

C. ALLEN POOL, Arbitrator
Arbitrator's Case No. 2-14-07

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

California Correctional Peace Officers)
Association, Bargaining Unit 6)
and)
State of California, Department of)
Corrections & Rehabilitation)
Grievance: DPA Case Nos. 06-06-0299 &)
05-06-0288 - Freeze on Lateral Transfers)

ARBITRATOR'S
OPINION AND AWARD
June 11, 2007

This Arbitration arose pursuant to Agreement between the California Correctional Peace Officers Association Bargaining Unit 6, hereinafter referred to as the "Union, and the California Department of Personnel Administration, hereinafter referred to as the "State", under which C. ALLEN POOL was selected by the parties to serve as the Arbitrator. The Parties stipulated that the matter was properly before the Arbitrator and that his decision shall be final and binding. The parties further stipulated that the interaction of Section 4.01 Management Rights and Section 27.01 Application and Duration, Entire Agreement imposes Dills Act obligations on the parties.

The hearing was held in the Sacramento, California on February 14 and April 3, 2007 at which time the parties were afforded the opportunity, of which they availed themselves, to examine and cross-examine witnesses and to introduce relevant evidence, exhibits, and argument. The witnesses were duly sworn and a written transcript was made of the hearing. The parties made oral closing arguments at which time the record was closed. The parties mutually agreed that the Arbitrator, after receipt of the transcript, shall hold any further action

with the case until notice is received from one of the parties to proceed. In a letter dated May 22, 2007, notice was received from the parties directing the Arbitrator to proceed with case and issue an Award.

Appearances:

For the Union:

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ISSUE

Did the State, the Employer, by implementing a freeze on lateral transfers in April 2005 and by renewing it or re-imposing it again on May 23, 2006 violate the Section 12.04 and/or Section 27.01 of the Memorandum of Understanding and the understanding between the parties? If so, what shall be the remedy?

RELEVANT PROVISIONS OF THE AGREEMENT

Article 12.04 Employee Requested Transfers Between Appointing Authorities

Article 27.01 Application and Duration, Entire Agreement

BACKGROUND

On April 15, 2005, the Director of the Department of Corrections, J.S. Woodford, issued a "Hard Internal Freeze For Correctional Officers Classification". The directive stated, "No lateral transfers, regardless of tenure and time base, or rollover of intermittent employees are allowed." The freeze was effective immediately throughout the State with the exception of

Delano II (Jt-2, p. 16).¹ The directive was addressed to all concerned parties with the exception of the Union.

The Union filed a class action grievance alleging the State's action violated Article 12.04, Article 26.01 and Article 27.01 of the MOU. The Union's requested remedies were "1. Cease and desist the internal hard freeze for the Correctional Officer classification and 2. Any and all remedies deemed justified." In a letter dated April 20, 2005 the Union requested a third level appeal (Jt-2, p. 11). In a letter dated May 18, 2005 the Union made an inquiry as to the whereabouts of State's response to the Union's third level appeal (Jt-2, p. 10). In a letter dated June 3rd, the Union submitted another inquiry as to the whereabouts of the State's response to the third level appeal (Jt-2, p. 9).

In a letter dated June 15, 2005 the Assistant Deputy Director of the Office of Labor Relations, Tim V. Virga, denied the grievance. Specifically, Mr. Virga's response stated that the "impact of the memorandum, order is "de minimus; it is not a denial of transfer, it is a temporary emergency action to keep staffing at safe levels. The memorandum is not in violation of 12.04, it does not prohibit transfers in their entirety; it has frozen general transfers and made provision for hardships". Mr. Virga's response also stated that "There is not a change to the hours, wages, working conditions, or scope of representation under Ralph C. Dillis Act that would require negotiation or notice pursuant to Section 27.01 of the BU6 MOU" (Jt-2, p. 7).

In a letter dated July 1, 2005 the Union requested a fourth level appeal. The letter noted that the grievance had been filed to the third level appeal on April 18, 2005 and the State's denial response had been received by the Union on June 16, 2005 (Jt-2, p 5-6). Following the Union's request for a fourth level appeal, the Union sent a letters to the State on July 26th and August 8th

¹ Joint Exhibits are cited as Jt-1, p. 3, etc. State exhibits are cited as E-1, E-2, etc. Union exhibits are cited as U-1, etc.

inquiring as to the whereabouts of the State's response to the fourth level appeal (Jt-2, p. 3-4).

On October 20, 2005 the State's Labor Relations Officer, Edward J. Takach, responded to the grievance and the request for arbitration with a denial. The State's position was that no violation of the MOU had occurred. Moreover, the State's response included a statement that its office as of October 20th had not received a request for a fourth level appeal from the Union; that the request for arbitration, dated August 16, 2005, had been received on August 17th; and that its office had received no other communication relative to the grievance (Jt-2a).

Mr. Takach's response on October 20, 2005 stated that the request for the third level grievance was received sometime after April 20th and the response from the department to the third level grievance was dated June 15th. Mr. Takach also responded by saying "There was no mutually agreed upon extension of the time limits; this office did not receive a fourth level appeal; the material provided lacked sufficient information to allow this department to investigate and respond; and the request for arbitration was untimely. Accordingly, the grievance and request for arbitration are denied" (Jt-2, p. 2).

On May 23, 2006 Secretary James E. Tilton of the California Department of Corrections and Rehabilitation issued a "Hard Internal Freeze Order for All R06 and SO6 Employees" effectively immediately. The order froze, again, all lateral transfers and was in effect for all CDCR Adult and Juvenile facilities and replaced "any freeze directives currently in effect for these classifications". The order stated that the freeze was necessary "due to the significant vacancy rates at institutions statewide and specifically those in remote and/or high cost of living areas". The reason, as stated by Secretary Tilton, was because the level of vacancies had been compounded by the reduced number of cadets currently graduating from the academy and an unprecedented increase in inmate population in adult facilities. Secretary Tilton's directive also

stated that steps are being taken to address these issues, that this is viewed as a temporary measure, and the freeze directive will be continually monitored and modified or lifted as soon as possible (Jt-4, pp. 1-2).

The Union, on May 31, 2006, filed a grievance and demand for arbitration on the freeze order of May 23rd. The Union's grievance alleged that the State's directive violated the MOU in that BU members were prohibited from transferring from one facility to another. The Union's assertion was that the negotiated language of the MOU is clear on this matter and the Department's action was a violation of Articles 12.04 and 27.01. The Union requested that the State immediately rescind the order and that the State engage in no similar activity henceforth. The grievance continued and was processed to this arbitration.

POSITION OF THE UNION

The freeze on employee transfers is a violation of the Memorandum of Understanding. The freeze is not de minimus and is not outside the scope of representation. The ability of employees to transfer is a negotiated right. The language and intent of Section 27.01 is clear. The employee has a negotiated right to transfer near a desired area according to the conditions expressed in Section 27.01. Prior to the freeze, the State failed to notify the Union of the freeze and failed to give the Union an opportunity to meet and confer. The grievance should be sustained.

POSITION OF THE STATE

The State is not in violation of Sections 27.01 and/or 12.04. The Department of Corrections has a labor shortage in all classifications and has a right to impose a freeze on lateral transfers. The freeze was imposed to deal with the vacancy rate. The Department's needs outweigh the Union's concerns. The matter is outside the scope of representation and the freeze

on lateral transfers is de minimis. If the freeze is lifted, the consequences would be enormous. It would impede the Department's ability to achieve its functions. The needs of the State must be given first priority. The 2005 freeze is not arbitrable. The Union failed to timely appeal the matter to arbitration. The grievance should be denied.

DISCUSSION

Inherent in every collective bargaining agreement, in this case a memorandum of understanding, is a covenant of good faith and fair dealing frequently referred to as a doctrine of reasonableness. The covenant imposes an obligation on each party to the agreement not to destroy or injure the right of the other party to receive the fruits of the contract. The implied covenant does not impose any new duties or obligations. It only governs conduct in those areas controlled by the agreement. In this case, the "fruits of the contract" is the negotiated right of employees to request and receive lateral transfers in accordance with the conditions expressed in Article 12.04 of the MOU.

The State's contention was that the freeze is "de minimis", that the freeze is temporary to deal with the increase in prison population and a shortage in prisons guards, and that the matter is outside the "scope of bargaining". The State's "de minimis" contention was not persuasive. De minimis is the legal doctrine that the law does not concern itself with minor or trifling matters.² The freeze on lateral transfers is not a trifling matter. It is a "big deal" and denies the employees the fruits of a mutually agreed to right.

The State's assertion that the freeze was temporary was a violation of the doctrine of good faith and fair dealing. If a temporary change in terms and conditions of the agreement are necessitated by a crisis or an emergency, the State had an obligation to meet with the Union to

² Roberts, Harold S. Roberts' Dictionary of Industrial Relations, 3rd Edition, The Bureau of National Affairs, Inc. Washington D.C., 1986.

explain the need, to provide an expectation as to the length of the temporary freeze, and give the Union an opportunity to assist in dealing with the problem through the meet and confer process. In this instance, prior to the 2005 freeze the State did not notice the Union nor did the State inform the Union of the freeze when it was issued. The State conducted itself in the same manner with the 2006 freeze. The evidence record was void of any operational reason not to meet and confer while preparing to issue the freeze. The State's unilateral action in these instances was arbitrary and unreasonable, to say the least.

To say that the State has a huge and growing problem would be an understatement. There is a real shortage of prison guards, there are critical vacancies in some prison facilities, and the inmate population continues to grow. One example of the crunch is the expectation that the prisons will be out of beds by August 2007. However, the problem will not be dealt with by unilaterally changing terms and conditions of the MOU.

The State also contended that the matter was outside the scope of bargaining. The State's argument was not supported by the record. The Dills Act mandates bargaining over wages, terms, and conditions of employment. The scope of bargaining includes the subjects that the parties have discussed at the bargaining table and have mutually incorporated into the MOU. In this instance, the employees' right to lateral transfers as mutually agreed to and incorporated into Article 12.04 of the MOU.

For the reasons discussed in the foregoing, the decision of the Arbitrator is that the State violated Articles 12.04 and 27.01 of the Memorandum of Understanding and the understanding between the parties by implementing a freeze on lateral transfers in April 2005 and by renewing it or re-imposing it again on May 23, 2006. The grievance is sustained.

The Union, with respect to a remedy, requested that a PERB type notice be posted in all facilities of the Department of Corrections & Rehabilitation throughout the State of California informing all persons that with this Award the freeze rule on lateral transfers has been lifted as the date of this Award and that the State was in violation of Article 27.01 of the MOU.

In addition, the Union offered two options for a remedy. One included lifting the freeze on lateral transfers except in those prison facilities designated as exempt by the State. Back pay would be awarded to those employees that had requested a lateral transfer and were on a transfer list from the date of the May 26, 2006 freeze to the date of this Award. Front pay of \$1000 per month would be awarded to those employees in the exempt facilities to the date the freeze is lifted in the respective employee's facility.

The second option offered by the Union was for the freeze order to be lifted in all prison facilities in statewide. If the State wants to re-impose the freeze, the State must give notice to the Union and give the Union a reasonable amount of time to negotiate in good faith before implementation.

The Arbitrator, upon consideration of the record and the Union's request with respect to the remedy question, concluded that the appropriate remedy would be the second option. Therefore, the State is directed to lift the freeze on lateral transfers at all prison facilities statewide. And, if the State wants to re-impose the freeze, the State must give notice to the Union and give the Union a reasonable amount of time to negotiate in good faith before implementation. The Union also requested that the Arbitrator retain jurisdiction over any disputes that may arise in the implementation of posting the PERB type notices and the order lifting the freeze rule on lateral transfers.

AWARD

The grievance is sustained. The State violated Articles 12.04 and 27.01 of the Memorandum of Understanding and the understanding between the parties by implementing a freeze on lateral transfers in April 2005 and by renewing it or re-imposing it again on May 23, 2006.

REMEDY

- 1. The State is directed to post PERB type notices in all prison facilities statewide that a violation of Article 27.01 was committed by the Employer
- 2. The State is directed to lift the freeze order on lateral transfers.
- 3. If the State wants to re-impose the freeze order, notice must be given to the Union and the Union must be given a reasonable amount of time to negotiate in good faith before implementation.
- 4. The Arbitrator retains jurisdiction over any dispute arising out of the implementation of this remedy.


 C. ALLEN POOL, Arbitrator

Date: June 11, 2007