PROCEDURAL HISTORY

The Washington State Department of Corrections, McNeil Island, is hereinafter referred to as “the State,” "the Employer," or “MICC.” Teamsters Local Union 117 is hereinafter referred to as "the Union." Collectively, they are hereinafter referred to as “the parties.” This arbitration addresses a "group grievance," and the subject employees shall be collectively referred to as “the Grievants.”

Two collective bargaining agreements base the grievances at issue here. They are hereinafter referred to as the “agreements” or “contracts.” The earlier agreement, Joint Exhibit 1, effective July 1, 2005 through June 30, 2007, bases grievance number 60-07, dated May 31, 2007, brought on behalf of two Correctional Officers, Catherine Dillon and Darren Feiler. The current agreement, Joint Exhibit 2, effective July 1, 2007 through June 30, 2009, bases grievance number 82 –07, dated July 16, 2007, filed on behalf of Correctional Officer Michelle Johnson, and grievance number 86-07, dated July 20, 2007, filed on behalf of Correctional Officer Fallen Luciano. The parties’ dispute goes to the interpretation and application of those agreements as they relate to the Employer's action suspending the assignment of voluntary overtime posts on the McNeil Island facility to employees working at the mainland based dock and depot worksites when those available assignments are contiguous to those employees’ regular shifts. The grievances were consolidated at the request of the Union, as noted in Joint Exhibit 7. The parties utilized the Grievance Resolution Panel (hereinafter “GRP”) process provided by the agreements, and on October 24, 2007 that panel announced its deadlock on the issue. Following unsuccessful attempts at resolution through Step 2 of the contracts’ grievance procedures, the Union, by letter of November 5, 2007, made a formal demand for arbitration. Following FMCS procedures, Anthony D. Vivenzio was selected by the parties and appointed

Arbitrator to hear the matter. An arbitration hearing was held at the Union's facilities In Tukwila, Washington, on September 4, 2008. The parties stipulated that all prior steps in the grievance process had been completed or waived, and that the grievance and arbitration were timely and properly before the Arbitrator. During the course of the hearing both parties were afforded a full opportunity for the presentation of evidence, examination and cross-examination of witnesses, and oral argument. The evidentiary record was closed on September 4, 2008. The parties filed post-hearing briefs. The Arbitrator received timely briefs from both parties, submitted on October 24, 2008. Thereafter, the parties sought to correct perceived irregularities in the Employer's brief, and prepared and presented a "Joint Submission to Arbitrator" dated November 7, 2008. The pertinent terms of that "Joint Submission" are set forth below entitled " Stipulations of the Parties." The full record was deemed closed and the matter submitted on November 7, 2008.

STIPULATIONS OF THE PARTIES

At the hearing, the parties expressed their wish that, in the event the Arbitrator should find a violation of the agreements, they be given an opportunity to resolve the matter and arrive at a remedy of their own making, and failing that, the Arbitrator should then prescribe one. To that end, the parties submitted a "JOINT SUBMISSION TO ARBITRATOR," dated November 7, 2008, setting forth their stipulated direction to the Arbitrator as follows:

- You will not issue any ruling as to remedy at this stage, as previously agreed by the parties;
- Accordingly, the decision you issue at this stage will solely be on the question of whether or not there is a violation, and therefore Section F of the Employer's Post-Hearing Brief would not be considered at this time;
- If you find a violation, the parties would then attempt to craft their own remedy;
- If the parties are unable to craft their own remedy within sixty days on your initial ruling, the Union would submit its position as to the appropriate remedy, and the Employer would then have two weeks to respond to that position statement with no further argument from either side. You would then be asked to issue an award with respect to

> remedy, and the parties agree that you would consider Section F of the Employer's Post-Hearing Brief along with the other material submitted by the parties. You would retain jurisdiction for an additional 60 days to resolve any disputes with respect to the meaning of the remedy that you crafted.

The parties agreed that with this submission they regarded the hearing, evidence and briefing as being closed**.** This Arbitrator's Award has been made in accordance with the parties' stipulations.

BACKGROUND

The McNeil Island Corrections Center is a corrections facility operated by the State of Washington. The main correctional campus is located on an island in the southern region of Puget Sound. The campus encompasses 4449 acres, and is the site of 52 homes occupied by staff in addition to the correctional facilities. It is accessed by a ferry operated by the Department of Corrections between the island and the dock on the mainland at Steilacoom, Washington. The ferry operates 24 hours a day, seven days a week. The crossing takes approximately 20 minutes, with the boats running at intervals of 60 to 90 minutes. There is also a depot located on the mainland opposite the island, which is located approximately one mile from the dock. Employees generally park their cars at the depot and ride a bus to the dock in order to take a ferry to the island.

The dock and depot are staffed by Correctional Officers 24 hours a day, seven days per week. They work three standard shifts: 10:15 p.m. to 6:45 a.m., 6:15 a.m. to 2:45 p.m., and 2:15 p.m. to 10:45 p.m., the same as shifts at the prison facility on the island. Article 17 of the applicable agreements sets forth the procedure by which these employees may volunteer for available overtime. Generally, employees volunteer for overtime in their job classification by signing up on an overtime list for the days and shifts that they wish to work. They may add or remove their names from the list up to four hours before the requested shift. Overtime is

assigned in order of seniority from among those employees who have signed up for a specific day and shift regardless of whether they're working an adjacent shift or are off duty. If the senior employee on the list is not on duty when the overtime shift becomes available, an attempt is made to contact them by telephone. The employee then has the option to decline the available overtime. If an employee is on duty and on the overtime list they may not decline the overtime assignment. When the voluntary overtime list has been exhausted, but additional overtime posts remain unfilled, an "all-call" will be issued. Those remaining overtime posts will be offered on a first-come, first-served basis. When there are insufficient volunteers to fill overtime posts, mandatory overtime may be assigned. Unlike voluntary overtime, mandatory overtime is assigned in reverse order of seniority, and employees are not required to work mandatory overtime unless the work is contiguous to the end of their normal shifts.

There is also a group of officers that work what are called "odd shifts." Their hours and scheduling differ markedly, with significant overlaps in relation to other Correctional Officers. They generally staff the visiting room, hospital, and food service. Though transport officers may have core hours, they are frequently adjusted depending on operational needs. Though these employees may sign up for voluntary overtime, they generally receive it only on days off. If such an employee is working and their name comes up on the list for available voluntary overtime, they will receive a call out of courtesy.

Before May, 2007, Correctional Officers working on the mainland, whether at the dock or the depot, had been able to work voluntary overtime either on the mainland or on the island directly after (contiguous to) their regular shift. The Employer made arrangements to cover the time required for a mainland based officer to get to the island. For example, sometimes a post would be left vacant, or someone on the island would be held over on overtime until the

mainland based officer reporting for overtime was able to arrive. These arrangements were generally left to the discretion of the Lieutenant on duty, depending upon available staffing and security needs. In January of 2007, the Union grieved the Employer's action deducting 1.7 hours travel time to the island from officers' compensation. The contractually created GRP found this practice violated the agreement. Subsequently, the Employer ceased assigning dock/depot workers to voluntary overtime on the island after their shift on the mainland, asserting they could not be present for work when the overtime shift began. This action led to the several grievances which were consolidated for submission to arbitration.

ISSUES BEFORE THE ARBITRATOR

The parties stipulated at the hearing that the Arbitrator should consider the statement of the issue as follows:

Did in the Employer violate the agreement when it did not award voluntary overtime posts on the island to employees working at the dock or at the depot, when the overtime work was contiguous to the employees' regular shift?

PERTINENT COLLECTIVE BARGAINING AGREEMENT PROVISIONS:

Collective Bargaining Agreement effective July 1, 2005 through June 30, 2007:

ARTICLE 9
Grievance Procedure

9.3 Non-Disciplinary, Non-Disability Separation Grievance Processing

All grievances other than disability separations or disciplinary action …will be processed as follows:

(B) <u>Processing</u>

Step 2-Grievance Resolution Panel. Within fourteen (14) days of receiving the Step 1 decision, the Union may remove the grievance to the Grievance Resolution Panel… if the panel is unable to reach a joint decision on the grievance, except those related to oral and written reprimands, the Union may file a demand to arbitrate the dispute.

9.5 Authority of the Arbitrator

The Arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The Arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this Agreement, nor will the Arbitrator make a decision that would result in a violation of this Agreement…

ARTICLE 17
Overtime

17.1 Determination and Assignment of Overtime

(A) Right to Assign
The Employer has the right to require an employee to work overtime. When the Employer determines that overtime is necessary and determines to assign such overtime to a bargaining unit employee, the Employer will:

(1) Identify the job classification to be assigned the overtime, the number of positions requiring overtime, the specific post assignments and the anticipated duration of the overtime.
(2) Assign overtime as voluntary or mandatory, as set forth in this Article.

(C) Eligibility for Voluntary Overtime
All employees will be eligible to sign up for voluntary overtime except those:

1. Who are on reassignment to home;
2. As otherwise provided in this Article.

Employees are responsible for accurately reporting their eligibility for voluntary overtime.

(D) Assignment of Voluntary Overtime
All available positions on each shift will be offered to the employees on the voluntary sign-up list based on seniority date. Volunteers may select any position available, but on-duty employees who have signed up on the volunteer overtime list for the next scheduled shift may not refuse an assignment of overtime. However, if a prescheduled overtime assignment is unavailable because the position has been filled, the employee volunteering for such prescheduled overtime may decline a different overtime assignment. The Employer will fill vacancies in advance of those shifts where vacancies are known. Supervisors responsible for assigning the overtime may fill vacancies up to two (2) weeks in advance using the volunteer sign-up list. The Employer will document the date and time each assignment is made. In the event the most senior employee is not on duty or cannot be reached, i.e. no answer, the next employee in descending order will be contacted. A good-faith effort must be made and documented to contact volunteers in a

timely manner to ensure they have enough time to arrive at work in advance of the shift in question…

Collective Bargaining Agreement effective July 1, 2007 through June 30, 2009:

ARTICLE 9
Grievance Procedure

9.3 Panel Grievance Processing

All panel grievances will be processed as follows:

(B) Processing

Step 2: Grievance Resolution Panel. Within fourteen (14) days of receiving the Step 1 decision, the Union may remove the grievance to the Grievance Resolution Panel… If the panel is unable to reach a joint decision on the grievance, except those related to oral and written reprimands, the Union may file a demand to arbitrate the dispute.

Step 4: Arbitration. If the grievance is not resolved... the Union may file a demand for arbitration.

9.5 Authority of the Arbitrator

The Arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The Arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this Agreement, nor will the Arbitrator make a decision that would result in a violation of this Agreement…

ARTICLE 17
Overtime

17.1 Determination and Assignment of Overtime

Arbitrator's note: (A)(1) and (2) are identical with the provisions of the prior contract.

(B) Eligibility for Voluntary Overtime

All employees will be eligible to sign up for voluntary overtime except those:

1. Who are on reassignment to home;
2. As otherwise provided in this Article.

Employees are responsible for accurately reporting their eligibility for voluntary overtime.

(D)(2) Prescheduled and daily voluntary overtime assignments will be offered to employees from the voluntary sign-up list based on seniority date.

(D)(4) In the event that the most senior employee is not on duty and cannot be reached, i.e. no answer, when assignments are being offered, the next employee in descending seniority order will be contacted. A good-faith effort must be made and documented to contact volunteers in a timely manner to ensure that they have enough time to arrive at work in advance of the overtime shift.

POSITIONS OF THE PARTIES AND DISCUSSION

Position of the Union

Historically, Correctional Officers working on the mainland, at the dock or at the depot, of the classifications involved here, have been able to use their seniority, as set forth in Article 17 of the agreements, to obtain assignments of voluntary overtime available at the next shift on the island. Following a lawsuit which resulted in recognizing as compensable time for work performed between shifts, so-called "pass-down" time, exchanges of equipment and information between shifts, the Employer, in collaboration with the Union, made adjustments to the timing of its shift schedule. These adjustments resulted in greater overlap between the ending of one shift and the commencement of the next shift. The availability of opportunities for overtime based upon seniority remained intact, however. The Employer took a number of approaches to address the situation and accommodate the senior employees volunteering for overtime, such as holding over a person on the island awaiting their replacement, or leaving a position on the island vacant until the overtime employee arrived. Alternatively, a mainland employee traveling to the island for an overtime shift might leave their mainland post early and their post would become vacant or be back-filled.

In April 2007, the GRP, in response to a grievance, granted compensation for an employee's time spent traveling from one worksite to another, that is, time in transit from the employee's regular shift on the mainland to the employee's anticipated overtime shift on the

island. This result led to the Employer to make a substantial change in its practice: the Employer would not thereafter recognize an employee stationed on the mainland as being eligible for overtime shifts on the island contiguous to that employee's shift on the mainland. Ironically, the Employer still retains the right to mandate that employee to work such shift and makes full compensation therefor.

The Union argues essentially two bases for its grievance: 1) the plain language of the agreements establishing seniority as the basis for the assignment of voluntary overtime, and 2) the long-standing past practice recognizing seniority and accommodating access to voluntary overtime posts on the island by senior officers working on the mainland. As to the first argument, the seniority language sought and bargained by the Union was an important and fundamental value urged throughout contract negotiations. It was important to the Union that there be no exceptions to that rule. The unique geography of McNeil Island has led the parties in the past, at the Union's request, to negotiate limited exceptions. For example, Article 17 .1 (G)(3) states that if an employee has missed a boat as result of working voluntary overtime during a cycle, that employee will be exempt from mandatory overtime. The parties have shown that they do have the capacity to bargain to address circumstances, but the Employer chose not to do so here. As to the second argument, even if an ambiguity is found with regard to the contractual language regarding seniority, there is a long-standing past practice with the Employer regarding the assignment of voluntary overtime and pay for employees in transit. In considering this argument, the Department of Corrections must be viewed as a whole institution, such that its practices as applied to other of its facilities, for example the Monroe Correctional Complex, should be applied to McNeil Island as well.

The grievance resulting in compensating an employee for time in transit from the mainland to the island cannot justify the unilateral change to the contract made by the Employer. "Portal to Portal" compensation law is decades old, and knowledge of it should be imputed to the Employer. Even if there is sympathy that the Employer did not understand the law, they were obligated to come back to the table and bargain an exception to the language in the contract, not ask the Arbitrator to legislate a change.

Position of the Employer

The Employer argues that there is more to the story surrounding the assignment of overtime than has been presented by the Union. For example, the other employees who work "odd shifts" and perform support in the areas of recreation programs and transport and the like are not part of the regular rotation overtime mix. Their hours are such that they are not available to work an overtime shift, because the end of their shifts extends too into the beginning of the subsequent overtime shift. The Union's position would result, if the Employer had to hold over an employee awaiting his relief, in the Employer's having to pay two people overtime simultaneously, while the volunteer makes his way to the overtime post. The Employer has not done that in the past and does not want to do it.

In regard to the employees who are the subject of this grievance, they are simply not available to work when the overtime opportunity begins. The Employer has not considered "odd shift" employees part of the overtime mix, and neither should these employees be so considered. This is especially so when the overtime shift they seek is an extension of their normal shift. These employees have the option to work overtime on their days off, or during vacation, or other times when the employee is able to timely arrive at the overtime post.

The Union's case should be considered in light of traditional arbitral law, that is that the Union bears the burden of proof in this matter. The Union may argue that the contractual language is clear and, failing that, that the intent of the parties favors the Union's interpretation of the language. In the absence of persuasive evidence addressing the intent of the parties, practice and custom may be called upon to give the language meaning. While the Union argues that all voluntary overtime should be awarded simply by going down the list of names, according to seniority, inspection of the contractual language specified does not lead to a conclusion that it is clear and unambiguous. The contract is not clear as to what to do when an employee is next on the overtime list, is contacted, and is not able to arrive at work in advance of the overtime shift. The implication is that overtime is not awarded. Likewise, there is no clear instruction as to what to do in other real-life situations, such as if an employee is on the voluntary list, but is sick, on vacation, or is otherwise unavailable. Further, there was no evidence presented regarding the intent of the parties expressed in negotiations. There is a question as to whether the Union has met its burden of proof as to the existence of a binding practice so as to sustain the grievances.

The plain language of the contracts does not require the employer to assign overtime based on seniority alone. While Article 17 contemplates a seniority-based overtime assignment system, an employee's seniority date does not always prevail when it comes to the assignment of overtime, for example, in the case of "odd shifts." Further, Article 17.1 (I) modifies Article 17.1 (D) (2):

Ability to Deny Overtime Assignment
The supervisor responsible for assigning overtime may deny a request by an employee to work voluntary or mandatory overtime, under the following circumstances:

1. The employee does not have the current qualifications or certifications to carry out the duties of the position requiring the overtime; or

2. For reasons that, if allowed, a violation of this Agreement would occur.

Before the Employer took the action which has been grieved, there were occasions in which on-shift island employees would "mandatory fill" the overtime post in order to allow the mainland employee to arrive. This practice was not contemplated in the contract and, in fact, violates the contract. Article 17.1 (E) requires an employer to exhaust the "all call" option prior to assigning mandatory overtime:

All Call
After the voluntary sign-up list has been exhausted and prior to the assignment of mandatory overtime, the Employer will solicit volunteers who are already on duty ("All Call"). If more than one (1) employee responds to an all call, the Employer will offer all available posts on a first-come, first-served basis. If there are still insufficient volunteers after the all call, Management may assign mandatory overtime.

If there are available employees who can voluntarily perform the overtime assignment when it starts, this provision requires the Employer to exhaust this option before assigning mandatory overtime. Only island based employees are available to perform the island overtime assignment when it begins.

Article 17.7 should be read as superseding the provisions of Article 17.1:

Employer's Right to Assign
Nothing in this Article precludes the Employer from utilizing off-duty staff, which requires the payment of callback, or utilizing an individual to complete a specific assignment.

The parties here agree that the Employer has the right to utilize an individual to complete a specific overtime assignment. The Employer has here determined to utilize an individual on the island to complete an overtime assignment when an overtime assignment is made on the island.

Even if there were to be found a binding practice making mainland officers available for voluntary overtime on the island, the practice is no longer binding because the underlying conditions for the practice have changed. The shuffling of staff that was involved with accommodating employees like these grievants produced some security risks. Also, the accommodation was done at no net cost to the Employer. The decision of the GRP, imposing overtime pay status for the 1.7 hours travel to the island, changed the underlying circumstance for the practice.

Requiring the Employer to assign mainland officers to voluntary overtime on the island would result in a violation of the contract. Situations would arise in which two officers would be assigned to the same overtime position while the mainland officer makes his way to the overtime post. The contract does not contemplate assigning multiple employees to the same overtime post. For the Arbitrator to direct the Employer to do so would exceed his authority under Article 9.5.

DISCUSSION

At the outset, the Arbitrator would note with appreciation the vigorous and professional advocacy demonstrated by the parties' representatives. Their conduct, taking the opportunity to enter into stipulations where possible, and displaying courtesy and patience with witnesses, was conducive to a productive hearing and is evidence of a respectful and positive labor/management relationship.

This matter weighs the rights of these employees to access overtime opportunities conditioned by a seniority-based system against Employer interests in cost and workforce deployment, all to be considered in the light of their agreements, and their relationship in observance of those agreements. While job retention and opportunities for promotion were the employee interests first protected in the evolution of seniority systems, their use, founded upon principles of protecting employee security, expanded into areas of employee benefits and other financial interests. Seniority systems are seen as furthering society's social and economic interests as well, promoting expertise and stability within the workplace, and securing resources to an aging workforce. Given the interplay of all of these dynamics, the U.S. Supreme Court's statement in American Tobacco Company v. Patterson, 102 S. Ct. 1534 (1982) that "seniority provisions are of 'overriding importance' in collective bargaining" is universally reflected at the collective bargaining table, where they are a vital ingredient of the total employment package. Given that background, the Arbitrator turns to the issues raised by the parties.

Summaries of testimony at the hearing:

Twenty-five year DOC employee Catherine Dillon, Corrections Officer 2, worked on the mainland since December of 2005. When she worked overtime on the island, she received a full eight hours' compensation. When working overtime, the Employer would hold someone over until she arrived. In other situations the Employer would leave a post unfilled to accommodate overtime, as when the post was in the recreation area or chapel. After eight months, beginning in July of 2006, the portion of compensation that represented travel time was backed out by the Employer, and she was thereafter compensated for 6.3 hours instead of eight hours. She filed the grievance that led to the GRP decision to grant travel time compensation to employees traveling from the mainland to the island to work the next shift as voluntary overtime (See Jt. Ex.'s 10 and

11). Since May of 2007 she has not been allowed to work overtime on the island. She was told by the assigning officer, Sgt. Klein, that he was not allowed to let her work. Though her name and seniority rank was listed, she was told by Shift Lieutenant Vershon, "You're not available at the start of the shift, so you're not allowed to work on the island anymore." Ms. Dillon filed the grievance at issue (Jt. Ex. 3).

Michelle Johnson, Corrections Officer 2, now assigned as Homeland Security Officer at the Steilacoom dock, has worked at MCC since 1988. She testified that she had always been able to use her seniority to, for example, work a day shift, then "do a double" on the island side. The Employer would relieve the witness early, and back fill the position, or she would remain on the mainland until the next boat, with the post on the other side remaining vacant. As Homeland Security, she is no longer relieved early. Previously, her post was left empty for the last forty-five minutes of her shift. Whether the island post was left empty depended upon "criticality." Since July of 2007, she has been passed over for overtime, and the posts go to junior employees. Until that time, she might "do a double" twelve times in a six month period.

Fallen Luciano, Corrections Officer 2, an eleven year employee at MCC, worked RDO, a relief position, at the island and on the mainland. Before the Employer's change, she could use seniority to do overtime on the island, from first shift to day shift, for example, and was generally paid the full eight hours. Depending upon the Lieutenant on duty, she might occasionally get paid for time on the island only, but her ability to use seniority to work was not affected. The exclusion from voluntary overtime has had a negative impact on her finances. Also, employees are more now more vulnerable to mandatory overtime: If you work five days a week on the mainland, and no overtime is available there, and you return on Monday, and your relief doesn't show up, even though there may be a voluntary post on the island, you can be

"mandatoried" out of sequence for the mainland position. People can get "mandatoried" out of sequence because employees on the island can't volunteer for the mainland job.

David Jividen, Correcions Officer 2, a seventeen year employee a MCC, worked as a Transport Officer with flexible hours. He served as a shop steward for over five years, and handled Witness Catherine Dillon's compensation grievance. There had been no deduction from overtime for time spent traveling between the mainland and the island until the Employer's unilateral action backing out such time. Employees were able to access contiguous voluntary overtime in both directions, mainland to island, and island to mainland. The Employer utilized backfilling (relieving an employee early so that they could make the boat) if security was an issue, or holding an employee over until the overtime employee arrived. An officer from a less security-sensitive post, like the tool room, might be called in to fill if security was an issue in accommodating the voluntary overtime. Within the last year, voluntary overtime was still offered across the passage, but generally the assigning officer's message has been that they "can't offer" voluntary overtime posts on the island to mainland employees. He noted that the Employer does "mandatory" an employee from the mainland to the island and pays the entire eight hours full time. The witness noted the financial importance of voluntary overtime to employees.

Witness Odis Rozier, a Corrections Officer 2, was working on the mainland in 2007 when he signed up for voluntary overtime on the island. When he didn't get called, he reviewed the roster, and found a junior employee had received the overtime for the next shift. When he inquired about the reason, he was told that he was "not available at the start of the shift." Then, the witness was called by the shift Lieutenant pursuant to an "all-call" to work on the island in the visiting area, for which he was offered full pay. The witness declined. Though his shop

steward was concerned that he should not decline a voluntary assignment, the witness, who had seen a junior employee obtain a post he had sought, and who was told to remove his name from the list, felt he was, in effect, being "mandatoried." He had been bypassed, had seen a junior employee select a preferred post, and then, under the all-call, had to take what post was left.

Michael Berenbaum, Director of the Corrections and Law Enforcement Division for Teamsters Local 117, described the procedures for overtime provided in the contracts. He noted the uniqueness of the McNeil facility, and testified that the Employer hadn't contacted the Union about its change of approach to employee eligibility for voluntary overtime until after the subject grievance was filed, and has not sought different contract language to address voluntary overtime at the McNeil facility. He went on to describe the overtime processes at other DOC facilities, and testified that, on any given day, the commander has options for accommodating voluntary overtime that do not necessarily result in cost.

David Flynn, Corrections Captain, testified to the uniqueness of the McNeil facility. He noted that the decision compensating employees for "pass-down" time (Stamey decision) affected shift schedules and staff availability, and resulted in a minimal change to the ferry schedule. He described the shift scheduling of various posts and "odd shifts", e.g., food service, hospital, transport, etc. The witness testified concerning the implementation of a new computer system, ATLAS, that had been recently installed to monitor the management of the roster. The Employer discovered that they were unintentionally paying people who were not working; double paying was occurring, the fill-in and the person in transit, on an inconsistent basis.

Kim White, day shift Lieutenant, testified that freeing people to accommodate overtime, or providing early relief, has not been a preferred practice, though the witness has done that. In the past, an unassigned relief officer or a chapel officer could be pulled in. The witness testified

that her job requires balancing the aspects of a shift, an unpredictable process. At 10:30, positions may appear filled, but later, employees may call in late and officers are missing, creating a hectic situation. The shuffling to accommodate overtime carried risks, for example if there was a fight or medical emergency. Shuffling people still occurs on the island.

The core contractual language at issue: Articles 17.1 (D) of the earlier contract, and 17.1 (D) (2) of the current contract:

> Articles 17.1 (D) of the earlier contract:
>
> Assignment of Voluntary Overtime
> All available positions on each shift will be offered to the employees on the voluntary sign-up list based on seniority date.
>
> Article 17.1 (D) (2) of the current contract:
> Prescheduled and daily voluntary overtime assignments will be offered to employees from the voluntary sign-up list based on seniority date.

An initial examination of this language finds clear, simply stated declarative sentences utilizing mandatory language ("will be offered") to prescribe under what conditions employees, including those interested here, will be offered, and empowered to accept, prescheduled and daily voluntary overtime assignments. A further examination of the contract does not readily reveal any written exception to this language. Without looking further, this language appears to this Arbitrator to clearly apply to the subject employees, so as to declare seniority as being the essential qualifier for accessing opportunities for overtime. The Arbitrator next considers arguments concerning the clarity and operation of this language and as it relates to other contractual provisions.

The Effect of language contained in Articles 17.1 (D)(4) of the current contract, and 17.1(D) of the earlier contract.

The Employer asserts that the following provision argues against a conclusion that the language regarding seniority is clear and unambiguous:

> In the event that the most senior employee is not on duty and cannot be reached, i.e. a no answer, (“when assignments are being offered” added in the current contract), the next employee in descending seniority order will be contacted.

The Employer argues that this language contemplates circumstances where an employee is next on the overtime list, is contacted, and is not able to arrive at work in advance of the overtime shift. The Employer goes on to assert that the language does not provide clear instructions as to what to do in those cases, but "implies the overtime is not awarded." The Arbitrator reads this language as applying to the situation where the employee, unlike our situation, is *not* on duty and “cannot be reached” meaning by telephone, as indicated by "i.e. no answer.” The assertion of an implication that no overtime is therefore awarded is understood, but is not persuasive. Further, the provision does not have effect in terms of defining “availability” or of validating the Employer’s argument of “availability” as the Employer defines availability, as a concept basing a denial of overtime to these employees as consistent with the contract. The reference to “odd shift” employees is likewise not persuasive in this context for reasons that will be discussed later. The provisions urged do not have the effect of rendering the primary contractual language unclear or ambiguous.

The Effect of Articles 17.1(I) and 17.1(E).

The Employer argues that the language of these Articles, set forth above, and their interrelationship, illustrates the fact that basing overtime on seniority is not an absolute, as here, for example, when such assignment may lead to a violation of the contract. The argument goes that not only is requiring an employee to "mandatory fill" a post in order to allow another employee to perform the overtime assignment, resulting in two employees being paid overtime until the mainland employee arrives, not contemplated in the contract, such a result violates the contract. If there are *available* employees who can voluntarily perform the voluntary assignment

when it starts, the argument goes, the "All Call" provision of Article 17.1 (E), set forth earlier, requires the Employer to exhaust this option prior to assigning mandatory overtime. The Employer reiterates that only island personnel are available to perform an on-island overtime assignment when it begins.

Credible testimony was presented at the hearing tending to establish a practice, followed without objection, of requiring an employee to mandatory fill or back fill a post until an assigned employee arrived at McNeil Island. Testimony was presented relating this practice to other institutions within the DOC. While the Employer acknowledges this, it asserts considerations of staff availability and facility security were conditions of this practice on the island. In ensuring accommodation of mainland officers for overtime on the island, the argument goes, instances would arise where mandatory fills/back fills would be unavoidable. Further, the Employer views mandatory overtime as a last resort, to be followed when voluntary and all call procedures have been exhausted.

No evidence was presented tending to show that any substantial change had occurred in the conditions cited by the Employer, the availability of staff or the security needs of the facility, after April, 2007. Further, mandatory fill is a violation of the agreements only if an all call is not first conducted. The Arbitrator finds the asserted provisions do not have the effect of rendering the seniority provisions of the agreements unclear and ambiguous, or of validating the action taken by the Employer in denying voluntary overtime to the subject employees. Without suggesting a waiver of the asserted provisions has been effected, the Arbitrator finds a pattern of responses to the provision of overtime to the subject employees that argue for the clarity of the provision.

As to practices elsewhere within the DOC, the Arbitrator finds that while they support the value of seniority to both parties, and its observance as demonstrated by the administrative efforts taken by management at the several institutions, e.g., dispatching directly from muster and the management of the list, testimony tended to cast the accommodation efforts as circumstantial and contextually dictated, and not persuasive for the purposes of this analysis.

The Significance of "Odd Shift" Employees

As part of their case, presented to illustrate that seniority alone has not been a ruling factor in the assignment of voluntary overtime, the Employer raised the example of "odd shift" employees. These employees include Correctional Officers assigned to, for example, food service, hospital, and the visiting area, and have shifts that run, for example, from 4 a.m. to 12:30 p.m., or from 8 a.m. to 4 p.m. Some "odd shift" employees, those covering the visiting area, work four-10 hour days. In sum, their shifts vary greatly from standard shifts, with much greater overlap than the shifts of the subject employees. Unlike the employees involved in this case, no evidence was presented at the hearing that these employees ever had the expectation or realization of contiguous shift voluntary overtime assignment. A "courtesy call," notifying a senior "odd shift" employee, in the food service, for example, is the extent of the Employer's response for assigning voluntary overtime available within the traditional shift schedule. "Odd shift" employees are able to access such employment only on days off or during vacation. (Testimony, Flynn) It is noted that an "offer" of overtime is made to these "odd shift" employees, however. The Arbitrator has not been called upon to render any opinion as to the scope of the overtime rights of these employees, and does not. The Arbitrator does find that these

employees are sufficiently different in kind and history so as to make their reference unpersuasive for purposes of this analysis.

The Effect of Article 17.7.

The Employer argues that the language of this Article, set forth in "Position of Employer," above, should be read as indicating an agreement that, rather than enumerating the multiple circumstances in which a senior employee may be passed over for overtime, the Employer has the right to utilize an individual to complete a specific overtime assignment, and in this case has simply determined to utilize an individual already on the island to complete an overtime assignment. The Arbitrator reads the language "to complete a specific assignment" as connoting a discrete task set, rather than the operations to be performed by an employee working a full shift. The provision urged does not have the effect of rendering the primary contractual language unclear or ambiguous.

The Arbitrator finds that the parties, through their actions over time, displayed an understanding of the meaning and intent of the contracts, and defined these employees as "available" for work. The bulk of credible evidence portrays management personnel, the assigning Lieutenant, and co-employees, as taking actions over a considerable period aimed at seeking to accommodate mainland employees in accessing on-island voluntary overtime posts both before and after the GRP decision awarding in transit pay. The reality of the application of Portal-to-Portal law only served to make these employees entitled to compensation for their time, not "unavailable." Nothing else had changed. The law itself had been in place for years before the Employer's action. Other conditions cited by the Employer, availability of staff , security needs were likewise unchanged. The GRP's decision granting overtime compensation for site-to-

site travel did not serve to create or change a definition of "available" recognized by both parties, but only to clarify a pay status.

Whether or not they may be viewed as evidence of "past practice," the actions of the Employer, through its managerial staff in seeking to accommodate the employees in their accessing overtime opportunities, and of the employees, in their ongoing reliance upon and accessing of the established seniority system, shed light upon what the parties themselves believed the relevant language of the contract meant. Even if the contract language was not classically clear and unambiguous, the parties' behavior indicates they were acting in accordance with what they each believed to be its meaning. In sum, to the employees seeking overtime, to the agents of the employer assigning overtime, to the employees awaiting or backfilling the assigned employee, the language of the contract was clear and unambiguous. The very purpose of a contract is to prescribe such behavior, and the Arbitrator will not disturb that process. The Arbitrator will here apply the Contract as it has been observed and responded to by the parties in their transactions with regard to the subject employees.

Across the field of collective bargaining agreements, the language employed for the provision of overtime may be as vague as "to be distributed proportionally among all qualified employees," or "as equally as possible." In this case, the agreements' language is far more specific, making seniority the essential qualifier for the enjoyment of that benefit. Even where arguably ambiguous seniority provisions exist, arbitrators will generally adhere to the principles of seniority. Consequently, even where employers may not find it preferable to select employees solely on the basis of seniority for assigning overtime, where the agreement's words support a particular meaning, matters such as those raised by the Employer will not overcome its obligation under the agreement. Lake City, Indiana and Correctional Officers Association, 125

LA 287 (2008). The Employer's contention that providing voluntary assignments of overtime to the subject employees is impractical, inefficient, and costly may very likely be true, but the Arbitrator's job is not to approve the soundness of an employer's business decisions or provide relief from unsound ones, but only to interpret the agreement. Akzo Nobel Coating and Teamsters Local 284, 123 LA 908 (2006).

The Arbitrator finds that the Union has sustained its burden of proof in establishing that the Employer violated the Collective Bargaining Agreement, to wit, Articles 17.1 (A)(2), 17.1 (D)(2), 17.1 (D)(4), and 17.8 of the Contract between the parties effective 2007-2009, and Articles 17.1 (A)(1), 17.1 (A)(2), 17.1 (C) and 17.1 (D) of the Contract between the Parties effective 2005-2007, from and after on or about May 22, 2007, when it did not award voluntary overtime posts on McNeil Island to employees working at the dock or at the depot on the mainland, when the overtime work was contiguous to the employees' regular shift.

CONCLUSION

From and after on or about May 22, 2007, the Employer was in violation of Articles 17.1 (A)(2), 17.1 (D)(2), 17.1 (D)(4), and 17.8 of the Contract between the parties effective 2007-2009, and Articles 17.1 (A)(1), 17.1 (A)(2), 17.1 (C) and 17.1 (D) of the Contract between the parties effective 2005-2007 when it did not award voluntary overtime posts on McNeil Island to employees working at the dock or at the depot on the mainland, where the overtime work was contiguous to the employees' regular shift. The Arbitrator will enter an award consistent with this conclusion.

IN THE MATTER OF THE ARBITRATION BETWEEN	**)**	**FMCS CASE NUMBER:**
	)	**080227-01952-8**
TEAMSTERS LOCAL UNION NO. 117,	**)**	
	)	**ARBITRATOR'S**
UNION	**)**	**OPINION AND AWARD**
	)	
and	**)**	**GRIEVANCE:**
	)	**VOLUNTARY**
	)	**OVERTIME**
STATE OF WASHINGTON	**)**	**DENIAL**
DEPARTMENT OF CORRECTIONS,	**)**	
	)	
EMPLOYER	**)**	

Having heard or read and carefully reviewed the evidence and arguments in this case, and in light of the above discussion, the Arbitrator finds in FMCS Grievance No. 080227-01952-8 as follows:

The grievance is granted as follows:

The Employer is in violation of the Collective Bargaining Agreement, to wit, Articles 17.1 (A)(2), 17.1 (D)(2), 17.1 (D)(4), and 17.8 of the Contract between the Parties effective 2007-2009, and Articles 17.1 (A)(1), 17.1 (A)(2), 17.1 (C) and 17.1 (D) of the Contract between the Parties effective 2005-2007, from and after on or about May 22, 2007, when it did not award voluntary overtime posts on McNeil Island to employees working at the dock or at the depot on the mainland, when the overtime work was contiguous to the employee's regular shift.

Pursuant to stipulation of the Parties, the Arbitrator will retain jurisdiction of the present grievance for sixty (60) days, that is until 4:30 p.m., March 17, 2009. During this period, the Parties shall endeavor to craft their own remedy. If the Parties are unable to craft their own remedy within that period, the Arbitrator's jurisdiction shall continue and the Union will submit its position as to the appropriate remedy for receipt by the Employer and the Arbitrator no later than 4:30 p.m. March 24, 2009. The Employer will then have two weeks, that is by 4:30 p.m., April 7, 2009, to respond to that position statement with no further argument from either side. The Arbitrator shall issue his Award thereon within thirty (30) days, that is by May 7, 2009, and his jurisdiction shall be extended for a further period of sixty (60) days to resolve disputes regarding the implementation of the remedy. If the Arbitrator is not in receipt of the Union's submission regarding the remedy by 4:30 p.m., March 24, 2009, the Arbitrator's jurisdiction over this grievance shall then cease.

RESPECTFULLY SUBMITTED this 16th day of January, 2009.

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Anthony D. Vivenzio, Arbitrator