



IN THE MATTER OF ARBITRATION )  
 )  
 BETWEEN )  
 )  
 Association of Oregon Corrections )  
 Employees (Edwards, et al.) )  
 )  
 vs. )  
 )  
 State of Oregon, Department )  
 of Corrections )  
 )  
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**OPINION AND AWARD  
 OF GEORGE LEHLEITNER  
 ARBITRATOR**

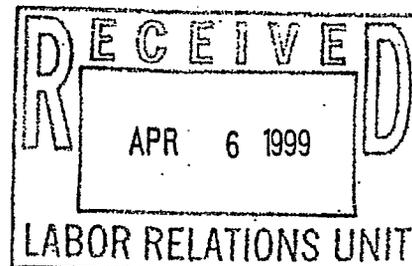
**HEARING: FEBRUARY 11, 1999**

**BRIEFS RECEIVED: MARCH 8, 1999**

**ARBITRATOR: GEORGE LEHLEITNER  
 7276 S.W. BEAVERTON-HILLSDALE  
 HIGHWAY, SUITE 334  
 PORTLAND, OREGON 97225**

**REPRESENTING THE  
 EMPLOYEES: JOHN HOAG, ESQ.**

**REPRESENTING THE  
 STATE OF OREGON,  
 DEPARTMENT OF JUSTICE: STEVE KROHN,  
 ASSISTANT ATTORNEY GENERAL**



## I. INTRODUCTION

This case involves grievances filed by the Association of Oregon Corrections Employees ("AOCE") on behalf of four (4) employees. While the circumstances of the four (4) employees are different, the circumstances of each case are sufficiently similar to warrant their being combined in a single arbitration. More specifically, in all four (4) cases AOCE contends the Department of Corrections ("Department") violated Article 28 of the Collective Bargaining Agreement when it involuntarily reassigned each of the grievants to a different shift during the pendency of internal investigations.

A hearing was held before the undersigned arbitrator on February 11, 1999 in Salem, Oregon. AOCE and the named grievants were represented by John Hoag, Attorney-at-Law. The Department was represented by Stephen Krohn, Assistant Attorney General for the Department of Justice. Both sides were afforded an ample opportunity to present evidence, examine and cross-examine witnesses, orally argue their respective causes and file Post-Hearing Briefs. Simultaneous briefs were received on March 8, 1999 and the hearing was closed on that date.

## II. ISSUES

The arbitrator frames the relevant issues as follows:

1. Did the Department violate Article 20 and/or Article 28 by involuntarily reassigning each of the grievants during the pendency of internal investigations to different shifts without paying them holiday premium pay, overtime or shift differential pay?
2. If so, what is the appropriate remedy?

### III. RELEVANT CONTRACT ISSUES

#### ARTICLE 1 - SCOPE OF AGREEMENT

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##### Section 4

This Contract incorporates the sole and complete agreement between the Employer and the Association resulting from negotiations held pursuant to the provisions of ORS 243.650 et. seq. and supersedes all prior labor contracts. It is acknowledged that during negotiations which resulted in this Agreement, each party had the unlimited right and opportunity to make demand and proposals with respect to any subject or matter appropriate for collective bargaining and that the understanding and the agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. It shall not be modified in whole or in part except by another written instrument duly executed by the parties.

##### Section 5

A. Policies, procedures, and rules of the Employer which directly relate to mandatory subjects of bargaining as defined in statute and which affect bargaining unit members on the day this Agreement becomes effective shall be continued, unless modified or deleted elsewhere in this Agreement. Should the Employer wish to change such a policy, procedure, or rule to be unreasonable then (sic) within seven (7) days of the date upon which the Association knows, or by reasonable diligence, should have know of the subject action, the Association shall request that the Employer meet to discuss the issue.

### ARTICLE 3 - MANAGEMENT RIGHTS

The Association agrees that the Employer retains all inherent rights of management and hereby recognizes the sole and exclusive right of the State of Oregon, as the Employer, to operate and manage its affairs in accordance with its responsibilities to maintain efficient governmental operations. The Employer retains all rights to direct the work of its employees, including, but not limited to, the right to hire, promote, assign, transfer, demote, suspend, or discharge employees for proper cause; to schedule work; determine the processes for accomplishing work; to relieve employees from duties because of lack of work or for other legitimate reasons; to take action as necessary to carry out the missions of the State; or determine the methods, means, and personnel by which operations are to be carried on, except as modified or circumscribed by the terms of this Agreement. The retention of these rights does not preclude any employee from filing a grievance, pursuant to Article 44, Grievance and Arbitration Procedure, or seeking a review of the exercise of these rights, when it is alleged such exercise violates provisions of this agreement.

### ARTICLE 13 - SHIFT DIFFERENTIALS

#### Section 1. Shift Differentials.

Night shift differential shall apply to all bargaining unit members, except part-time employees working less than thirty-two (32) hours per month.

In order to qualify for night shift differential, an employee must be in a job classification which is eligible for overtime compensation.

The employee (except as specified below) shall be paid a differential of

fifty cents (\$.50) for all hours of any shift which starts between the hours of 12 noon and 3:00 a.m. A portion of an hour is a period of thirty (30) minutes or greater.

## ARTICLE 20 - HOLIDAYS

### Section 1.

The following holidays will be recognized and paid for at the regular straight time rate of pay:

- A. New Year's Day on January 1;
- B. Martin Luther King, Jr.'s Birthday on the third Monday in January;
- C. President's Birthday on the third Monday in February;
- D. Memorial Day on the last Monday in May;
- E. Independence Day on July 4;
- F. Labor Day on the first Monday in September;
- G. Veterans' Day on November 11;
- H. Thanksgiving Day on the fourth Thursday in November;
- I. Christmas Day on December 25;
- J. Every day appointed by the Governor of the State of Oregon as a holiday.

### Section 2.

For all employees who work in positions that are staffed five (5) days a week, Monday through Friday, when a holiday falls on Saturday, the previous Friday shall be recognized as the holiday. When a holiday falls on Sunday, the following Monday shall be recognized as the holiday.

For all employees who work in positions that are staffed seven (7) days a week, the recognized holiday will be the actual day specified in Section 1 above.

**Section 3.**

Employees who are required to work on days recognized as holidays which fall within their regular work schedules shall be entitled, in addition to their regular salary, to compensatory time off for the time worked or to be paid in cash for time worked at the discretion of the Employer. Compensatory time off or cash paid for all time worked shall be at the rate of time and one-half (1½). The additional compensation which an employee shall be paid for working on a holiday shall not exceed the rate of time and one-half (1½) of his/her straight time pay. Any compensatory time earned may be converted to cash payment by the Employer. Holiday benefits shall be prorated for part-time employees.

**Section 4.**

Where an employee has been approved to work an alternate work schedule such as a four (4) day, ten (10) hour work week, management shall either revert the schedule to a five (5) day, eight (8) hour work week or allow the employee to utilize other available paid leave for the balance of the holiday off.

**Section 5.**

Holidays which occur during vacation or sick leave shall not be charged against such leave.

**ARTICLE 28 - WORKING CONDITIONS**

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**Section 7. Shift and Time Off Bidding**

A. Regular status employees assigned to Corrections Officer positions in

DSU may bid within that work section for shifts and days off on a schedule posted by Employer at the work section, on the basis of their classification seniority as defined in Article 39. Regular status employees assigned to Corrections Officer positions within SMU may bid within that work section for shifts and days off on a schedule posted by the Employer at the work section, on the basis of their classification seniority as defined in Article 39. Regular status employees assigned to Corrections Officer positions within IMU may bid within that work section for shifts and days off on a schedule posted by Employer at such work section, on the basis of their classification seniority as defined in Article 39. Regular status employees in positions at MCCF as of August 1997 may bid within that facility for shifts and days every six (6) months on a schedule posted by the Employer at the work section, on the basis of their classification seniority as defined in Article 39. During the initial bid period, August 1-10, 1997, all staff must rebid or they will be assigned at the option of the employer. MCCF staff have the option of using their classification seniority to remain at MCCF or return to OSP. At OSCI regular status employees assigned to Correction Officer positions in Unit 5 may bid within that work section for shifts and days off on a schedule posted by the employer at the work section on the basis of their classification seniority as defined in Article 39. The manner of bidding will be consistent with the method spelled out in paragraph I of this section.

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C. Employer shall post notice of proposed six (6) month rotation shift and time off schedules at the work section during the first day of the month immediately preceding the starting date of six (6) month rotation schedules. The Employer will continue its previous practice of bidding one-sixth (1/6<sup>th</sup>) of the time slots each month.

Employees shall be given until 5:00 p.m. on the tenth (10<sup>th</sup>) calendar day of such posting to submit their bids. Bids shall address only shift and days off. All bids must be in writing signed by the employee, and numbered by preference if the employee is placing more than one (1) bid. Employees will be limited to three (3) bids. The mechanics of the bidding procedure shall be determined by the Employer. Employees scheduled for leave in the bidding period, may submit bids in advance to the work section supervisor.

Employees on unscheduled leave during the bidding period may submit their bids by telephone, but must confirm their bid in written, signed bid form on the first (1<sup>st</sup>) day of return to duty. Employees may not bid out of their respective work unit (MCCF, SFFC, OSP) where they may be under a work plan or under disciplinary action without management approval.

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F. All affected employees must remain on the same shift/days off, except that after placing two (2) successful and consecutive bids on the same shift/days off and working on such shift/days off without placing any further bids unless out bid by a senior employee. Such employee will, however, be eligible to place bids on other shifts/days off as the rotation dates occur.

G. Employees who are involuntary reassigned shall retain their shift and days off. If that is not feasible, management will make reasonable attempts to maintain the employee's shift and days off or close proximity of shift and days. The employee shall retain their previous bid vacation.

#### IV. RELIEF REQUESTED

A finding by the arbitrator that the Department violated the collective

bargaining agreement, as alleged, and an order directing the Department to make the grievants whole for lost premium pay, for not working on holidays, for lost shift differential pay, and for any other expenses resulting from the improper change from their bid shifts.<sup>1</sup>

V. FACTS

1. Background

AOCE is the exclusive representative of classified employees within the bargaining unit at the Oregon State Penitentiary (OSP), the Mill Creek Correctional Facility (MCCF), and the South Fork Forest Camp (SFFC). AOCE also represents Correctional Officers (COs), as well as Corporals and Sergeants at the Oregon State Correctional Institute (OSCI). The terms and conditions of employment enjoyed by the bargaining unit employees are described in the collective bargaining agreement between the parties.

2. Reassignments Made During the Pendency of Internal Investigations

As previously indicated, this arbitration involves four (4) separate grievances all of which involve a similar legal principle. More specifically, each of the grievants was reassigned to a different shift during the pendency of internal investigations. What follows is a brief description of each reassignment.

A. CO Mary Turner

CO Mary Turner (formerly Hammond), has been a CO at OSP for eleven and one-half (11 1/2) years.

Allegations were made against then CO Hammond of improper relations

with an inmate.<sup>2</sup> On October 3, 1997, she was duty stationed to her residence pending completion of the investigation by Internal Affairs. During this period, she was expected to be available from 8:00 a.m. to 5:00 p.m. with a one (1) hour lunch break from noon to 1:00 p.m. (Exhibit A-3). Thereafter, on October 10, 1997, she was assigned outside the secure perimeter of the institution with no direct supervision of inmates while the investigation continued. Her schedule, while on this assignment, was from 7:30 a.m. to 4:00 p.m., Monday through Friday (Exhibit A-4). She remained on this assignment for approximately four (4) months during which time she was interviewed concerning the allegations against her.<sup>3</sup>

Prior to being reassigned, first to her home and subsequently to an assignment outside the secure perimeter, then CO Hammond worked a bid shift from 5:00 a.m. to 1:30 p.m. with Fridays and Saturdays off. At the time, she was married to another CO employed by OSP and she coordinated her schedule with his so they could care for their children. According to CO Turner, she incurred additional child care expenses as a result of her being reassigned. Moreover, she did not receive premium pay for days she would have worked on her bid shift and she apparently missed out on some shift differential pay.<sup>4</sup>

B. CO Jose Gill

CO Gill was not available to testify at the arbitration hearing. However, his situation was substantially similar to that of CO Turner and was addressed in the same class action grievance (Exhibit A-5).

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C. Sergeant Sam Welling

Sergeant Sam Welling is a Sergeant at OSCI. He commenced his employment with the Department in 1978.

Grievant Welling was placed on administrative leave with pay and was duty stationed to his home effective March 25, 1998 pending the investigation of allegations that he had assaulted an inmate. (Exhibit A-15). Welling was duty stationed to his home for approximately one month. During this period, he was supposed to be on duty and available from 8:00 a.m. to 5:00 p.m., Monday through Friday with an hour off for lunch between 12 noon and 1:00 p.m. (Exhibit A-15).<sup>5</sup> Thereafter, Welling was placed on a modified assignment for approximately one (1) month during which time he worked 4/10 shifts (i.e., 7:00 a.m. to 5:00 p.m.) from Monday through Friday with Friday through Sunday off.<sup>6</sup>

Prior to being duty stationed to his home effective March 25, 1998, Welling worked a bid shift from 4:00 p.m. to Midnight with Thursday and Friday off. Welling claims a loss of shift differential pay, the opportunity to work overtime and holiday pay as a result of his reassignment. (Exhibit A-16).

D. CO Gene Edwards

At all times relevant, grievant Gene Edwards was a CO at OSP.

Grievant Gene Edwards was involuntarily reassigned to a different shift on or about October 31, 1997. More specifically, Edwards was involuntarily reassigned from his bid shift of 1:30 p.m. to 9:30 p.m. with Sunday and Monday off to an 8:00 a.m. to 4:00 p.m. shift with Saturday and Sunday off. Edwards remained on this shift for

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approximately seven (7) months pending the outcome of an internal investigation having to do with contraband allegedly being brought into the institution. He was returned to his regular shift the day after he was ordered to and then gave a statement to the Department's investigator.<sup>7</sup>

Grievant Gene Edwards contends that he incurred additional day care expenses as a result of the involuntary reassignment because his bid shift was designed to dovetail with the hours worked by his wife.

### 3. Past Practice

Evidence presented with respect to past practice at OSCI and OSP was specific and to the point.

At EOCI on at least five (5) occasions, employees were duty stationed to their residences during the pendency of internal investigations. In these instances, they were to be on duty and available during regular work hours and days (i.e., 8:00 a.m. to 5:00 p.m., Monday through Friday). (Exhibit E-1). All of these instances occurred before AOCE was certified as the exclusive representative at EOCI in August 1997.

Similarly, the Department produced evidence of three (3) instances in 1989 and 1990 where bargaining unit members were duty stationed to their residences from 8:00 a.m. to 5:00 p.m., Monday through Friday during the pendency of internal investigations. (Exhibit E-2).<sup>8</sup> All of these instances occurred before AOCE became the exclusive representative in December 1992.

### 4. Bargaining History

The credible testimony of Department Negotiator, Mark Hunt, established

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<sup>6</sup>  
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that when Article 28, Section 7G was negotiated in 19985, neither party intended to address circumstances whereby employees were being duty stationed to their residences during the pendency of an internal investigation.<sup>9</sup> AOCE does not dispute Hunt's testimony on this point.

## **VI. POSITION OF THE PARTIES**

### **1. AOCE**

AOCE's arguments are summarized as follows:

1. There are several sub-issues for the arbitrator. The first is whether the Department violated the labor agreement by placing the grievants on house arrest. The second involves the nature of the reassignment, i.e., outside the walls and with different hours/days off work.

2. AOCE does not necessarily dispute the Department's right to reassign employees during an internal investigation. However, there was no justification in these instances for placing employees on house arrest with changed hours of work. At the very least, the Department could have kept them on the same shift.

3. The Department argues that it should be allowed to place employees on house arrest and change their shift times because it must have access to interview them. This argument fails for several reasons. First, in most cases the employees were not even interviewed while they were under house arrest. Second, none of the grievants had shifts that were so unusual they could not be interviewed while assigned to their normal shifts.

4. With respect to being assigned outside the walls, the Department

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9. The grievance should be granted and a broad remedy ordered so that the grievants can be awarded lost premium pay for not working on holidays and in some instances, lost shift differential pay.

2. The Department

The Department's arguments are summarized as follows:

1. In view of the established past practice at both OSCI and OSP, the question for the arbitrator is whether Article 28, Section 7C and/or F can be held to modify or delete the Department's right to continue with the practice. (See, Article 1, Section 5). As the moving party, AOCE must be able to prove that the applicable provisions in Article 28, Section 7 had the intended effect of modifying or deleting the established practice.

2. Article 1, Section 5 of the labor agreement is clear: The parties agreed that a broad range of activities (i.e., policies, procedures and rules of the Employer) would continue as of the date of signing the agreement unless modified or deleted by the contract. This being so, it is incumbent on AOCE to identify a specific provision of the contract that modifies or deletes the practice. This AOCE cannot do.

3. Nowhere in Article 28 did the parties address the issue of situations where employees are duty stationed to their homes during the pendency of an internal investigation. Thus, the past practice language in Article 1, Section 5 is neither modified nor deleted by Article 28, Section 7.

VII. OPINION

The Department did not violate the collective bargaining agreement as alleged. The arbitrator's rationale follows:

1. Contractual Analysis

In my view, this case lends itself to a straightforward analysis.

As the Department and counsel correctly observes, the logical starting point for analyzing the applicable contract language is Article 1, Section 5 because that provision establishes the general right to continue "(P)olicies, procedures and rules of the employer...which affect bargaining unit members on the date this Agreement becomes effective...unless modified or deleted elsewhere in this Agreement". (Exhibit A-1, Article 1, Section 5).

This provision is not limited to past practices that were established after AOCE became the exclusive bargaining representative at OSCI and OSP. To the contrary, the provision expressly includes all practices that were in effect when the collective bargaining agreement became effective. In this case, the evidence clearly established that when the collective bargaining unit went into effect there were established practices at both OSCI and OSP to duty station employees to their homes from 8:00 a.m. to 5:00 p.m., Monday through Friday during the pendency of internal affairs investigations. The evidence established further that this was done to keep employees subject to allegations of misconduct away from inmates and available to investigators during normal business hours.

The question then is whether anything in Article 28, Section 7(A), (C) and/or (G) somehow modifies or deletes the established practice of duty stationing employees' at their residence and/or outside of the walls during an internal investigation even though by doing so their bid shifts are changed.

The answer is "no". The applicable sections of Article 28, Section 7

confer nothing more than a general right to bid for shifts based on seniority. Nothing in these provisions speaks to modifying or deleting the Department's established practice as described above.

2. The Duty to Act in Good Faith

I do not mean to imply that the Department has "carte blanche" authority to arbitrarily reassign employees to different shifts in every instance where they are subject of an internal affairs investigation.

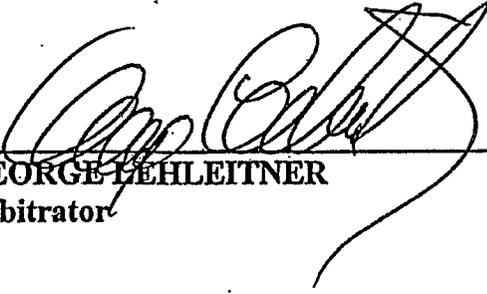
Clearly, the Department must act reasonably and in good faith in such situations. If there is no reasonable justification for taking employees off of their shift, then the action is suspect. On the other side of the coin, AOCE as the charging party has the burden of proving that the Department acted arbitrarily and capriciously in taking such action. The evidence offered in this case fell short of satisfying that burden of proof.

VIII. AWARD

The grievance is denied.

Respectfully submitted this 1st day of April 1999.

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GEORGE LEHLEITNER  
Arbitrator

## FOOTNOTES

- 1 There was some discussion at the hearing as to whether or not some of the grievances were untimely. Since the Department's counsel did not address the untimeliness issue in its Post-Hearing Brief, it will not be considered by me.
- 2 Testimony of CO Mary Turner
- 3 Testimony of CO Mary Turner
- 4 Testimony of CO Mary Turner (Exhibit A-5)
- 5 Testimony of Sergeant Sam Welling:  
According to Welling, he was interviewed by the Oregon State Police before he was duty stationed to his residence but he was not interviewed by anyone from the State while he was assigned to his house for a month or during the following month when he was placed on a modified assignment.
- 6 Testimony of Sergeant Sam Welling.
- 7 Edwards was interviewed by the Oregon State Police on October 29, 1997. He was then interviewed by an Internal Affairs investigator approximately one (1) week later. During the interview with the Internal Affairs investigator, Edwards declined to provide a voluntary statement based on his rights under the 5<sup>th</sup> Amendment. (Exhibit A-14).
- 8 The Department also cited one (1) instance that occurred in January 1997 in which a Lieutenant was duty stationed to his residence during the pendency of an internal investigation. (Exhibit E-2, page 4).
- 9 Testimony of Mark Hunt.