

NEW YORK CITY  
OFFICE OF COLLECTIVE BARGAINING  
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In the Matter of the Arbitration

between

CORRECTION CAPTAINS ASSOCIATION

and

THE CITY OF NEW YORK, DEPARTMENT  
OF CORRECTION  
-----\*  
Case No. A-4152-92

AWARD

The undersigned arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

The grievance is sustained. There was a violation of both the Agreement and Department Orders in the way in which Captains were rescheduled and shift reduced. The City and the Department shall comply immediately with the staff reduction and rescheduling requirements as described in the opinion herein. Furthermore, the parties shall have 120 days to resolve the issue of back pay for the rescheduling violation. The Arbitrator shall retain jurisdiction in this case in the event that questions arise concerning its meaning or implementation.

  
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Carol Wittenberg

STATE OF NEW YORK

SS.:

COUNTY OF WESTCHESTER

I, CAROL WITTENBERG, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

  
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Date:

  
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Signature

NEW YORK CITY  
OFFICE OF COLLECTIVE BARGAINING  
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In the Matter of the Arbitration  
between

OPINION AND AWARD

CORRECTION CAPTAINS ASSOCIATION

A-4152-92

and

THE CITY OF NEW YORK, DEPARTMENT  
OF CORRECTION  
- - - - - \*

Before: Carol Wittenberg

The undersigned, having been designated by the parties pursuant to the collective bargaining agreement, was selected to serve as arbitrator of the dispute described below. Hearings were held on April 2, 1993, May 7, 1993, May 18, 1993 and June 14, 1993 at the Office of Collective Bargaining in New York, New York. The Union was represented by Harry Greenberg, Esquire. The City was represented by Robin Romeo, Esquire.

The parties had a full opportunity to examine and cross-examine witnesses, to submit documentation and to make oral argument in support of their respective positions. The hearing was declared closed on October 25, 1993, upon receipt of the parties' post-hearing briefs.

There are two issues before the Arbitrator which were consolidated for purposes of the hearing. They are as follows:

Did the Employer violate the collective bargaining agreement and relevant Department Orders by the way it rescheduled the tours of duty for Captains? If so, what shall the remedy be?

Did the Employer violate relevant Department orders when it implemented the shift reduction program for Captains? If so, what shall the remedy be?

### RELEVANT CONTRACT PROVISIONS

#### ARTICLE III HOURS AND OVERTIME

##### Section 2.

a. In order to preserve the intent and spirit of this Section on overtime compensation, there shall be no rescheduling of days off and/or tours of duty except as provided below. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory re-assignment of personnel to different days off and/or tours of duty. Notwithstanding anything to the contrary contained herein, the Department shall not have the right to reschedule employees' tours of duty, except that the Department shall have the right to reschedule employee's tours of duty on ten occasions per year and on an additional six occasions per year for training purposes at the training academy without payment of pre or post-tour overtime provided that the Department gives at least 24 hours advance notice to the employee whose tours are to be rescheduled.

b. The Department shall also have the right to reschedule employees within the first six months of the promotion to Captain on or after July 1, 1990 on an additional eight occasions for training purposes at the training academy without payment of pre or post-tour overtime provided that the Department gives at least 24 hours advance notice to the employees whose tours are to be rescheduled.

ARTICLE III (CBA between DEA and CNY)

Section 1(b).

In order to preserve the intent and spirit of this section on overtime compensation, there shall be no rescheduling of days off, except that for the purpose of night watch coverage an employee's swing period shall not be diminished by more than 8 hours. This restriction shall apply both to the retrospective crediting of time off against hours already worked and to the anticipatory reassignment of personnel to different days off. Prior to the completion of the steps in the grievance procedure under Article XXI of this Agreement, the President of the D.E.A. may informally discuss a question in regard to the application of this Section 1(b) with the Police Commissioner and the Chairman of the Personnel Grievance Board in an effort to resolve the matter.

ARTICLE XX GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. - Definition

For the purpose of this Agreement the term "grievance" shall mean:

- a. a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement;
- b. a claimed violation, misinterpretation or misapplication of the rules, regulations, or procedures of the agency affecting terms and conditions of employment, provided that except as otherwise provided in this Section 1a. the term "grievance" shall not include disciplinary matters;

## BACKGROUND

### RESCHEDULING

The collective bargaining agreement covering Correction Captains, like the majority of contracts covering uniformed employees, contains a prohibition against rescheduling an employee's scheduled tour of duty. When rescheduling occurs, the employee is compensated at an overtime rate.

In negotiations for the 1987-1990 contract, the Union agreed to allow the City to reschedule ten days without the payment of overtime in exchange for a savings credit valued at 1.22 per cent. The Union contends that there were restrictions placed on the ten rescheduled days, namely: (1) the Department was required to give 24 hours notice prior to rescheduling; (2) captains could not "fly"<sup>1</sup>; (3) the Department was precluded from creating a false extra<sup>2</sup> in order to reschedule; and (4) rescheduling would be defined as any change in tour, whether inside or outside a platoon.

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1. Flying is defined as being reassigned to a post outside of one's permanent command.
  2. False extra is defined as adding an additional position on a tour and then rescheduling that person.

The City disputes the fact that such restrictions were placed on its right to reschedule. It contends that rescheduling of hours that does not change a person to a different platoon does not qualify as a rescheduled tour prohibited under the contract and compensable by overtime pay. The City asserts that it never agreed in negotiations that captains would not "fly". Nor did it agree to only reschedule extras. The City concedes that it agreed not to create false extras and not to reschedule employees on a pass day.

Following negotiations with the City, the Union reached an agreement with the Commissioner of Corrections which was incorporated into a series of guidelines which were published on June 15, 1991. The guidelines include the following:

- A. Captains may be rescheduled up to ten (10) times each year.
- B. A rescheduled tour of duty must be scheduled within the 24 hour period beginning with the first tour (midnight) and ending with the third tour (evening) during which the original tour was scheduled (as defined in the Police Department Detective Rules). At least 24 hours advance notice is mandatory when rescheduling a tour of duty.
- C. Captains shall not be scheduled for rescheduled tours of duty outside their parent facility, except for training purposes at the Academy as defined in the Correction Captains contract.
- D. In no case shall a security post be shift reduced and thereafter filled in any manner (eg. by rescheduling).
- E. Whenever possible rescheduling and the notice of rescheduling should be done as far in advance as possible.

F. Each facility may use up to ten (10) rescheduled tours of duty each year. Rescheduling should be used only to fill authorized positions on the Uniformed Table of Organization.

In effect, the guidelines placed a ban on "flying" and required the Department to reschedule in accordance with "Detective Rules." The guidelines also included an agreement not to shift or reduce a security post.

The Union claims that "Detectives Rules" apply to any change in start times whether or not a tour is rescheduled inside or outside a platoon. The Union contends that its interpretation is supported by a decision and award of Arbitrator George Nicolau.

The City defines "Detective Rules" as the rescheduling of a tour within the same 24 hour period as the original tour was scheduled. The City notes that detectives can have their hours changed within a 24 hour period without the payment of any overtime. Detectives are not paid overtime when rescheduled unless the rescheduled tour falls on a pass day or regular day off.

The Department is on a three platoon system pursuant to the Administrative Code S9-116. Tours of duty commence at midnight, 8:00 a.m. and 4:00 p.m. The evening tour can be any eight hour period starting from 11:00 a.m. and before 8:00 p.m. The day tour can be any eight hour period starting from after 8:00

a.m. and before 11:00 a.m. The night tour can be any eight hour period starting from 8:00 p.m. to 7:00 a.m. The City asserts that the creation of a miscellaneous tour within the same platoon, provided for under the Administrative Code, is not compensable, i.e. a change from 8-4 to 9-5. The Union contends that any change in start time, whether or not a tour is rescheduled inside or outside a platoon, is considered a rescheduling compensable under the contract.

#### SHIFT REDUCTION

In 1991, the Department began a program of shift reduction for Captains under Operation Order 26/91. Shift reduction is defined as reassigning an individual to work in a different location than his/her usual post, filling the vacancy left on that post by someone else, and then not filling the vacancy created by the reassigned person. The Department had instituted a shift reduction program for Correction Officers in 1988.

The shift reduction program was designed to reduce overtime costs by not filling a vacancy on a post. The decision to shift reduce a post is made by the warden at each facility. Order 26/91 states in relevant part.

\* The intent of the program is to close positions that will not result in the violation of any mandates and/or established guidelines. Additionally, there are to be no shift reductions made that cause facility security to be jeopardized.

The Union defines a security post as one that involves contact with inmates at any point of custody and control. The Union maintains that security posts include: security, control room, movement, housing, yard captain - inmate activity, food services, medical services, receiving room, vacation relief of security, personnel probe, CPSU, investigative duties, classification, environmental health, program, inmate identification, and personnel. The Union contends that each of these security posts is not subject to shift reduction.

#### CONTENTIONS OF THE UNION

The Union contends that its agreement to reschedule ten tours without the payment of overtime was premised on the application of "Detective Rules". The Union claims that "Detective Rules" are synonymous with the Nicolau award. Specifically, the Union contends that the rescheduling provisions are in effect whether or not a tour is rescheduled inside or outside of a platoon.

The Union also asserts that the right to reschedule pertained only to Captains who were extra on a particular tour. It argues further that the parties' agreement would preclude a Captain assigned to a mandated post from being rescheduled. While the Department could reschedule extras, it could not require a Captain to "fly". Moreover, the Union asserts that rescheduling can only be used to fill authorized positions on the Uniformed Table of Organization.

The past practice of performing the tour established by the duty chart at the beginning of the year, for the entire year, or tour that is changed, within the platoon's period of time on a week's notice, is permissible and not considered a rescheduling violation. The Union contends the City is required to compensate Captains whose tours were rescheduled at the contractual rate of time and one-half.

With regard to the shift reduction program, the Union contends that the City violated Department Orders when it implemented the program. Specifically, the Union claims that the Department agreed not to shift reduce security posts under the Department's June 15, 1991 guidelines on the implementation of rescheduling. The Union charges that, despite the Department's agreement, security posts have been shift reduced.

The Union notes that the Department did not provide a definition of a security post during the course of the hearing. In the absence of a departmental definition, the Union asserts that its definition should be accepted. Moreover, the Union points out that its definition is aimed at including posts which involve contact with inmates at any point of custody and control where there is an impact on the safety and security of inmates and staff.

#### CONTENTIONS OF THE CITY

The City contends that the Department has not violated the contract or its policy on the ten rescheduled tours. The Union bases its grievance on a claim that rescheduling means any change in a Captain's scheduled tour of duty. It is the City's position that rescheduling means changing a scheduled tour from one platoon to another as defined by the Administrative Code.

The Administrative Code establishes a three platoon system; a day tour, an evening tour and a night tour. It defines each tour by its starting time. The Code also allows for the creation of miscellaneous tours which are created by altering the start time to within a specified time period to include the definition of a day, evening or night tour. The City contends that ~~changing~~ the start time within the definition of a day, evening or night tour does not

constitute rescheduling. The City argues that rescheduling only occurs when the changed times fall within the definition of a different tour.

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The City contests the Union's reliance on "Detective Rules" in defining what rescheduling means. It points out that detectives may be rescheduled from one tour to another without the payment of overtime except on pass days. The City cites the John Sands award as supportive of its interpretation of "Detective Rules", as well as the Nicolau award in defining rescheduling as a change from one platoon to another.

The City also relies upon the past practice of the Department to compensate employees whose tours are switched to a different platoon. The City contends that no bargaining history was introduced to indicate that this practice was altered during negotiations.

The City also responded to the Union's charge that it violated Department policy in its selection of who to reschedule. The City denies it agreed only to reschedule extras, insisting that it only agreed not to create false extras. The City relies on bargaining history in support of its position. It claims that it would not have been able to realize the 1.22 credited to ~~the~~ the Union had it only been able to reschedule extras. Moreover, the City points out

that there is no written agreement that supports the Union's assertion.

With regard to shift reduction, the City denies reducing security posts. It argues further that the designation of a security post is within management's discretion. The City never agreed to bargain over the level of staffing or to give up its right to determine the levels of security.

The City argues further that wardens must continue to have the right to define a security post in order to adjust to changing needs within the facilities. The City contends that since the Department has not defined a security post in its written policy, no violation has taken place.

#### OPINION

The Arbitrator has two issues before her: One, whether the Department is properly rescheduling tours under Article III, Section 2. of the Agreement; and two, whether the Department improperly shift reduced Captains. The Arbitrator finds that the Department has violated both the Agreement and departmental orders in the way it shift reduced posts and rescheduled Captains. My reasons follow.

The issue of rescheduling is covered in Article III, Section 2. There is no reference to shift reduction in the contract. Nor was the matter discussed in bargaining between the Union and the City. Nevertheless, following negotiations for the 1987-1990 contract, the Department reached an agreement with the Union which it incorporated into a series of guidelines to reflect the relationship between the implementation of shift reduction and the rescheduling of ten tours. These guidelines, which were promulgated by the Department on June 15, 1991, must be viewed as a binding agreement since they represent the Department's interpretation of how Article III, Section 2. was to be applied.

The guidelines are clear in certain respects. One, they prohibit "flying", or the assignment of a Captain to a post outside one's permanent command. Two, they prohibit the Department from reducing a security post and filling it thereafter. Three, they require the Department to use rescheduling to fill authorized positions on the Uniformed Table of Organization. Four, the agreement precludes the Department from creating false extras. There is nothing in this agreement, however, which limits the Department to rescheduling only extras. Nor did the City agree to this demand in bargaining.

The guidelines also require the Department to reschedule in accordance with "Detective Rules". The parties disagree as to the

meaning of this phrase. The Union contends that "Detective Rules" apply to any change in start times whether or not a tour is rescheduled inside or outside a platoon. The City contends that "Detective Rules" refer to the rescheduling of a tour within the same 24 hour period of the original scheduled tour. Both sides cite bargaining history and the Nicolau award in support of their positions. The City also cites the Sands award as a basis for defining "Detective Rules".

There is no question that, under the DEA collective bargaining agreement, detectives may be rescheduled from one tour to another without the payment of overtime except on pass days. Sands supported the City's interpretation of rescheduling in his September 25, 1985 arbitration award on this issue.

Nicolau, in a decision issued on December 26, 1987, found that the rescheduling of Captains from the midnight tour (11:00 p.m. to 7:30 a.m.) to either the 5:00 a.m. to 1:30 p.m. or the 6:30 a.m. to 3:00 p.m. tour violated Article III, Section 2. His decision was based on the following: One, the tours were "ad hoc and did not follow the customary pattern of authorization and approval"; and (2) they were not created to "fill new needs...but solely to fill gaps on the day tour". Nicolau concluded that their creation was "not a bona fide operational decision, but merely a device, which, ... was purposefully designed to skirt the Agreement". While

Nicolau did not define the term "rescheduling", he described the kinds of changes that violated the spirit and intent of the Agreement.

Upon careful review of the record, the Arbitrator is not persuaded that either the Union or the City's definition of rescheduling is the correct one. The Union's interpretation is unsupported either by the DEA contract or by practice. And, while Nicolau sustained the Union's grievance, his decision cannot be read to define rescheduling as any change in hours. Nicolau ruled that the overlapping of tours by six and one-half to seven and one-half hours was violative of the contract. On the other hand, the City's definition of rescheduling would allow for the type of violation prohibited by the Nicolau award.

The definition of rescheduling must reflect the contract language while being consistent with prior arbitration awards. In this light, the Arbitrator finds that "rescheduling" means a change in hours which results in the majority of the basic eight hour tour, in excess of four hours, spilling over into the next platoon. When the Department reschedules Captains in accordance with this definition, it must compensate them at the overtime rate, time and one-half above their regular rate, in accordance with current practice.

The Arbitrator turns next to the issue of shift reduction of Captains in conjunction with the rescheduling of tours. The Department agreed to certain restrictions on the reduction of security posts without defining what that means. The City contends that the definition of a security post must be left to the warden of each facility. The Union contends that its definition of what constitutes a security post should prevail.

In the absence of a definition of a security post, the Department cannot be held to comply with its June 15, 1991 agreement with the Union. The Arbitrator is persuaded, based upon the testimony adduced at the hearing, that certain posts are security posts. The basis for this designation rests with the Captain's responsibility for the direct care, custody and control of inmates where there is an impact on the safety and security of inmates and staff.

The following includes a list of security posts: Security; Control Room; Receiving Room; Movement/Classification; Housing; Inmate Activity; Food Service; Medical Service; Personnel (Probe); CPSU; and Investigation where the assignment involves interviewing inmates. The following do not necessarily constitute security posts: Program Captain; Environmental Health Officer; General Officer; Personnel; Classification (No Security Duties); Headquarters; and any other unnamed posts. These and other

unnamed posts will be considered security posts when they have the same level and amount of inmate contact and supervision as those designated as security posts.

In sum, the Department violated the Agreement and its Orders in the manner in which it shift reduced and rescheduled Captains. The Department shall comply with this award prospectively. In addition, Captains who were improperly rescheduled shall be compensated. The parties shall have 120 days in which to resolve the issue of back pay for the rescheduling violation. At the request of the parties, the Arbitrator shall retain jurisdiction on the remedy and other matters arising from her award. Therefore, on the basis of the record before her, the Arbitrator makes the following award:

AWARD

The grievance is sustained. There was a violation of both the Agreement and Department Orders in the way in which Captains were rescheduled and shift reduced. The City and the Department shall comply immediately with the shift reduction and rescheduling requirements as described in the opinion herein. Furthermore, the parties shall have 120 days to resolve the issue of back pay for the rescheduling violation. The Arbitrator shall retain jurisdiction in this case in the event that questions arise concerning its meaning or implementation.

Dated: November 12, 1993

  
Carol Wittenberg