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." The terms "intermittent employees" and "on-call employees" are interchangeable.

The grievance at issue is grounded in the provisions of the Agreement between the Parties effective July 1, 2007 through June 30, 2009, *Jt. Ex. 1*. It is hereafter referred to as the "Agreement" or "contract." The Parties' dispute goes to the interpretation and application of that Agreement as it relates to the Employer's action responding to concerns voiced by the Union at a series of labor/management meetings over a memo of April 10, 2007, *Jt. Ex. 2*, sent by the Employer's Superintendent, describing the Employer's policy for assigning on-call staff and overtime. In response to the Union's concerns, the Employer sent a letter *Jt. Ex. 3* stating their policy for assigning on-call employees and overtime, and their unwillingness to adopt the Union's position for such assignment. The reason for sending the letter, dated January 23, 2008, acknowledged by the Parties, was to afford the Union a starting date for the institution of a grievance. In view of the content of ongoing discussions, the Parties bypassed Step One of the grievance procedure and moved to Step 2, the Grievance Resolution Panel (hereinafter "GRP") process provided by the agreements. On May 21, 2008, that panel announced its deadlock on the issue. Thereafter, the Union, by letter of July 2, 2008, , 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 Employer's facilities in Olympia, Washington, on March 25, 2009. 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 March 25, 2009. The parties filed post-hearing briefs. The Arbitrator received timely briefs from both parties, submitted on April 27, 2009. The full record was deemed closed and the matter submitted on April 27, 2009.

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.

In years before the passage of the Personnel System Reform Act of 2002, state employees could not bargain economics. Further, in the context of the workplace in issue, full time employees volunteering for overtime could not directly select their post. After the passage of the Act, and the institution of collective bargaining agreements reflecting workplace bargaining changes, the Union and the Employer moved to a system that allowed for more direct

selection of posts when full time employees signed up on a voluntary overtime list. In former times a list would "close" and no employees could be *added* to it. They could, however, delete themselves from a list to avoid a placement they did not favor. In more recent times, the contract reflected what the Union describes as a "quid pro quo," preserving seniority as a basis for overtime assignment while assuring the Employer of a volunteer overtime workforce, wherein an employee would be able to volunteer for over time and select their post, but where *deletions* would not be allowed any longer. The Employee would get to state a preference, but at the end of the day, for example, a full time employee volunteering for overtime the next shift would not be able to decline what was available. They had to work the overtime.

In the 2005-2007 contract, the Parties bargained a "Zipper Clause," declaring null and void "any past practice or past agreement between the Parties, whether written or oral." Near the end of the term of that Agreement, and roughly coinciding with the installation of the new Superintendent, the Union began to pass on to the Parties' labor/management committee complaints it was receiving from senior employees who believed that their seniority rights of overtime post selection were being compromised by the Employer based on their belief that the Employer was improperly administering its overtime assignment policy, to wit that the Employer was either allowing less senior on-call employees to select, or was assigning them to fill vacant positions that should otherwise represent opportunities for overtime to senior volunteer who should then have selection rights of those vacant positions by virtue of seniority. Discussions in the labor/ management committees continued, fueled by the Superintendent's memo mentioned in the previous section, resulting in the Employer's letter to the Union of January 23, 2008 (Jt. Ex. 3)

This action led to the grievance which was ultimately submitted to arbitration.

ISSUES BEFORE THE ARBITRATOR

The Parties were unable to stipulate at the hearing to volunteer overtime list statement of the issue(s) that the Arbitrator should consider. The Parties agreed that, after hearing evidence and argument, the Arbitrator would frame be issue(s) to be resolved.

The Employer believes the statement of the issue is as follows:

1. Did the Employer give the choice of overtime posts to intermittent (on-call) staff prior to offering overtime posts to the most senior full-time employees who were signed up on the voluntary overtime list?

2. If so, was it in violation of Articles 17.1 D.2, 17.1D.3, and 17.1 L of the collective bargaining agreement?

3. If so, what is the appropriate remedy?

The Employer believes its statement is in accordance with the original grievance filed by the Union, which states, "The Union protests Management giving the choice of overtime posts to intermittent staff prior to offering the posts to the most senior full-time employees who are signed up in the Volunteer Overtime List." The specific allegations of the grievance include:

1. On-call staff at MICC are allowed to pick overtime posts when they are scheduled to work; and
2. Because on allegation #1, overtime opportunities are, in essence, taken away from full-time employees on the voluntary overtime list.

The Employer argues the Arbitrator must first determine the practice alleged by the Union is in fact occurring at MICC in order for the Arbitrator to find a violation of the Agreement. The Employer argues that the Union veered from the allegations of its original grievance and instead focused their efforts at the hearing on their belief that full-time employees volunteering for overtime should be able to pick from all positions requiring coverage, to include those positions being covered by on-call employees working straight time. This issue, however,

originally arose from the Union's belief that on-call employees pick their posts when scheduled to work. The Employer has not agreed to expand this issue and asks the Arbitrator to rule on the issue cited in the original grievance. Article 9.5 of the agreement, it argues, limits the Arbitrator in his decision to the issue set forth in the original grievance unless the parties agreed to modify it. Further, the Employer takes issue with the union's argument that the Employer failed to exercise its right to raise a procedural issue during the Grievance Resolution Panel process. The Employer argues this is not a procedural issue.

The Union proposed the following statement to the issue:

> Did to the Employer violate the Agreement when it allowed intermittent employees to select their post and/or when it assigned intermittent employees to posts before allowing overtime volunteers to select their post in order of seniority? If so, what is the appropriate remedy?

The Union argues that the occasion of the arbitration hearing was the first time that the Employer took the position that the issue before the Arbitrator could only be stated as whether the Employer was allowing intermittent employees to choose their post ahead of overtime volunteers. This argument was not raised at any point in the grievance procedure prior to arbitration. *Moroffko, Joint Exhibit 5-9.* The parties have a grievance procedure that requires that such arguments be presented. Specifically, the parties have a step in the grievance procedure that involves a Grievance Resolution Panel. There is a specific, mandatory procedure for raising a procedural defense before the Grievance Resolution Panel, and failure to follow this procedure constitutes a waiver of the argument. *Joint Exhibit 1 at 21 (Article 10.9).*

Next, the grievance is broad enough to encompass both circumstances. The alleged violation is stated as follows:

> Management continues to allow intermittent employees to choose their posts instead of allowing full time employees, in order of seniority, [to] have first choice, and then plugging in the intermittent employees to the remaining posts.

Joint Exhibit 4 at 1. The grievance does describe the situation of management allowing intermittent employees to choose posts, but the emphasis is on the correct method which the Union argues must be utilized: "allowing full time employees, in order of seniority" to have "first choice, and then plugging in the intermittent employees to the remaining posts." The remedy requested in the grievance is stated as:

> The Union requests a full-make whole remedy including determining how many over time employees are needed, call intermittent employees for availability and inform them they will get their assignments once on the island, then giving first choice of all available open positions to full time employees by seniority, and any other relief that is just and equitable.

and makes it clear that the issue is about the primacy of post selection for overtime volunteers ahead of the assignment of intermittent employees to posts. This put the Employer on notice that the Union's primary issue was not with how intermittent employees are assigned to posts (through management discretion or giving the intermittent employees a choice), but with the fact that intermittent employees were being allocated to posts before overtime volunteers exercised their contractual right to select their post in seniority order.

MICC management agreed to give the Union a letter, *Joint Exhibit 3,* denying the remedy stated above so that the Union would have an Employer action from which it could then file a timely grievance. The parties then agreed to skip the first step of the grievance process. *Joint Exhibits 5 and 7.* It is entirely inconsistent with the parties' handling of the grievance at the lower steps of the procedure for the Employer now to claim that the grievance does not call for the resolution of the overall issue, but is limited to the specific situations in which the Employer allows intermittent employees to choose their posts. The Employer understood very well that the issue was whether the Employer may assign intermittent employees "to posts prior to beginning the assignment of overtime," *(Joint Exhibit* 3) and that this issue is presented irrespective of the method that the Employer uses

for assigning intermittent employees to posts (allowing intermittent employees a choice or assigning them as a matter of Employer discretion).

Finally, there is no arguable prejudice to the Employer even if it could demonstrate that it had been surprised by the breadth of the issue. Moreover, if the Arbitrator were to accept the Employer's narrow interpretation of the scope of the issue presented by the grievance, it would only invite another grievance since this is an on-going issue, with a new violation occurring every time an intermittent employee is assigned to a post prior to overtime volunteers being offered their choice of post. For all of these reasons, the Union urges the Arbitrator to adopt its proposed statement of the issue.

DISCUSSION

It is generally understood that arbitration does not utilize and observe the kind of formality used in pleadings filed in the civil judicial system to frame the precise issues to be resolved. Despite the increasingly legalistic conventions appearing in arbitration processes, the system continues to seek and preserve, to the extent possible, values of simplicity and utility. This approach possesses some practicality, insofar as many, if not most, grievances are written in the first instance by people with little or no legal training, whereas an employer's responding staff often has a higher level of targeted education, often including legal education.

The essence of the grievance filing process is, in a word, notice. It is the failure of a party to provide notice, either in writing or by discussion, of additional claims that it intends to assert, until after all grievance procedures are finished, that will lead an arbitrator to exclude those claims from consideration. An arbitrator will consider the wording of the grievance in formulating a statement of the issue when the parties have not agreed upon a specific statement. Additionally, when the parties have failed so to agree, an arbitrator may arrive at a precise

statement of the issue or issues after studying the entire record in the case, including pre-arbitral grievance steps. *Elkouri 5th Ed. P.320-324.*

The Arbitrator has examined the record, testimony, and arguments of the Parties. The Employer does not dispute that it was aware of, and did not object to, that portion of the Union's grievance that goes beyond on-call employees' selection of posts during pre-arbitral grievance resolution steps, including the Grievance Resolution Panel. It merely claims that the language of Joint Exhibit 1 at 21 (Article 10.9) applies to "procedural objections," and that its objection to the inclusion of this issue for consideration is not "procedural." Even before proceeding to the GRP, and as a way to speed its entry there, MICC management agreed to give the Union a letter, *Joint Exhibit 3,* denying the remedy stated above so that the Union would have an Employer action from which it could then file a timely grievance. The parties then agreed to skip the first step of the grievance process. *Joint Exhibits 5 and 7.* A reading of the remedy reveals a mixture of claim and remedy, urging a way something must be done while calling the process into question. This was confirmed in the course of the hearing, where testimony revealed an array of approaches to the assignment of on-call and volunteer assignments. Choice as a mechanism for assignment of overtime was not a dominant theme, but was a thread appearing in the fabric of the Employer's approach to assignment. Reluctantly nodding to the formal judiciary, it is axiomatic that notice is an indispensable component of procedural due process. On balance, the Arbitrator does not have a basis to find that the Employer was surprised or prejudiced by the Union's urging its statement of the issue at the arbitration hearing.

Finally, a review of the record shows that, at the arbitration hearing, the Arbitrator, confronted by the disagreement of the parties with regard to the statement of the issue, announced his general practice to consider the record as a whole in formulating a statement of

the issue(s). To this the Employer registered her agreement, and stated that she was prepared to proceed on both issues, that is, the assignment of overtime to on-call employees based upon choice, and assignment of on-call employees to posts before allowing overtime volunteers to select their post in order of seniority.

Based upon the foregoing, the Arbitrator states the issues before him for consideration as:

1. Did the Employer violate the Agreement between the Parties by giving the choice of overtime posts to on-call employees before offering overtime posts to the most senior full-time employees who were signed up on the voluntary overtime list? If so, what is the appropriate remedy?

2. Did the Employer violate the Agreement between the Parties by assigning on-call employees to posts before allowing overtime volunteers to select their post in order of seniority? If so, what is the appropriate remedy?

PERTINENT COLLECTIVE BARGAINING AGREEMENT PROVISIONS:

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

ARTICLE 3
MANAGEMENT RIGHTS

3.1 Management Rights

It is understood and agreed that the Employer possesses the sole right and authority to operate the institutions/offices and to direct all employees, subject to the provisions of this Agreement and federal and state law. These rights include, but are not limited to the right to:

M. Utilize non-permanent and on-call employees;

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 referenced in Article 10 ("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 10
GRIEVANCE RESOLUTION PANEL

10.9 Procedural Objections

Either party may raise a procedural objection(s). Objections must be filed in writing and submitted to the DOC Labor Relations Office, the Union's Headquarters Office, and the local Human Resources Office within seven (7) calendar days from notification of a Panel hearing being requested. The nonmoving party may file a written response to the objection…

ARTICLE 15
HIRING AND APPOINTMENTS

15.1 The Employer will determine when a position will be filled, the type of appointment to be used when filling the position, and the skills and abilities necessary to perform the duties of the specific position within a job classification that is being filled. Only those candidates who have the position-specific skills and abilities required to perform the duties of the

15.6 On-Call Employment

The Employer may fill a position with an on-call appointment when the work is intermittent in nature, is sporadic and does not fit a particular pattern. The

Employer may end on-call employment at any time by giving one (1) working day's notice if the employee is scheduled to work, or one (1) calendar day's notice if the employee is not scheduled to work.

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. Voluntary Sign-Up List

Voluntary overtime will be assigned utilizing voluntary overtime sign-up lists.

1. A voluntary overtime sign-up list for each day and each shift for an entire month will be posted by the fifteenth (15^{th}) of the preceding month for each job classification.

2. Each list will have a column for employee name, time and date of sign-up, seniority date... and a column that allows volunteering employees to remove their name from the list.

3. The volunteering employee must complete all columns on the sign-up list. The employee may not specify the post (s) they are available or not available to work on overtime.

5. Four (4) hours prior to the start of the shift requiring overtime, the sign-up list will be pulled and no further additions or deletions will be made and overtime will be assigned (daily).

D. Assignment of Voluntary Overtime

1. The Employer may fill vacancies up to two (2) weeks in advance of those shifts where vacancies are known (prescheduled).

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

3. Volunteers may select any position available, but on-duty employees who have signed up for the voluntary overtime list for the next scheduled shift may not refuse an assignment of overtime.

L. On-Call Employees

The Employer may assign work to on-call employees prior to assigning overtime.

ISSUES, POSITIONS OF THE PARTIES, AND DISCUSSION

At the outset, the Arbitrator wants to note the professionalism that attended the hearing in this matter. Both counsel were prepared and argued vigorously, while maintaining an atmosphere of respect and cordiality that reflects well upon their relationship.

In this portion of the Award, the Arbitrator presents the issues raised in this matter, the positions of the Parties, and provides his discussion and conclusion.

1. Did the Employer violate the Agreement between the Parties by giving the choice of overtime posts to on-call employees before offering overtime posts to the most senior full-time employees who were signed up on the voluntary overtime list?

Position of the Union:

The Position of the Union is summarized as follows:

In November of 2007, Teamsters Local 117 Business Representative Analtha Moroffko discovered that some managers and supervisors at McNeil Island Corrections Center ("MICC") were allowing intermittent employees to choose their posts ahead of regular full-time employees who had volunteered for overtime. *Moroffko.* However, this approach was not (and to this day, is not) being applied universally. There were and are some shift sergeants (Calvin Smith and Charles Burris, for example) who assign posts correctly by first allowing overtime volunteers to select their post and then

filling the remaining posts with intermittent employees. *Moroffko, Burris.* Specifically, Sergeant Burris testified that he first prints out a roster for the shift in question and determines the number of vacancies. *Burris.* He then determines how many intermittent employees are available but he does not assign a post at the time that the intermittent employee commits to work. Instead, he instructs the intermittent employee to report to work at the facility at which time the assignment will be given. In the meantime, Sergeant Burris fills any remaining vacancies by reference to the volunteer sign-up list with overtime volunteers being allowed to select their post from the list of all available posts, as required by the contract. *Burris.* Once the volunteers have selected their posts in order of seniority, Sergeant Burris then assigns the intermittent workforce to the remaining posts. *Id.* In this way, Sergeant Burris offers all available posts to the volunteers rather than limiting their post selection by first assigning intermittent employees to available posts. *Id.*

However, the evidence established (and it is undisputed) that other shift commanders have allowed intermittent employees to select their post ahead of overtime volunteers. *Jividen.* For example, Sergeant David Jividen testified that he observed Lieutenant Kimberly White allow an intermittent employee, Beverly Sanders, the opportunity to select her posts. *Jividen.* In fact, Lieutenant White acknowledged that she had offered Ms. Sanders the choice of post on occasion. *White.* In any event, Lieutenant White confirmed that she consistently fills posts with intermittent employees prior to offering available posts to overtime volunteers. *White.* Only after intermittent employees are assigned does Lieutenant White then offer posts to the overtime volunteers. *Id.*

This is becoming a significant problem because of the increased use of intermittent employees. If intermittent employees are allowed to choose their posts or are assigned to posts before overtime volunteers, it significantly reduces the available post choices for the overtime volunteers. *Luciano.* Sergeant Jividen and Officer Fallen Luciano testified that there are more and more occasions on which senior officers are being displaced by intermittent employees in preferred positions such as towers, the depot and the dock.[4] *Jividen, Luciano.*

Position of the Employer

The Position of the Union is summarized as follows:

At the hearing, the Union downplayed the issue of on-call employees "picking their posts" as alleged in the original grievance, and focused at the hearing on their belief that full time employees volunteering for overtime should be able to pick from all positions requiring coverage, including those positions being covered by on-call employees working straight time. However, the Union failed to provide evidence through direct testimony or exhibits to support its claim that on-call employees were being allowed to choose their posts. The Union did not call any on-call employees so to testify, nor did they offer testimony from employees who schedule on-call employees that they allow them to their posts. Instead, they offered only secondhand and hearsay testimony regarding some on-call employees being allowed to choose where they work. Those witnesses were unable to identify specific dates, or even a time frame, in which the incidents occurred.

The employer offered credible direct testimony from two different managers at MICC schedule on call employees to work on a regular basis. Mary White-Zollars , Roster Manager at MICC, testified she does not allow on-call officers to choose their posts when she schedules them to work. Instead, after exhausting her available pool of relief officers, she schedules on-call staff to work and assigns and positions based on their skill levels and the nature of openings within the facility. Lt. Kim White testify that prior to April 2007 there were occasions when she did allow on-call staff to pick where they wanted to work from the available positions. Since the issuance of the superintendent's memo (Jt. Ex. 2) she has not allow this. Now, when she utilizes on-call staff to fill open positions, she does not allow them to choose where they will be

assigned, and assigns them to specific open positions based on institution need and the officer's experience level.

Even if the Union were able to prove that on-call employees were allowed to pick their posts at MICC, they would still need to prove that the Agreement prohibits such an action. They must also prove the Agreement compels the Employer to operate in the manner outlined in the requested remedy of the grievance.

DISCUSSION

The Arbitrator here focuses solely on the Union's claim regarding the Employer's allowing on-call employees to pick their posts when they are assigned to fill vacancies ahead of full-time employees signed up on the volunteer overtime list, without regard to questions of when and how determining the need for overtime is accomplished, or determining the right of such volunteers to be able to choose assignments from all vacancies at MICC.

A review of the testimony offered by the Union in regard to this issue generally agrees with the characterization offered by the Employer. Witness Moroffko testified sincerely about her belief that overtime employees were being allowed to choose from available vacant posts before overtime volunteers. While strict rules of evidence are not uniformly followed in labor arbitration proceedings, there needs to be a greater nexus between sincere belief and and some corroborative fact to provide the kind of reliability upon which an Arbitrator depends for a finding. In her testimony, she cited Lieutenant White as an example of an assigning officer's allowing the complaint of choice. No evidence was presented of a grievance having been filed as a result of that observation. Further, Lieutenant White's testimony was substantially as characterized by the Employer in that she follows the process outlined in Joint Exhibits 2 and 3, and observes the needs of the facility's post to be filled, rather than on-call employee preference.

No live testimony was presented to rebut this. Further, the witness explained the situation raised by witness Jividen concerning his complaint of one on-call officer, Sanders, being allowed to select a post. Apparently this occurred at a time when there were a lot of vacancies at the facility and not a lot of on-call officers to fill them, and the fill would otherwise have gone to overtime. Witness Jividen also cited situations of allowing choice to on-calls. Witness Dowler, Labor Relations Manager, countered Witness Jividen that the cited events were approximately two years in the past, with a contract containing a Zipper Clause and new language, and a new Superintendent intervening. Also, the event(s) had been neither documented nor grieved. Witness Angers discussed the drying up of overtime opportunities since the days he was able to select posts. Later testimony revealed that there were no on-calls at his facility then. He felt that " If there are on-calls in a position, it's not overtime." Witness Luciano also testified from sincere belief, and named some individual 0n-call employees who had been allowed to choose, but, again, neither specifics, nor documentation, nor corroboration in any form was presented at the hearing.

Based on the foregoing the Arbitrator finds that he is not presented with the quantity and quality of evidence that would be required to reliably support a finding that the Employer had allowed on-call employees to select vacant posts ahead of full time employees signed up on the volunteer overtime list.

Conclusion

The Arbitrator is persuaded and finds that the Union failed to carry its burden of proving that the Employer offered on-call employees assigned to fill vacancies their choice of posts ahead of senior employees signed up on the volunteer overtime list in violation of the Agreement

by a preponderance of the evidence. Accordingly, this portion of the Union's grievance is denied, and the Arbitrator shall enter an Award to that effect.

2. Did the Employer violate the Agreement between the Parties by assigning on-call employees to posts before allowing overtime volunteers to select their post in order of seniority? If so, what is the appropriate remedy?

Position of the Union:

Prior to the 2004-2005 collective bargaining agreement between the parties, overtime volunteers at the Department of Corrections did not have the contractual right to affirmatively select their post. *Thal, Joint Exhibit 10.* As a result, employees often declined to volunteer for overtime, and mandatory overtime was common. *Id.* In the negotiations that led to the 2004-2005 collective bargaining agreement, the Union pressed hard for a seniority-based system of post selection for overtime volunteers. *Thal.* The Union argued that such a system would not only respect seniority but would increase voluntary overtime and thereby reduce mandatory overtime, a desired result for both parties. *Id.* Specifically, the parties shared the interest of maximizing volunteers and minimizing mandatory overtime because in a prison environment it is especially desirable to have staff who want to be there rather than those who are mandated to be there against their will. *Id.*

Accordingly, the parties adopted a seniority-based system of post selection in the 2004-2005 collective bargaining agreement, and it remained essentially unchanged through the next two contracts, including the current contract. *Thal, Exhibits 11-12 and Exhibit 1.* The *quid pro quo* for the adoption of this system was that in two important ways, overtime volunteers were "locked in." First, once volunteers select a post, they cannot refuse to work it and cannot "shuffle the deck" (if a more preferred post becomes available, they cannot move to it even if they have the seniority). *Exhibit 11 at 31*

> Section 17.4: "Once an employee has accepted an overtime assignment they cannot refuse to work that overtime assignment."

Secondly, employees are no longer able to remove their name from the list at any point prior to the assignment of overtime, so if the volunteer is on-duty the volunteer can no longer decline an overtime assignment simply by removing his/her name from the list (as was the case prior to the 2004-2005 contract). *Thal, Exhibit 1 at 44 (Section 17.1 m(3*)) . The approach worked: voluntary overtime increased, mandatory overtime fell off, and the parties have therefore retained the system—essentially unmodified—through three contract cycles over the past five years. *Thal, Exhibits 11, 12 and 1*.

In November of 2007, Teamsters Local 117 became aware the Employer was assigning on-call employees to vacant posts ahead of regular full-time employees who had volunteered for overtime. There were and are some shift sergeants (Calvin Smith and Charles Burris, for example) who assign posts correctly by first allowing overtime volunteers to select their post from among all vacancies and then filling the remaining posts with intermittent employees.

The scenario proffered by the Union as the contractually required way to assign on-call and overtime is as follows:

Specifically, Sergeant Burris testified that he first prints out a roster for the shift in question and determines the number of vacancies. *Burris.* He then determines how many intermittent employees are available but he does not assign a post at the time that the intermittent employee commits to work. Instead, he instructs the intermittent employee to report to work at the facility at which time the assignment will be given. In the meantime, Sergeant Burris fills any remaining vacancies by reference to the volunteer sign-up list with overtime volunteers being allowed to select their post from the list of all available posts, as required by the contract. *Burris.* Once the volunteers have selected their posts in order of seniority, Sergeant Burris then assigns the intermittent workforce to the remaining posts. *Id.* In this way, Sergeant Burris offers all available posts to the volunteers rather than limiting their post selection by first assigning intermittent employees to available posts. *Id.*

The Employer's approach of assigning on-call employees before allowing volunteers to select among all available vacancies significantly reduces the available post choices for the overtime volunteers. *Luciano.* Sergeant Jividen and Officer Fallen Luciano testified that there are more and more occasions on which senior officers are being displaced by intermittent employees in preferred positions such as towers, the depot and the dock. *Jividen, Luciano.*

The evidence at hearing established that at other Department of Corrections institutions, overtime volunteers are being offered the choice of all available posts before intermittent employees are assigned to posts. The evidence can be summarized as follows:

The plain language of the contract requires the Employer to allow overtime volunteers to select posts by seniority. Here, the parties have adopted a seniority-based system of voluntary overtime post assignment that is set forth in Article 17.1 of the contract. *Joint Exhibit 1 at 40-44 (Article 17.1).*. They adopted plain language to establish such a system. The operative language provides that:

> **"Volunteers may select any position available,** but on duty employees who have signed up for the voluntary overtime list for the next scheduled shift may not refuse an assignment of overtime."

Joint Exhibit 1 at 44 (Section 17.1(D)(3) (emphasis added). This language is significant because it imposes a clear obligation on the Employer to offer all available posts to volunteers, and it because it embodies the *quid pro quo* for that commitment: the volunteer has bound himself/herself to work on the next shift. The agreement and understanding that the Employer must offer all available posts to overtime volunteers has been present throughout each contract. *Compare: Exhibit 11 at 31 (Section 17.4); Exhibit 12 at 41 (Section 17.1(D)); Exhibit 1 at 44 (Section 17.1(D)(3)).* If management has the right to restrict posts available for overtime it could undermine the post selection system in the voluntary overtime section simply by deeming certain posts "unavailable," and then making them "available" later. This interpretation is unreasonable entirely inconsistent with the language in Article 17.1(D)(3), and with the

undisputed intent of the parties which was to establish a seniority based system of volunteer overtime post selection in which all posts are available for selection. *Thal.*

Article 17.1(L) of the contract is merely an acknowledgment that the Employer can use employees on straight time ahead of employees on overtime. *Thal.* The Union acknowledges and fully respects the significance of this economic issue. However, this language does not address the order of post selection as is clear from the plain language of that section.

Where the contract language is clear and unambiguous, arbitrators will simply apply that language to give it the meaning that was expressed by the parties. To "ignore clear- cut contractual language" or "legislate new language, would usurp the role of the labor organization and employer." *Elkouri and Elkouri,* How Arbitration Works

The Employer's effort to persuade the Arbitrator to treat "work" and "posts" as synonymous in Section 17.1(L) should not be accepted. The parties have used both terms repeatedly throughout the contract. *Dowler.* It would be improper for the Arbitrator to presume that the parties meant a different word than the one they adopted. As the leading treatise in the area observed, "Use of two different terms may be held to imply different meanings." *Elkouri and Elkouri,* How Arbitration Works at 452 (O^{h} Ed. 2003). This technical point though is significantly bolstered by the fact that the use of the term "work" is consistent with the purpose of the provision. *Id.* at 453. It is undisputed that the purpose of Section 17.1(L) was to ensure the Employer's right to avoid overtime when qualified straight time employees are available to work. If the word were changed to "posts" it would add a supplemental meaning that is not consistent with this underlying purpose of the section.

If the Arbitrator finds any ambiguity in the language or the intent of the parties, or has any concern about the practicality of administering a system of post assignment in which

volunteers select posts ahead of intermittent employees being assigned to remaining posts, those issues are resolved by reference to the widespread and largely consistent past practice at other Department of Corrections institutions. The practice at other institutions (like the practice at MICC) may not be universal, but the overwhelming weight of evidence introduced at the arbitration hearing establishes that the Union's interpretation is being successfully applied at many locations throughout the state including Monroe Correctional Complex, Stafford Creek Corrections Center, Airway Heights Corrections Center, Coyote Ridge Corrections Center, and Washington Corrections Center for Women. *Hahn, Kuhn, Moroffko, Stott.* The Department offered very little evidence that its interpretation was being utilized at other locations. Most critically, the Department offered absolutely no evidence that would suggest that such a system was administratively unworkable.

Position of the Employer:

The position of the Employer can be summarized as follows:

In the course of managing its workforce, the Employer has several options for determining how and whether a vacant position may be filled. The Employer may choose to leave the position unfilled, choose to reassign another employee to that position to cover the absence, choose to cover the position with on shift relief staff, hire an employee on a non-permanent basis to cover the position, hire an employee on an on-call basis to cover the position, or cover the position through the use of overtime *Dowler*. Joint Exhibit 2, the Superintendent's memo of April 10, 2007 describing the process for assigning duties to on-call officers and staff assigned overtime, was sent to the Union's Director of the Corrections and Law Enforcement

Division for Teamsters Local Union 117, Michael Beranbaum. The Union did not dispute receipt of that memo. No grievance was filed regarding the Employer's process until January 31, 2008. During those nine months, positions requiring coverage at MICC were filled in accordance with that memo.

To prevail, the Union must show either that the contractual language is clear and unambiguous and favors the Union, the intent of the parties favors the union's interpretation of the language, or that practice and custom give the language meaning that favors the Union. Article 17 does not clearly support the Union's argument. Article 17.1 D. subsections 2 and 3 do speak to seniority as a factor when the Employer makes voluntary overtime assignments. No clear language compels the Employer to assign voluntary overtime to full-time employees prior to assigning on-call employees on straight time, nor is their language that prohibits the Employer from utilizing on-call employees to offset the need for overtime. In fact, there is direct language contradicting the union's position:

Article 17 .1 L:

The Employer may assign work to on-call employees prior to assigning overtime.

No evidence was presented at the hearing regarding the intent of the Parties expressed in negotiations regarding how on-call employees should be scheduled to work. Witness Thal's testimony regarding past contract negotiations was not relevant to the union's assertion that voluntary overtime should be offered before on-call employees are scheduled to work straight time. The Union must demonstrate a binding past practice that favors his position. The requirement of a binding past practice, "clarity, consistency and except ability" is in fact applicable to the Employer's practice for assigning on-call employees to work and determining

and assigning voluntary overtime since April 2007. The Union presented neither evidence disputing this, nor evidence regarding a binding past practice at MICC.

Article 3 .1 M provides the Employer with the right to "utilize nonpermanent and on-call employees," a right which management utilizes. Article 15 .6 B affords that right when the work is intermittent in nature, sporadic, and does not fit a particular pattern. Article 17. 1L is consistent with that scheme. It is only after on-call employee resources have been exhausted that a determination regarding the need for overtime is made. *Burris, Boday, White, Dowler.* The provisions of article 17 .1 D 2 and 3 do not apply until the Employer has first determined overtime is necessary as provided in Article 17 .1 A. Under its terms, the Employer could meet this requirement only after determining where the on-call employees would be working.

Granting the Union's version for applying the contract would add to, subtract from, and/or modify the Agreement between the Parties. The Union complains about the manner in which on-call employees working straight time are assigned work. However, on-call employees are scheduled to work *prior to* there being a determination that overtime is necessary. The Union would have the Employer first determine how many overtime correctional officer employees are needed, then contact on-call employees for availability and inform them they will get their assignments once on McNeil Island, then give first choice of all available open positions to full-time employees by seniority. This would violate Articles , 3, 15, and 17, and add to the provisions of Article 17, thus violating Article 9 .5's limitation on the Arbitrator's authority.

DISCUSSION

A number of witnesses testified to the various scenarios for the assignment of on-call and volunteer overtime employees:

Witness Thal's testimony was sincere, and was a factor in the portion of the Arbitrator's Award containing an advisory recommendation to further bargain this matter due to the equities presented apart from the technical aspects of the matter.

Witness Burris was presented as describing an example of the process as it is envisioned by the Union. Further examination disclosed the witness did not have roster responsibility at certain relevant times. Further, the witness testified that the roster he receives before assigning overtime volunteers has already been prepared, largely filled out with on-call employees already plugged into various posts by MICC's roster office prior to assigning volunteers. The witness testified that he "has nothing to do with the roster office" as far as assigning staff. He further testified that when the on-call pool is exhausted, that is when the need for overtime is determined. The witness confirmed that the "needs of the shift" are paramount considerations.

Witness Stott testified that the Monroe facility assigns in the manner suggested by the Union. He related that an employee at Twin Rivers, one Bittner, an on-call, had been selecting posts, but that after the witness spoke to HR, the practice ceased, and Bittner understood and accepted the reason. Examination revealed that the witness's knowledge and experience were prior to the contract in issue, but actual timing was ascertained. The witness testified that not all facilities do it the Union's way, and that he did not have assignment responsibilities at Stafford Creek. Last, the witness had no personal knowledge of the process at MICC.

Witness Kuhn testified that the Penitentiary assigns along the Union's suggested lines. If there are ten vacancies, the roster manager finds the number of on-call employees, e.g. three, then calls overtime for all ten vacancies, and lets the seven volunteers select from all the posts. He acknowledged that, predictably, policy requirements, the safety and security of a prison facility's needs in terms of personnel skills, would dictate, however. For example, a specialized position might require a Corrections Officer Level 2, or an officer with weapons qualifications. The witness had never scheduled at MICC, and had not been at a site he described since January of 2001. He acknowledged that in the event of a vacancy of an officer's position because of training, an on-call employee might be scheduled, depending upon availability and need.

Witness Moroffko testified that she has seen on-call employees assigned after volunteers. She has seen problems where an on-call has been temporarily assigned because a corrections officer was on leave, etc. Where there are few on-calls, there tends to be a lot of mandatory overtime, especially in remote places like Belfair. The relieved post is not generally available for overtime because the Employer is low on corrections officers so an on-call is assigned a temporary permanent assignment.

Witness Hahn testified he saw the process favored by the Union at Stafford Creek. On examination, the witness testified his knowledge was pre-2002, and he had no knowledge of MICC's process.

Witness Van Boening testified he drafted Joint Exhibit 2 to respond to witness Jividen's concerns, to clarify the process, and noted many months without a grievance being filed.

Witness Boday explained the use of the terms "work" and "post" in the contract: the definition of "work" for on-call officers is the post assignment of the body of work they will be doing. "Work" is encompassed in a specific post. This was echoed by witness Dowler, whho

testified that Article 17 doesn't apply just to corrections officers, but also to food service, etc. "Post" is used when discussing custody assignments. One doesn't work as a custody officer, one is assigned a post. One can "work" in other classes.

Witness White-Zollars is the MICC roster manager, and testified that she is responsible for preparing the roster before witness Burris sees it. She has been preparing the roster as per Joint Exhibits 2 and 3 for two years. She noted that experience level may dictate if, for example, if an on-call is a Corrections Officer 2 and a CO2 is needed.

Witness White, day shift lieutenant at MICC, confirmed that she follows the process outlined in the exhibits.

Witness Dowler of Labor Relations discussed the issues involved in maintaining a workforce at MICC: workload peaks, having enough relief staff, and how staffing relates directly to safety and security not just for the staff and inmates at MICC, but for the community at large. He emphasized the many options open to MICC before going to overtime, which he believes is assigned only when the Employer has exhausted all other resources. The witness testified he contacted the roster manager at Monroe, and learned that assignment there is performed according to the exhibits. In preparation for bargaining, he conferred with his team, composed of Department of Corrections managers, and confirmed the Employer's stated process. He noted that there is no definition to be found for a preferred post. The central problems noted by the witness was those associated with never being able to know the final roster until the selection process suggested by the Union was completed, creating problems of security to the extent shuffling to accommodate selection among all vacant posts would have the potential to create.

Taken in total, the gross effect the testimony presents a quilt of various contradictory scenarios of various assignment practices at various institutions at unclear times, bearing a "Yes,

they do," " No, they don't," "Yes, they do," refrain. As to practices at other institutions, neither party presented direct evidence in the form of a live witness to testify from personal knowledge of practices at relevant time frames, (except for the Employer's witnesses administering processes at MICC), though subpoena lies to procure the attendance of live testimony. While labor arbitration does not closely follow formal court evidence rules, where the evidence is relevant to core issues in a matter, an Arbitrator will be reluctant to ground a finding upon hearsay alone.

In sum, the Arbitrator finds that there is insufficient evidence in the record to cast the language of the contract as ambiguous, or to counter the effect of the language of Article 44 of the 2005-2007 contract, the so-called Zipper Clause, so as to invalidate the Employer's performance of determining the need for overtime, and assigning on-call employees prior to such determination. The Arbitrator is, however, mindful of the values and expectations that have been important to the bargaining unit, and the application of seeming technicality that clouds those expectations and the consequent affect upon morale in this setting. In that regard, the Arbitrator, as part of this Award, believing that sustaining the grievance would exceed his authority upon this record, and believing that the grievance has merit from the standpoint of equity, will make an advisory recommendation that the Parties meet to subject this matter to bargaining at their earliest convenience.

Conclusion

The Arbitrator is persuaded and finds that the Union failed to carry its burden of proving that the Employer assigned on-call employees to fill vacancies ahead of senior employees signed up on the volunteer overtime list in violation of the Agreement by a preponderance of the evidence.

Accordingly, this portion of the Union's grievance is denied, and the Arbitrator shall enter an Award to that effect.

IN THE MATTER OF THE ARBITRATION BETWEEN	)	**FMCS CASE NUMBER:**
	)	**080709-03835-8**
TEAMSTERS LOCAL UNION NO. 117,	)	
	)	**ARBITRATOR'S**
UNION	)	**OPINION AND AWARD**
	)	
And	)	**GRIEVANCE:**
	)	**CHOICE OF POSTS**
STATE OF WASHINGTON	)	**ON VOLUNTARY**
DEPARTMENT OF CORRECTIONS,	)	**OVERTIME**
	)	
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. **080709-03835-8** as follows:

The grievance, Union Number 11-08 (MICC) is denied.

The Arbitrator, drawing upon inherent and customary authority so to do, respectfully urges and recommends unto the Parties that the subject matter basing the grievance herein be the subject of bargaining as soon as the same may be practicable.

RESPECTFULLY SUBMITTED this 17th day of July, 2009.

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Anthony D. Vivenzio, Arbitrator