I'm informed by the parties, that this applies to the direct negotiations involving this particular institution and not the main table negotiations.

And finally, number three, I will retain jurisdiction with respect to the implementation of this remedy and in particular, in case there is a dispute as to compensation if the department does, in fact, elect not to assign the full number of officers as it would have prior

to July 6th

And that ends the order. Let me explain with respect to the determination of to whom pay should be going to if there are not the full number assigned, which I assume won't be. I assume that the parties can work that out, and that's certainly my expectation that they will be able to identify who would have received the assignments to go into the security wing and so on and will manage to work out a procedure for identifying who gets paid without actually having been assigned to work there. But if there's a dispute as to that aspect of the order, then obviously I'm available.

MR. YANK: Mr. Arbitrator --

THE ARBITRATOR: Yes.

MR. YANK: -- I'm going to try to state this to be clear.

If the pattern would have called for the assignment of ten officers, but the department chooses to assign just three, then seven will be paid for not having worked whatever the shift is. Do I understand --

THE ARBITRATOR: Well, my thinking was that in actuality -- and I really don't understand, because we really didn't get into it in detail what the association's last offer was. I understood that basically the pattern was going to be four officers would be assigned with an additional two officers assigned if there were certain categories of inmates that were assigned to the hospital.

So my expectation -- correct me if I'm wrong, please. My expectation is that the basic staffing pattern which would be allowable would be four officers in addition to the sergeant.

MR. YANK: I said three just for an example.

THE ARBITRATOR: Okay.

MR. YANK: But let me restate it to four, because I believe you're correct, and there was a step up and so on.

But just the point of my inquiry is that if the department chooses in its option after it consults with the hospital, it can pay just four or five or six.

THE ARBITRATOR: It can assign just four or five or six.

MR. YANK: Right. And pay two people for not being there.

THE ARBITRATOR: That's what I contemplate by this order.

And, you know, I'll tell you the rationale. I feel that the bargaining -- in my opinion, the bargaining process which has been adopted by the parties in its settlement decision of the Kelly 2 -- in the Kelly 2 case is a very important process, which I feel has to be honored. And I feel that a significant remedy must be imposed in order to establish the importance of that bargaining process, which I feel has not been complied with in this case.

So if there is nothing further, we'll be off the record.

(Whereupon, at 5:20 p.m. the proceedings were concluded.)

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