

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between:

**PENNSYLVANIA STATE
CORRECTIONS OFFICERS
ASSOCIATION**

AAA Case # 14 390 00077 08
(SCI - Pittsburgh –
Supplemental Agreement)

and

**COMMONWEALTH of PENNSYLVANIA
Department of Corrections**

Hearing Date: January 28, 2009
Decision Date: May 19, 2009

Appearances: For the Association – Thomas W. Jennings, Esq., *Jennings Sigmund*

For the Commonwealth – William J. Helzlsouer, Bureau of Labor
Relations

Introduction

The Pennsylvania State Corrections Officers Association (PSCOA) represents approximately 10,000 employees of the Commonwealth of Pennsylvania, employed in the Department of Corrections and the Department of Public Welfare, including corrections officers, food service employees and tradesmen. The facility involved in the instant proceeding is the State Correctional Institution (SCI) – Pittsburgh, a medium security facility for male inmates, which closed in January 2005, but which reopened beginning in May 2005. The facility currently employs about 300 bargaining unit employees, and is classified as a Level 2 institution, housing over 1700 inmates, providing mostly drug and alcohol counseling services; but also houses inmates classified as Level 3 and Level 4 – i.e. serious risks.

The instant dispute arises out of the refusal of the Commonwealth to re-implement and apply the terms of a supplemental agreement, unique to the SCI - Pittsburgh facility, dealing with the rights of unit employees to bid on posts and shifts.

This grievance was initially denied by the Commonwealth. When the issues of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration Association for selection of a neutral arbitrator. By letter dated April 24, 2008, the undersigned was appointed arbitrator in this matter.

Thereafter, a Notice of Hearing was issued on July 14, 2008 scheduling a hearing to take place on January 28, 2009 at SCI - Greensburg. Subsequently, a second Notice of Hearing issued on January 16, 2009, setting the location of the hearing for SCI-Pittsburgh. Pursuant to this Notice of Hearing, a hearing was held on January 28, 2009 at 10:00 AM at the SCI – Pittsburgh facility, located at 3001 Beaver Avenue, Pittsburgh, PA. Both parties were duly represented, participated fully in the hearing, and provided sworn testimony, and subsequently filed post-hearing briefs.

Issue

Did the Commonwealth unilaterally change terms and conditions of employment, or otherwise abrogate or repudiate the terms of the collective bargaining agreement by refusing to re-implement an alleged supplemental agreement dealing with Bid Posts? If so, what should the remedy be?

Statement of Relevant Facts

The Initial Collective Bargaining Agreements:

As noted previously, the Commonwealth currently operates a Level 2 correctional facility for about 1700 male inmates at 3001 Beaver Avenue, Pittsburgh, Pennsylvania. This facility has been in existence for more than 125 years, and has a storied and sometimes controversial history. Prior to 2005, SCI – Pittsburgh operated as a Level 5 institution, a high-security facility, and employed more than 700 corrections officers.

The employees of SCI – Pittsburgh were first organized by the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) around 1970, and subsequently AFSCME Local 2500 was formed in September or October 1970.¹ Thereafter, AFSCME negotiated a series of collective bargaining agreements, starting with the 1972-1973 contract.²

This initial agreement contained a provision at Article IX, Section 5 that addressed the issue of shift assignment preferences, which read,

¹ The Pennsylvania State Corrections Officers Association, the grievant herein, did not become the collective bargaining representative for this bargaining unit until June 2001.

² Received into evidence as Union Exhibit 1.

Section 5. In making shift assignments preference shall be granted on a seniority basis unless it is necessary to assign otherwise in order to protect the efficiency of operations. Seniority status in this regard shall be that status attained within a classification series at an institution.

The Union, however, viewed this contract language as deficient. The Union presented as a witness James S. Weaver, Jr. Weaver, now retired, served as a Corrections Officer at SCI – Pittsburgh for his entire career, from June 1970 until January 2004. Weaver also served as Union Vice-President, Recording Secretary, Chief Steward, and as a member of the Union's bargaining committee. Weaver testified authoritatively and in significant detail about the history of labor relations at SCI – Pittsburgh. I credit the entirety of Weaver's testimony.

According to Weaver, the contract language related only to "shift assignments" and dealt merely with the hours of work that Corrections Officers would be assigned, but did not address the duties they were to perform or the specific posts within the institution where they would work. This was a matter of great concern to the Corrections Officers, who worked in daily close contact with dangerous inmates. According to Weaver, untrained and newly-hired employees were often assigned to duties for which they had no training and which put their safety at risk, and also risked the safety of other Corrections Officers and inmates.

Unfortunately, even the negotiation of a second collective bargaining agreement³, with a term of July 1, 1973 through June 30, 1976, failed to address these issues, as it contained exactly the same language regarding "shift assignments."

³ Received into evidence as Union Exhibit 2.

The Murder of Lt. Peterson, and the so called “Shapp Agreement”:

On December 10, 1973, tragedy struck at SCI – Pittsburgh when Corrections Officer Lt. Walter Peterson, a career officer since 1958, was brutally beaten and stabbed to death by four inmates as he worked alone with them in the RHU, the Restricted Housing Unit, which was reserved to house the most dangerous inmates in the facility. The inmates pummeled Peterson with chairs, kicked him, and stabbed him with broken fluorescent lamp tubes. According to contemporaneous newspaper accounts⁴, Peterson’s body was “severely mangled”. Among Peterson’s attackers was convicted cop-killer Stanley Hoss, and convicted armed robber Danny Delker, who was awaiting trial for stabbing two other inmates, one of whom died.

The murder of Lt. Peterson created an emergency situation at the prison, with many Corrections Officers calling-in sick, and other Corrections Officers refusing to enter the detention areas of the facility. The Pennsylvania State Police were called to investigate Peterson’s killing, and to secure the facility. As union witness James Weaver testified, “...if something was not done, there would have been a riot and it would not have been the inmates rioting.”

The following day, then-Pennsylvania Governor Milton Shapp visited the prison and attempted to calm and console the frightened and angry Corrections Officers. Governor Shapp joined in discussions with representatives of the Local Union, and indicated to representatives of the Bureau of Prisons that he wanted an agreement that would ensure that there would be no repeat of the violence that had occurred.

Indeed, negotiations promptly followed in Harrisburg within a day or two of Shapp’s visit to the prison. The Governor attended these negotiations and remarked to both parties, “I want this thing settled. I don’t care how you do it. Settle it. Take it back to the institution and settle it.”

⁴ See Union Exhibit 3, received into evidence.

Thereafter, negotiations continued at the Pittsburgh facility for the next 4-5 months, resulting in what has become known, at least from the Union's perspective, as the "Shapp Agreement". According to Union Official Weaver, this agreement covered "ten or eleven items", addressing such issues as the structure of the RHU, training, safety, taking away razor blades and radios from inmates, and most importantly, shift assignments.⁵ Weaver testified credibly that the agreement that was reached included three provisions regarding shift preference, and allowed bidding on days off, the hours of the day that Corrections Officer would work, and the exact post within the institution where they would be assigned. This agreement applied to at least 100 posts throughout the facility and basically excluded only the RHU and one administrative post.

Beginning in 1974, the Pittsburgh facility implemented a practice of posting vacant positions on a monthly basis, specifying the exact position, the hours of work, and the days off attached to each bid. Further, in the collective bargaining negotiations for the November 30, 1976 to June 30, 1978 contract⁶, the parties agreed to revised shift preference language which read,

Section 10. In making shift assignments to shift openings, preference shall be granted on a seniority basis unless the Employer feels it necessary to assign otherwise in order to protect the efficiency of the operation. Seniority status in this regard shall be classification seniority.

According to Union Official Weaver, this exact same language has appeared in every subsequent collective bargaining agreement, and currently can be found in Article 27, Section 11 of the agreement between the Union and the Commonwealth.

⁵ There was no evidence presented that this agreement was ever reduced to writing.

⁶ See Article XXX, Seniority, Section 10 of Union Exhibit 4, admitted into evidence.

More importantly, Weaver testified credibly and without challenge, that at SCI - Pittsburgh the "Shapp Agreement" was implemented fully, and remained fully in effect for more than 30 years. Weaver explained how each month vacancies would be posted on a bid board for bidding in accordance with seniority, and that on the 15th of each month there would be a labor-management meeting at which bids would be awarded. Weaver contends that this arrangement was vigorously enforced by the Union, up until his retirement in 2004. While there were occasional local negotiations for the addition or deletion of certain positions within the "Shapp Agreement", the underlying agreement remained in full force and effect.

Additionally, various letters were exchanged between the parties, including two letters in 1988 from Kathryn H. C. Adams, the BOC's Chief of Labor Relations Division to AFSCME Grievance Chair Michael Fox, which clearly establish that there was some unspecified contractual practice of bidding job posts that was unique to SCI - Pittsburgh, and different from the practice in place elsewhere in the Commonwealth's correction system.⁷

The Closure of SCI – Pittsburgh:

Beginning in 2002, the Department of Corrections began to make plans to close SCI - Pittsburgh. At a Labor-Management meeting held on June 18, 2002, the parties discussed the fact that the Pittsburgh facility would be closing and that unit employees would be offered transfers to SCI – Fayette, which was characterized as a replacement facility for SCI - Pittsburgh. The minutes of the meeting noted, "Fayette will honor your Pittsburgh seniority until the first new hire at Fayette. The positions from Pittsburgh are going to Fayette." Management further advised the local union that, "it would begin the process of phasing out bid posts, except for a couple of posts."⁸ Finally, the minutes

⁷ See Union Exhibit 7, admitted into evidence.

⁸ See Page 5, Union Exhibit 8, admitted into evidence.

reflect that, "management stated that they would get together with the Union to come up with an agreeable procedure for this implementation."

The shut-down of SCI – Pittsburgh was to take place over several years, and since the Union did not wish to forfeit its hard-won right to bid for posts during the shutdown period; on September 12, 2002 the Union grieved management's unilateral changing of the bid post practice. This grievance ultimately became the subject of AAA Case No. 14-390-00555-04, heard by Arbitrator Lewis R. Amis more than 4 years later on October 3, 2006.

Arbitrator Amis subsequently issued his Award on March 21, 2007⁹, finding that, "...given the extent of the change in conditions accompanying the shutdown of SCI Pittsburgh, management was justified in suspending the 1972 bid post procedures at that location during the course of the shutdown." (underlining added for emphasis) Arbitrator Amis further noted in his Award,

"My mandate as arbitrator in this case does not extend to issues arising outside the scope of the grievance filed in 2002 in Pittsburgh. That being the case, I cannot consider the merits of any subsequent grievance raising a different, though related, issue that the Union filed at SCI- Fayette. Any such grievance must be dealt with in separate arbitration proceedings."

While the Union's grievance, protesting management's unilateral changing of the bid procedure at SCI – Pittsburgh, was winding its four-year path through the contractual grievance-arbitration procedure, other events were unfolding at the facility. In addition to closing the Pittsburgh facility, the Department of Corrections decided to also close Waynesburg – SCI. The 780 unit employees at SCI - Pittsburgh, and the 104 unit

⁹ See Union Exhibit 9, admitted into evidence.

employees at Waynesburg were all permitted to utilize their contractual rights to transfer to the new SCI - Fayette facility, and employees who wished to transfer began exercising their rights to do so. Over the next three years, the number of inmates and staff at SCI – Pittsburgh gradually diminished, with many of the dangerous RHU inmates sent to SCI – Fayette, a Level 4 institution. Ultimately the transfer to Fayette was completed by January 1, 2005, at which time SCI - Pittsburgh ceased operations and the facility was partially mothballed.

The Commonwealth does not contend, and there is no evidence in the record to suggest, that there was any agreement between the parties terminating the contractual relationship between the Union at SCI – Pittsburgh and the Commonwealth, or otherwise extinguishing the rights of unit employees under the “Shapp Agreement” to bid for posts. Unit employees who transferred from SCI – Pittsburgh to SCI – Fayette continued to work under the terms and conditions of the state-wide collective agreement, but the unique bid posting procedure that had existed at SCI – Pittsburgh, the “Shapp Agreement”, was not applied at the Fayette facility.

The Reopening of SCI – Pittsburgh:

No sooner had the SCI – Pittsburgh facility closed, than the Commonwealth realized that it had a serious inmate housing problem, and was operating at about 120% capacity systemwide. Despite the construction of new corrections facilities across the Commonwealth, additional cells were needed. Thus, in December 2005, shortly after it had shut down the Pittsburgh facility, the Department of Corrections decided to reopen Pittsburgh in a slightly modified form. Instead of operating as a Level 5 facility, SCI – Pittsburgh would be reconstituted as a Level 2 institution, primarily providing drug and alcohol counseling services. As Guard Captain John P. Tustin so aptly characterized it, the facility would now house, “a better quality of felon”.

According to Union witness David A. Mandella, bargaining unit employees were offered reinstatement in seniority order, and began returning in May 2006. Initially, these employees worked to “shake down” the entire facility for any contraband that may have been left behind by contractors or others while the facility had been closed. Virtually 100% of the Corrections Officers who were employed during this initial period were former SCI - Pittsburgh employees who exercised their recall rights. Recalls continued, as the institution was re-populated with inmates, and as of the date of the arbitration in this matter, approximately 300 bargaining unit employees are employed in the Pittsburgh facility, as opposed to about 780 before the shutdown. There are major sections of the facility not yet reopened.

Union witness Mandella testified that unit employees' job duties and functions were exactly the same as they were before the shutdown and that their responsibilities vis-à-vis the inmates were the same. Despite the fact that SCI – Pittsburgh now houses a better quality of felon, there is still a RHU to house about 55 dangerous or uncooperative inmates. Mandella additionally testified that the management command structure is the same as before the shutdown, and that training manuals, forms, and procedures are the same. Of course, the employees at SCI - Pittsburgh work under the same state-wide collective bargaining agreement as before the shutdown. There is, however, one important difference: The “Shapp Agreement”, unique to SCI – Pittsburgh, which previously governed post bidding, is no longer in effect.

Instead of unit employees being allowed to bid for specific days off, specific duty stations, and specific work shifts, employees now are merely allowed to engage in the sort of limited “shift preference” bidding that was in effect before the murder of Lt. Peterson.

Analysis and Discussion

Factually, there is very little in dispute in this matter. There is no question that following the tragic murder of Lt. Peterson, the Union was able to obtain from management certain terms and conditions of employment that were not part of the state-wide agreement, specifically the right to bid not only for shift preference, but also for specific hours of work and specific duty posts. Based on the uncontroverted testimony of Corrections Officer Weaver, and other witnesses, this arrangement served the parties well for more than 30 years, until 2002 when management decided to close the facility.

Upon announcing the shutdown of the SCI - Pittsburgh facility, management commented, "...that they would get together with the Union to come up with an agreeable procedure for this implementation." Apparently, that never happened. When management announced the closing of the SCI - Pittsburgh facility, and its intention to no longer apply the terms of the "Shapp Agreement", the Union filed a grievance and processed that grievance to arbitration, thus continuing to assert its rights.

Arbitrator Lewis R. Amis wrote a thorough and well-reasoned decision concluding that management was within its rights in, "...suspending the 1972 bid post procedures at that location during the course of the shutdown." Note, however that Arbitrator Amis did not find that the "Shapp Agreement" ceased to exist. His award did not terminate the practice, but merely permitted the suspension of the practice during the shutdown period. Amis essentially concluded that this unconventional and non-conforming supplemental agreement should be placed in limbo. By terming the "Shapp Agreement" as suspended, Amis's award does not preclude claims that it should be reinstated if and when SCI - Pittsburgh were to reopen; an event which occurred much sooner than anyone could have anticipated. Arbitrator Amis's Award is carefully and very narrowly crafted to address only the issue of the *suspension* of the "Shapp Agreement" during the shutdown period. His award does not address the issue of whether the "Shapp Agreement" was forever nullified by the shutdown, or by the brief

hiatus which followed during which the facility lay dormant, or somehow became permanently void and without effect. Those are issues for this arbitration.

Customarily, arbitrators give great deference to prior arbitral findings¹⁰, and that is certainly the case here. There is, however, no conflict or tension whatsoever between this finding and Arbitrator Amis' prior arbitration decision. Arbitrator Amis considered only the issue of the applicability of the suspension of the "Shapp Agreement" during the shutdown phase. He presciently reserved for future proceedings all other issues, noting,

"I cannot consider the merits of any subsequent grievance raising a *different, though related*, issue that the Union filed at SCI - Fayette. Any such grievance must be dealt with in separate arbitration proceedings."

The instant proceeding addresses that very same "*different, though related*" issue that Arbitrator Amis referenced: the issue of the applicability of the "Shapp Agreement" at the re-opened SCI- Pittsburgh facility. Considering all of the facts set forth above, I find that the "Shapp Agreement" remains viable, was never concluded, and should be re-implemented.

Of concern is the contention of the Commonwealth that the "Shapp Agreement" is not an agreement at all, but only a practice, and as such does not share the weight of an actual written clause of the contract. The Commonwealth does concede that there was an unwritten "practice that was in place for over twenty-five years." As testified to by Union witness Weaver, this practice came about as the result of extensive meetings and discussions and was concluded by a handshake. Weaver's testimony was not vague or chimerical. Instead it was clear and concise and I give it great weight in reaching my conclusion in this matter.

¹⁰ See, *W.R. Grace & Company v. Rubber Workers Local 759*, 461 U.S. 757 (1983).

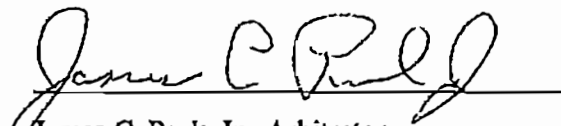
The courts have held that a collective bargaining agreement may encompass more than what has been reduced to writing.¹¹ Having concluded that there was at least a “past practice” with respect to the issue at hand, that practice necessarily becomes a means to determine rights under the collective bargaining agreement.

Based on all of the credible and uncontroverted evidence, I find and conclude that the “Shapp Agreement” survived the wind-down period prior to the closing of the SCI – Pittsburgh facility, and the brief interregnum period during which the prison was shuttered. Clearly, the Union never abandoned its claim to this supplemental agreement which came out of the tragic death of Lt. Peterson. Management had an opportunity to bargain the termination of the “Shapp Agreement” in the days leading to the Pittsburgh prison closing in early 2005, but failed to do so. Thus, the “Shapp Agreement” lives on, and management must comply with its terms.

¹¹ See for example, *Danville Area School District*, 562 Pa. 238, 754 A. 2d 1255; *City of Erie*, 104 Pa. Cmwlth. 394, 522 A.2d 132.

AWARD

In accordance with the decision set forth above, the Grievance in this matter is SUSTAINED. The Commonwealth is directed to re-instate the terms of the supplemental "Shapp Agreement" at SCI – Pittsburgh, retroactive to the date of the recall of the first bargaining unit employee to the facility, and to make unit employees whole for any losses they may have suffered, and to make no deviation in the terms and conditions of the "Shapp Agreement" unless and until a new agreement has been reached, or the parties have bargained to a good-faith impasse. I shall retain jurisdiction over the remedy portion of this Award, in the event that the parties are unable to reach agreement with regard to the remedy.



James C. Peck, Jr., Arbitrator

Wallingford, PA

May 19, 2009