

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)
BETWEEN) OPINION
)
STATE OF WASHINGTON DEPARTMENT) AND
OF CORRECTIONS)
) AWARD
"THE STATE" or "THE EMPLOYER")
)
AND)
)
TEAMSTERS LOCAL NO. 117) Darren Kelly
) Trash Run Grievance
"LOCAL 117" OR "THE UNION")

HEARING: April 17, 2007
Spokane, Washington

BRIEFS: Employer's received: May 29, 2007
Union's received: May 29, 2007

HEARING CLOSED: May 29, 2007

ARBITRATOR: Timothy D.W. Williams
2700 Fourth Ave., Suite 305
Seattle, WA 98121

REPRESENTING THE EMPLOYER:
Shirley Morstad, Labor Relations Consultant
J'Anna Young, Human Resources Consultant

REPRESENTING THE UNION:
Spencer Thal, General Counsel

APPEARING AS WITNESSES FOR THE EMPLOYER:

J'Anna Young, Human Resources Consultant
Rob Herzog, Associate Superintendent
Paul Duenich, Correctional Lieutenant
John E. Whitehead, Human Resources Manager

APPEARING AS WITNESSES FOR THE UNION:

Darren Kelly, R&M Officer
Dave Powell, R&M Officer
John Brunner, R&M Officer

EXHIBITS

Joint

1. Collective Bargaining Agreement between Teamsters Local 117 and the State of Washington, 2005-2007
2. Grievance, dated 8/23/2005
3. 1st Step Response, dated 9/26/2005

Employer

1. Notice of position change of the Grievants
2. Position Descriptions for 3172, 2698, 2701, 3104, 2717, 2699
3. Web site print out for class specifications.
4. Post orders for #331, 332, 333, 334, and 335
5. Duties of Construction & Maintenance Supervisor

BACKGROUND

The State of Washington Department of Corrections (hereafter "the State", "the DOC" or "the Employer") and Teamsters Local 117 (hereafter "Local 117" or "the Union") agreed to submit a dispute

to arbitration. A hearing was held before Arbitrator Timothy D.W. Williams in Spokane, Washington on April 17, 2007.

At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made a digital recording of the proceedings, informing the Parties that the recording was intended as a part of his own notes and not to be considered an official transcript. A copy of the recording was provided to each Party.

During the hearing the Employer raised the question of arbitrability claiming that the Union had not timely filed a grievance and thus the matter was not properly before the Arbitrator. After discussion, the Arbitrator indicated that he would take evidence and argument on both the question of arbitrability and the merits of the issue. He further indicated that the final decision would be bifurcated; providing first a response to the question of arbitrability and, only if the matter is found arbitrable, second to the merits of the issue.

At the close of the hearing the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to file briefs in lieu of oral arguments and the briefs were timely received by the Arbitrator. Thus the award, in this case,

is based on the evidence and argument presented during the hearing and on the arguments found in the written briefs.

SUMMARY OF THE FACTS

The grievance in this case is between the State of Washington Department of Corrections and Teamsters Local 117. The Parties are bound by a Collective Bargaining Agreement, effective July 1, 2005 through June 30, 2007, under which the present grievance arose. The Grievance was filed on August 23, 2005 by Business Representative Joseph Kuhn on behalf of bargaining unit members Darren Kelly, Chris Rundlett, Robert Zirkle, John Brunner, Dave Powell, and Michael Perry.

The Employer, Airway Heights Corrections Center, is a prison housing approximately two thousand inmates in living units containing approximately 260 inmates per unit. The Grievants are employed as Custody and Corrections Officers 2 and assigned to duties as Response and Movement Officers (R&Ms). R&Ms are the primary responders to any emergency incident at the institution, especially those which require the use of force. R&Ms are also assigned other functions including the transportation and monitoring of inmates during daily tasks and for medical emergencies. At any one time, there are five R&M officers on duty. The present grievance concerns the Employer's practice of assigning the trash run to R&M Officers on Sundays.

During the workweek, Construction Maintenance and Supervisor John Clarry conducts the trash run. This task entails picking up inmates from their cells, driving them around the living units to the garbage bins, monitoring them as they collect the trash and returning them to their quarters. On the weekends, Mr. Clarry is unavailable to conduct the trash run, but the garbage generated on the weekends is of sufficient quantity that it must be managed.

The Employer's solution to this problem for many years has been to assign the duty of trash run on Sundays to an R&M officer. Undisputed testimony was presented at the hearing that the practice of assigning R&Ms to the Sunday trash run has been in place since as early as 1995. The instant grievance concerns the issue of whether or not the practice constitutes a violation of the Collective Bargaining Agreement, either as regards the safety of the employees affected or as regards the assignment of duties to bid positions.

The Union's grievance, dated August 23, 2005 alleges that the Employer committed a violation of Articles 13.1, 13.2, 19.1 and 19.2 of the CBA when, on August 4, 2005, it assigned the duty of trash run to R&M Officer Darren Kelly. The grievance indicates that Mr. Kelly discussed this matter with his Captain and Lieutenant prior to the filing of the grievance. The grievance further indicates that the Union spoke with Captain Haynes in an attempt at resolution prior to the filing of the

grievance. As a resolution was not reached, the grievance proceeded to Step One. The specific language of the grievance is that

13.1 and 13.2 both describe the need for management to provide a safe work environment. Management is requiring one of the response staff to escort a trash truck, which does not allow for that staff to respond to emergencies. 19.1 and 19.2 identifies what a bid is and we feel that management is requiring the R&M staff to operate outside their bid position. There is no other area of the contract which allows for this run.

Associate Superintendent Robert Herzog replied to the grievance on September 26, 2005. Mr. Herzog's reply indicates that a Step One meeting was held with Mr. Kelly and Mr. Kuhn on September 13, 2005. The reply proceeds to voice his findings that no violation occurred with respect to each piece of contract language cited by the Union in the Grievance. Lastly, the reply notes that the issue of timeliness was taken up at the meeting. Mr. Herzog writes

R&Ms are issued a duty card that describes tasks associated with their assigned post. The most current duty card is dated 3-21-05 and identifies 333 as responsible for the Sunday "garbage run". The grievance identifies August 4, 2005 as the date the alleged violation occurred. This is well beyond the 21-day limit for filing a grievance as stated in Article 9.3 section A.

You argued that the contract became effective on July 1, 2005. The garbage run duty was in effect on July 1, 2005 and as such any grievance should have been filed by July 22, 2005.

As the Parties were unable to settle the grievance, it proceeded to Step 2 and was brought before the Grievance Resolution Panel,

as provided for by Articles 9 and 10 of the CBA. At the Panel hearing, the Employer chose not to make an objection as to the timeliness of the grievance, as was its option under Article 10.9. The Panel did not reach a decision regarding the alleged violations of the Contract and the grievance proceeded to arbitration, as provided for by Article 9.

STATEMENT OF THE ISSUE

The Parties were able to agree upon an issue statement related to the merits of the dispute. The Employer, however at hearing raised the additional question of arbitrability and the Arbitrator agreed to deal with this question prior to the issue created by the original grievance. Thus, there are potentially three issues for the Arbitrator.

1. Is the grievance arbitrable under the language of Article 9 and Article 10 of the collective bargaining agreement?
2. If arbitrable, did the Employer violate Article 13.1, 13.2, 19.1 or 19.2 by assigning the duty of trash run to response and movement officers?
3. If so, what should the remedy be?

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, 2006-2009

ARTICLE 3: MANAGEMENT RIGHTS

Section 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:

C. Plan, direct, control, and determine the operations or services to be conducted by employees.

D. Determine the size, composition, and direct the workforce.

O. Determine the method, technological means, number of resources and types of personnel by which work is performed by the Department.

ARTICLE 9: GRIEVANCE PROCEDURE

Section 9.1 Terms and Requirements:

A. Grievance Definition: A grievance is an alleged violation of this collective bargaining agreement.

B. Filing A Grievance: The Union may file grievances on behalf of an employee or on behalf of a group of employees. Whenever possible, disputes should be resolved informally, at the lowest level. To that end, all supervisors and employees are encouraged to engage in free and open discussions about disputes.

C. Computation of Time: The time limits in this Article must be strictly adhered to unless mutually modified in writing. Days are calendar days, and will be counted by excluding the first day and including the last day of timelines. When the last day falls on a Saturday, Sunday or holiday, the last day will be the next day which is not a Saturday, Sunday or holiday. Transmittal of grievances, appeals and responses will be in writing. Service on the Parties is complete when personal service has been accomplished; or upon receipt by facsimile or by the postmarked date if sent by certified mail.

D. Failure to Meet Timelines: Failure by the Union to comply with the timelines will result in the automatic withdrawal of the grievance. Failure by the Employer to comply with the timelines will entitle the Union to move the grievance to the next step of the procedure.

E. Contents:

1. Disciplinary and Disability Separation (Non-Panel)
Grievances: For grievances challenging disability separations or disciplinary actions other than oral and written reprimands, the written grievance must include the following...

2. Non-Disciplinary and Non-Disability Separation (Panel)
Grievances: For all grievances except those described in Subsection 9.1 E.1 above, the written grievance must include the following information:

- a). A statement of the pertinent facts surrounding the grievance;
- b). The date upon which the incident occurred;
- c). The steps taken to informally resolve the grievance, the individuals involved in the attempted resolution, and the results of such discussion;
- d). The requested remedy;
- e). Name of the business representative or shop steward representing the Grievant;
- f). A specific description of how each cited alleged violation has occurred; and
- g). Signature of affected employee(s), the business representative or shop steward. The affected employee(s) must sign the grievance prior to or at the Step 1 hearing.

Section 9.3 Non-Disciplinary, Non-Disability Separation Grievance Processing: All grievances other than disability separations or disciplinary action described in Section 9.2 above, will be processed as follows:

A. Filing: A grievance must be filed within twenty-one (21) days after the date the alleged violation occurred, or the date the Grievant became or should have become aware of the issue giving rise to the grievance. The employee or representative will utilize this twenty-one (21) day period for attempting to informally bring about settlement. Attempts at informal resolution will at a minimum include discussions with a manager who has the authority to resolve the issue. The employee or representative will indicate that the discussion relates to an issue of a potential grievance.

B. Processing

Step 1 - Grievance Filing and Initial Review. If an issue is not resolved informally, the Union may present the grievance,

in writing, to the local Human Resources Office within the twenty-one (21) day period described above...

Step 2 - Grievance Resolution Panel. Within fourteen (14) days of receiving the Step 1 decision, the Union may move the grievance to the Grievance Resolution Panel referenced in Article 10 ("Panel"). The request will be sent to DOC Headquarters Labor Relations Office and must include...

Section 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 any decision that would result in a violation of this Agreement. The Arbitrator will be limited in his or her decision to the grievance issue(s) set forth in the original grievance unless the Parties agree to modify it. The Arbitrator will not have the authority to make any award that provides an employee with compensation greater than would have resulted had there been no violation of the Agreement. The Arbitrator will hear arguments on and decide issues of arbitrability before the first day of arbitration at a time convenient for the Parties, immediately prior to hearing the case on its merits or as part of the entire hearing and decision-making process. If the issue of arbitrability is argued prior to the first day of arbitration it may be argued in writing or by telephone, at the discretion of the Arbitrator. Although the decision may be made orally, it will be put in writing and provided to the Parties. The decision of the Arbitrator will be final and binding upon the Union, the Employer and the Grievant.

Section 9.6 Arbitration Costs: The expenses and fees of the Arbitrator, and the cost (if any) of the hearing room will be shared equally by the Parties.

ARTICLE 10: GRIEVANCE RESOLUTION PANEL

Section 10.1 Authority of the Panel: The Employer and the Union will continue to maintain a permanent committee for the resolution of grievances, referred to as the Grievance Resolution Panel ("the Panel"). The Panel will have the authority to interpret the provisions of this agreement, only to the extent that the interpretation is necessary to render a decision on the case being heard. The Panel will not have the authority to contradict, add to, subtract from, or otherwise modify the terms and conditions of this agreement.

Section 10.2 Panel Membership: The Panel will consist of three (3) Employer Panel members appointed by the Employer, and three (3) Union Panel members appointed by the Union. If the

case involves an institution or facility that a business representative has been appointed to represent, or at which a shop steward is employed, the representative may not serve as a Panel member during the hearing of that case. If the case involves an institution or facility where an Employer representative is employed/located, the Employer representative may not serve as a Panel member during the hearing of the case..

Section 10.9 Procedural Objections: Either Party may raise a procedural objection(s). Objections must be filed in writing and submitted to 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 non-moving Party may file a written response to the objection. The written response must be filed within seven (7) calendar days of receipt of the written objection and will be submitted to DOC Headquarters Labor Relations Office and the Union. An administrative review on the procedural objections filed will occur during an Executive Session at the next scheduled Panel hearing. Both Parties will be notified of the Panel's decision.

ARTICLE 13: SAFETY

Section 13.1 Safety Standards and Principles: The Employer and the Union agree that the nature of work performed in correctional facilities by employees is recognized as potentially hazardous. Therefore, the Union and the Employer will cooperate in the endeavor to maintain a safe, healthy, and drug and alcohol free work environment. The Employer agrees that no employee should work or be directed to work in a manner or condition that does not comply with accepted safety practices or standards as established by the Agency's Safety and Health Program, Department of Labor and Industries, State of Washington, and other applicable regulatory requirements.

Section 13.2 Employer Responsibilities: Recognizing the inherent risk(s) in a correctional setting, the Employer is obligated to provide a safe workplace and to educate employees on proper safety procedures and use of protective and safety equipment. The Employer is committed to responding to legitimate safety concerns raised by employees. The Employer will comply with federal and state safety standards, including requirements relating to first aid training, first aid equipment and the use of protective devices and equipment.

ARTICLE 19: BID SYSTEM

Section 19.1 Definitions: For purposes of this Article only the following definitions apply:

- A. Assigned Positions - Positions filled by other than a bid
- B. Bid Eligibility - An employee will be eligible to bid at the time he or she completes their probationary and/or trial service period within their current classification.
- C. Bid Positions - Positions filled as a result of a bid.
- D. Bid System - A process allowing employees with permanent status to submit bids to positions within their employing institution in the same job classification in which they currently hold permanent status or have previously held status.
- E. Operational Need - A circumstance encompassing one (1) or more of the following:
 - 1. Training
 - 2. Safety, where the continued assignment of an employee in a position is considered a threat to the safety of the employee or others.
 - 3. When there is a need to balance the skills or experience of staff in a particular area.
 - 4. An emergency, such as a fire, riot or disturbance.
 - 5. Assignment of off-site or overnight inmate crew response to such things as flood control, forest fire, etc.
 - 6. Documented medical reasons that necessitate the reassignment of the employee. The duration of the reassignment will be determined by a physician's medical statement indicating how long the employee should be reassigned. The Employer will require a release from a physician prior to the employee returning to his/her former position.
 - 7. Special qualifications for particular tasks, such as translation of foreign languages or gender searches.
 - 8. Employee investigations where it is necessary to temporarily reassign an employee pending investigation of a charge of misconduct and pending any resolution of a finding misconduct against the employee.
 - 9. Documented performance deficiencies where the employee has a demonstrable inability to perform the job after receiving the training necessary to perform the job.
 - 10. Litigation against or relating to the employee where it is necessary to reassign an employee to avoid difficulties in the defense of the litigation.
 - Al 11. Rotational assignment out of Intensive Management, Segregation, or Mental Health Units.
 - 12. To correct a supervisor-subordinate (to include the entire chain of command) nepotism relationship.
 - 13. Failure to maintain compliance with statewide minimum standards of the position.
 - 14. Court order necessitating the reassignment of a staff member.
- F. Position - A particular combination of post, shift and days off.
- G. Post

1. Single or individual assignments with a defined set of job duties.

OR

2. Inmate living units including intensive management units, segregation, and mental health units.

These duties may be common to one or more employees working at one or more locations.

Section 19.2 Components of a Bid: Bids will indicate the employee's choice of shift, post and days off, the position number of the desired position, and job classification. Employees will be responsible for the accuracy of their bids. Each bid will remain active for a period of one (1) year from the date submitted by the employee.

POSITION OF THE EMPLOYER ON ARBITRABILITY

At hearing and in its written brief, the Employer makes the procedural objection that the grievance is not properly before the Arbitrator because it is not timely. Given that the contract provides for strict enforcement of the time limits on the filing of grievances, the grievance should be considered automatically withdrawn.

Specific contract language places a time limit of twenty one days on the filing of grievances and spells out the consequences of untimely filing. Article 9.3 mandates that a grievance be filed within twenty-one days of the alleged violation or the date the Grievant became aware of the issue. Article 9.1 (C) and (D) underscore the serious nature of this time limit. According to Article 9.1 (C), "The time limits of this Article must be strictly adhered to unless mutually modified in writing" (Joint Ex-1). According to Article 9.1 (D), "Failure by the Union to

comply with the timelines will result in the automatic withdrawal of the grievance".

The language of Article 9 is clear and unambiguous and evidences that the Parties intended for the twenty-one day limit to be binding. The Parties did not grant the Arbitrator the authority to modify the time limit or any other provision of the contract. Such a move would be expressly against Article 9.5 which states that "The Arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this agreement" (Joint Ex-1). Additionally, Elkouri and Elkouri observes that "If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested". The Employer believes that the Grievants in this case did not file their grievance within twenty-one days of becoming aware of the fact that R&M officers are assigned to the trash run on Sundays. This position is outlined in the Step One Grievance Response, issued by Superintendent Rob Herzog. It would not be appropriate for the Arbitrator to hear the grievance, given the delay in filing and the lack of mutual modification of the requisite time limit.

The Union filed the grievance on behalf of Mr. Kelly, Mr. Powell, Mr. Perry, Mr. Brunner, Mr. Rundlett and Mr. Zirkle on August 23, 2005. Each of the Grievants had been performing the trash duty for long periods of time prior to that date. The

length of time that they had been aware of the assignment of trash duty to R&Ms varies, but is in every case between eight months and eight years. Not one Grievant can claim to have become aware of this practice within the twenty-one day window, yet they chose not to grieve until August 23, 2005. "The Employer believes that by continuing to perform the trash run duty as long as they did without filing a grievance to address the issue, the grievants demonstrated their acknowledgement and acceptance of the situation" (Employer's brief, p. 5). Given the strict requirements for grievance procedure provided for by the contract and the considerable delay in the filing of this grievance, the Employer prevails on the Arbitrator to deny jurisdiction over the grievance.

The Union seeks to undermine the Employer's position by claiming that the Employer's failure to raise the timeliness issue before the GRP amounts to a withdrawal of the objection. This is inaccurate. The language of Article 10.9 related to raising objections before the GRP is permissive. There is no requirement that all objections be raised, nor are there mandatory consequences for failing to object. The Employer did raise the issue at Step One. Not raising it again before the GRP does not render the grievance timely.

The Union further seeks to support its position that the grievance is arbitrable by relying on the concept of a continual violation. The Employer protests that even an allegation of a

continual violation is untimely considering the amount of experience the grievance had with this practice before they chose to file the grievance. They performed the trash run, on average, for years without demonstrating any concern for their safety. Based on this fact, the grievance was legitimately denied by Employer and should not be heard by the Arbitrator.

POSITION OF THE UNION ON ARBITRABILITY

The Union believes that the Employer's procedural objection is groundless and asks that the matter be heard and decided on its merits. The Union responds to the objection in two ways. First, the Union argues that the State's objection is itself procedurally improper because the State failed to raise it before the Grievance Resolution Panel. Secondly, the Union argues that the contract violation in dispute is of a continuing nature. Because the grieved event in the instant matter is a regularly recurring task assignment, it may be grieved each Sunday as another R&M Officer is performing the trash run.

The Grievance Resolution Panel is a step of the grievance process for non-disciplinary grievances, provided for by the Collective Bargaining Agreement (CBA). A hearing before the Grievance Resolution Panel is a mandatory step, intended to allow the Parties to review the grievance and hopefully resolve the matter prior to arbitration. Accordingly, the Panel holds the same authority to interpret the CBA as does the arbitrator. Full

disclosure of all arguments at this step is a key aspect of the Panel hearing, since its purpose is to allow the Parties to assess the strength of a grievance before proceeding further. Importantly, the Panel is made up of Union and Employer representatives who, as is provided for by the Contract, are not participants to the Step One proceeding. Because the individuals comprising the panel may not be familiar with the arguments of the case, it is especially incumbent on the Parties' representatives to argue each issue of relevance to the grievance, including procedural objections.

Article 10.9 sets forth a required process for raising and addressing objections before the Panel. It provides that "Either Party may raise a procedural objection(s). Objections must be filed in writing and submitted [to all Parties] within seven days from notification of a Panel hearing being requested". While no party is obligated to make an objection, any objection to be made must be made to the Panel.

It is generally recognized by arbitrators that a party "who had recognized and negotiated a grievance" (Elkouri and Elkouri) without making and preserving a timely objection has effectively waived time limits. The Employer did raise the timeliness objection at Step One, but failed to do so before the Grievance Resolution Panel. The Union believes that the State should not be allowed to raise an objection before the Arbitrator which it did not present to the Panel. "Holding back" a procedural

objection for arbitration, according to the Union, amounts to "trial by ambush" and defeats the purpose of the Grievance Resolution panel and "the spirit of the Parties' grievance procedure which favors full disclosure and case presentation" (Union brief, p. 8).

The second argument in opposition to the Employer's objection is that the time limit for most grievances is not applicable to the instant case as the violation in question is of a recurring nature. The CBA provides for a 21 day time limit for the filing of grievances. R&M Officers are assigned to the trash run every Sunday; therefore, three grievable events occur in any 21 day period. Consequently, it stands to reason that the grievance, filed on August 23, 2005 alleges in a timely fashion that Employer was in violation of the CBA when it assigned the trash run to R&M Officers on August 7, 14, and 21, 2005.

The majority view among arbitrators is that a continuing violation may be grieved at any time. "[A] new right to grieve is triggered each time there is a recurring violation of the contract, and a grievance is not time-barred simply because it was not raised the first time that the violation occurred" (U brief, p. 9). The harsh consequence of the opposite view is that if the Employer were able to avoid a grievance within 21 days of a violation, it would be allowed to continue committing said violation indefinitely. In the instant case, the Union believes that the assignment of R&Ms to the trash run is a long-standing

violation which continues to jeopardize the safety of bargaining unit members every Sunday and its grievance is not untimely so long as the situation remains unchanged. The Union requests that the Arbitrator dismiss the State's objection and proceed to issue a decision based on the merits of the case.

ANALYSIS ON ARBITRABILITY

The Arbitrator's authority to resolve a grievance is derived from the parties' collective bargaining agreement (CBA) and the issue that is presented to him. The preliminary issue before the Arbitrator is whether or not the grievance is arbitrable. As the Employer's sole objection to the arbitrability of the present matter is based on the timeliness of the grievance, the issue is more specifically whether or not the grievance is timely. If the grievance is found not to be timely, the Arbitrator will not issue a ruling on the merits of the case and the grievance will be considered withdrawn.

Under widely recognized arbitral authority, where the Parties have negotiated into the contract a grievance procedure culminating in arbitration, the strong presumption is created that grievances submitted to this process are arbitrable. That is, having agreed to resolve disputes through the steps of the grievance procedure, no party is granted the authority to make the unilateral decision that some grievances not be permitted to advance through the steps to arbitration. Therefore, when one

party believes that the dispute is not arbitrable, it falls to that party to argue against the presumption that a grievance is rightfully to be heard. In arbitration, the proponent of a procedural objection effectively assumes the burden of proving the validity and prohibitive force of that objection. In order to sustain the objection, the Employer must prove by a preponderance of evidence that the grievance is not properly before the Arbitrator.¹

As the contract provides for the steps of the grievance procedure, it also provides for requirements associated with each of these steps. A legitimate objection may be made on the grounds that the Union has failed to meet some requirement of the process.

In the present case, the Employer believes that the grievance is barred from arbitration because it has failed to meet a time limit for the filing of grievances. Specifically, the Employer argues that the Union did not comply with the language of Article 9.3 (A) which states "A grievance must be filed within twenty-one (21) days after the date the alleged violation occurred, or the date the Grievant became or should have become aware of the issue giving rise to the grievance".

¹ More discussion on the presumption of arbitrability may be found in Elkouri & Elkouri (5th ed., p. 308) and Borstein, Gosline and Greenbaum's *Labor and Employment Arbitration* (2nd ed., Chapter 8). For example, "the presumption is [also] a preference for hearing cases on their merits in order to make the system work" (p. 8-7)

Arbitrators have generally upheld and enforced contractual time limits on the submission of grievances. This Arbitrator agrees that the failure to comply with a specified timeframe results in the conclusion that the grievance is not subject to arbitration. The contract between Teamsters 117 and the State of Washington is emphatic on the point that "Failure by the Union to comply with the timelines will result in the automatic withdrawal of the grievance" (Article 9.1 D). No evidence has been presented to the effect that the Parties have a practice of not enforcing time limitations on grievances or that there has been an agreement, written or verbal, to waive the timelines in this case. The Arbitrator therefore finds that the instant grievance may be barred from arbitration if the Employer is able to show that its objection is properly made and supported by a preponderance of evidence.

In order to sustain the objection, the Employer must show that it properly protested the Union's failure to file timely. The Union argues that the Employer's objection is not properly made and should therefore not preclude the Arbitrator from considering the merits of the case. The question before the Arbitrator, therefore, is whether or not the Employer complied with contract language regarding procedural objections, when it alleged that the Union was late filing this grievance. The issue of timeliness is here quite relevant, as the contract provides

for binding timelines on the submission of objections, as well as grievances.

The Union asserts that the Employer had the opportunity and, indeed, the obligation to make the objection at the Grievance Resolution Panel hearing. Failing to do so, the Union argues, amounts to non-compliance with negotiated contract language regarding GRP proceedings, contained in Article 10. The Employer defends its actions with the argument that the language in question is permissive rather than mandatory. The Arbitrator sees this as the deciding point regarding the issue of arbitrability and the reasons for this belief are elaborated below.

Elkouri and Elkouri write that "[t]he right to contest arbitrability before the Arbitrator is not waived merely by failing to raise the issue of arbitrability until the arbitration hearing" (5th ed., p. 311). This Arbitrator agrees with the logic behind this commonly accepted conclusion. As this contract indicates, the Parties drafted the language providing for grievance procedure with the hope that disputes would be resolved at the lowest level, that is, with the hope of avoiding arbitration to the extent feasible. Certainly, if the Parties believe that a grievance is resolvable without recourse to arbitration, there is good reason to proceed with discussions without making a procedural objection. It is in the interest of both Parties to resolve the issue that gave rise to the

grievance, and this may be done without considerations of arbitrability. In principle, the Employer has the general right to hold its procedural objection until the arbitration hearing itself.

However, the general right of the Employer to make an objection of timeliness before the Arbitrator, whether or not it was previously raised, may be curbed by a negotiated contract provision. In the present case, such a provision does exist. The Parties agreed to a grievance procedure, outlined in Articles 9 and 10, which includes the mandatory step of a pre-arbitration hearing before the Grievance Resolution Panel. The specific language with regard to raising an objection is found in Section 10.9:

Either Party may raise a procedural objection(s). Objections must be filed in writing and submitted to 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 Arbitrator does not accept the Employer's argument that this language is permissive. On the contrary, the Arbitrator finds that, if the Employer has any objection to make, the Article requires the Employer to present that objection to the Panel. This conclusion is based on the following reasoning.

The language of Section 10.9 is formally very similar to that found in Article 9.3 regarding Step 2 of the grievance procedure. The language here reads "Within fourteen (14) days of

receiving the Step 1 decision, the Union may move the grievance to the Grievance Resolution Panel referenced in Article 10 ("Panel"). The request will be sent to DOC Headquarters Labor Relations Office and must include...". Both articles begin with a permissive sentence: The Employer may, but does not have to, file a procedural objection just as the Union may, but does not have to, move the grievance to the Panel step. The second sentence in both Articles is mandatory: in order to carry out the optional move (of introducing an objection or moving along a grievance), mandatory requirements must be met.

The language here is quite straightforward and explicit. While it does not precisely spell out the consequences of failing to raise an objection with the Panel, it does designate the Panel hearing as the proper forum for the handling of procedural objections. In other words, the Employer it is not required to raise a procedural objection. The raising of the objection is permissive. However, if the Employer intends to raise the objection, then it must do so "in writing and submitted to 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." In the instant case, the Employer failed to do so and thus is barred from raising the objection at the arbitration hearing.

Therefore, the Employer's procedural objection is denied and the Arbitrator will turn to the merits of the case.

POSITION OF THE UNION ON MERITS

Although the issue statement agreed to by both Parties concerns the violation of Article 13.1, 13.2, 19.2 and 19.2, the Union focuses on Article 13.2 as the basis of the grievance. The Union argues that assigning the trash run to R&M Officers limits the institution's ability to respond to an emergency incident and thereby jeopardizes the safety of emergency responders.

Article 13.2 contains rather broad language regarding safety in the workplace. It provides that "the Employer is obligated to provide a safe workplace... The Employer is committed to responding to legitimate safety concerns raised by employees". Obviously, in a prison setting safety concerns are numerous, very serious and not always predictable. In drafting the contract, therefore, the Parties expressed a generalized commitment to a safe workplace. Not only the livelihoods, but the lives of bargaining unit employees are dependent on the Employer's commitment to assuring a safe environment as much as is viable. Safety is an especially critical concern in a prison setting, as a disaster here would jeopardize not only the prison community, but also the surrounding area in which the prison is located.

The Employer argues that assigning trash run duty to an R&M Officer does not endanger the safety of the other employees. The Union believes this position to be untenable. R&Ms are the primary responders for all incidents requiring use of force. They are especially trained for the task and comprise the

Corrections Center's quick response team (QRT). When an incident occurs, the R&Ms must be free to respond quickly and as a team in order to demonstrate a "show of force". This is critical as the number of inmates greatly exceeds the number of the staff.

Assigning R&Ms to the trash run jeopardizes the remaining officers' ability to contain an incident. In order to maintain an effective QRT, most institutions do not assign R&M Officers any duties outside of the R&M function. Airway Heights, however, has assigned R&Ms to perimeter relief, as well as given them the regular task of performing the trash run. Thus, of the five R&Ms on duty at any given time, two may be unable to respond to an incident in a timely and effective manner. The level of staffing - only five R&Ms for the entire prison housing 2,100 inmate - simply does not leave any room for an officer to be tied up in another task.

Unlike perimeter relief, which is assigned on a sporadic basis, the trash run is a particularly unsuitable task for R&Ms. This is because it occurs regularly each Sunday, as the inmates know. Knowing that the QRT is regularly short one person, inmates may easily stage an incident at that time to divert officers from living units. When the institutions assigns R&Ms to the trash run it creates a double peril: the already small QRT is weakened and the inmates are privy to that information. The emergency response team leader, Paul Deunich, is responsible for deploying resources during an incident which requires use of

force. He testified that his ability to develop a proper response to an incident becomes limited when resources such as R&M officers are diverted to other tasks. He also recognized that inmate knowledge of this limitation creates a situation which is suited to the possibility of a decoy incident. The Union prevails on the Arbitrator to order that that situation be changed presently, before the possibility of its harmful consequences be realized.

Preventative safety measures are absolutely necessary to ensure compliance with Article 13.2. The State places much weight on the fact that no calamitous incidents have occurred, no injuries suffered as a result of R&Ms performing the trash run. This argument should not sway the Arbitrator. Here is a circumstance in which everything works just fine, until the one Sunday when all goes terribly wrong. Once that happened, it would be too late to respond to the safety concerns which are now being raised by the Grievants and which the Employer is contractually obligated to address. At hearing, testimony was heard considering two close calls during which two R&M Officers were unavailable to respond because they were involved in perimeter relief or the trash run. The close calls illustrate the need to address the issue before a more serious incident occurs. With only five R&M officers for the entire facility, it is not unreasonable to believe that the absence of a single officer may have a serious impact on the outcome of an incident.

The Union believes that the ongoing assignment of the trash run to R&M officers is simply incompatible with the Employer's obligation to provide a safe work place to the employees because it limits the resources necessary for a proper response to a critical incident.

The Union does not deny that allowing the garbage to accumulate during the weekend would create its own safety hazard, but this problem can be resolved without the use of R&M officers for trash runs. The Employer articulated one alternative, which is to construct locking refuse boxes where garbage can be safely stored until John Carry, who performs the trash run during the week and is not an R&M, can take it out on Monday. This solution has not been implemented because, according to the Employer, the construction of the boxes would create additional places for inmates to hide. The Union believes that the boxes could be built in a way which takes line of sight into consideration, and in any case there are already ample opportunities for an inmate to hide on the vast grounds of the facility. Finally, the Union does not insist on this solution or any other particular solution, nor does the Arbitrator need to resolve how the garbage is to be handled; that is best left up to the discretion of management. The Union only seeks that the Employer handle the garbage problem in a way which does not take R&M officers away from their primary and vital task, thereby respecting the

commitment to safety it made to bargaining unit members when the language of Article 13.2 was adopted.

Conclusion

The Union prevails on the Arbitrator to sustain the grievance and order the Employer not to assign the trash to R&M officers. The Union does not seek a monetary remedy.

POSITION OF THE EMPLOYER ON MERITS

Should the Arbitrator decide that the grievance is properly under his jurisdiction, the facts of the case support the position of the Employer that assigning the trash run to R&M officers does not violate the safety provisions of the contract or any other provision.

The Union alleges that the assignment of an R&M officer to the trash run violates Articles 13.1 and/or 13.2 which state:

The Employer and the Union agree that the nature of work performed in correctional facilities by employees is recognized as potentially hazardous. Therefore, the Union and the Employer will cooperate in the endeavor to maintain a safe, healthy, and drug and alcohol free work environment. The Employer agrees that no employee should work or be directed to work in a manner or condition that does not comply with accepted safety practices or standards as established by the Agency's Safety and Health Program, Department of Labor and Industries, State of Washington, and other applicable regulatory requirements.

Recognizing the inherent risk(s) in a correctional setting, the Employer is obligated to provide a safe workplace and to educate employees on proper safety procedures and use of protective and safety equipment. The Employer is committed to responding to legitimate safety concerns raised by employees. The Employer will comply with federal and state safety standards,

including requirements relating to first aid training, first aid equipment and the use of protective devices and equipment.

The Union does not present any argument or evidence to the effect that the Employer has failed to comply with safety practices as established by the Agency's Safety and Health Program, Department of Labor and Industries, or the State of Washington or that the Employer has failed to comply with requirements relating to first aid or protective devices. The basis of the Union's grievance does not relate to the infraction of a specific mandate, but rather voices a generalized concern that the practice creates an unsafe situation. Correctional Lieutenant Paul Deunich and Associate Superintendent Rob Herzog provided expert and ample testimony at the hearing that the unavailability of one R&M officer does not impair the Employer's ability to respond to an emergency incident in any significant way.

As Mr. Kelly testified, the Grievants are concerned that the trash run creates the possibility that out of five R&M officers on duty, up to three may be occupied in tasks that render them unable to respond to an emergency incident, necessitating that the lieutenant deploy other resources to contain the incident. The concerns of the Grievants ought to be weighed against the experience of Correctional Lieutenant Mr. Duenich and Associate Superintendent Rob

Herzog, who do not believe that the absence of a fifth R&M is detrimental to their ability to handle an emergency.

Mr. Duenich has at least four years of experience in emergency management systems and has instructed all staff at the facility. He is assistant team leader of the Special Emergency Response Team. At hearing, he testified that it is his responsibility to make sure that enough resources are sent to the site of an incident to manage it successfully. According to Mr. Duenich "I have not run across one situation where we were missing one or two or three R&Ms that we were not able to send resources in a timely manner to resolve the situation" (quoted from Employer's Brief p. 10). Mr. Duenich also provided examples of other times that R&Ms would be unable to respond to an emergency summons such as when they are on an emergency medical run, taking a lunch break, or monitoring offenders during their meal times. It is a regular part of Mr. Duenich's job to keep track of all available resources, which do not remain constant, and to respond to an emergency in a variety of staffing situations.

Mr. Herzog served as the specialty team leader for the Emergency Response Team and the Special Emergency Response Team for nine years. He has spent eight years on the Statewide Emergency Response Committee and instructed emergency response. Mr. Herzog testified that the absence of an R&M officer does not lessen the institution's ability

to respond to emergencies because other staff is also able to carry out R&M functions. In preparation for emergencies, all correctional staff is trained in every phase of response. According to Mr. Herzog, a very effective response could still be made, even in the complete absence of R&M officers. He was not aware of any emergency response where the absence of an R&M for the trash run caused problems in handling the incident.

The Union has established that incidents do occur while R&M officers are conducting the trash run. What the Union has failed to establish is that this situation has had any impact on the safety of the remaining officers. Simply put, the assignment of the trash run to R&M officers has never resulted in an inadequate or ineffective response to an emergency. Whether or not a deficient response will occur in the future is a speculative matter. The Grievants' specific concerns regarding a possible emergency are also purely speculative.

The Union notes that if the lieutenant must cover the absence of an R&M officer by deploying a living unit officer, that may place the remaining living units officer in an unsafe position. Lt. Duenich testified that frequently the on-site supervisor is available at a living unit, and possibly an assigned sergeant as well. Even if a living unit officer is left alone, this does not in itself

create an anomalous or unsafe situation, as living unit officers are alone in their units at other times as well, such as during lunch breaks or when the other officer is taking property to the property room. The remaining officer also has radio communication, including an emergency button.

The Union also notes the inmates know about the trash run because it takes place regularly every Sunday. The institution does not consider this a safety hazard. Again, Lt. Duenich testified that this is not anomalous because inmates know of other regularly scheduled tasks that make R&M officers unavailable at particular times. "Inmates know our programs sometimes better than we do", he said.

The Union has failed to present a case that the Employer has neglected its obligation to strive to provide employees with a safe working environment. On the contrary, the Employer has taken significant preventative measures by ensuring that each member of the staff is trained to respond to an emergency as part of a team. "There was more than sufficient testimony from the Employer that the institution has ample trained resources from which to draw for the purpose of emergency response" (Employer's brief p. 14). The speculative concerns of the Grievants do not establish that the Employer has violated any portion of Article 13.

Article 19

In bringing the grievance forward, the Union also alleged that the assignment of the trash run to R&Ms violates Articles 19.1 because the trash run is outside of the duties of the correctional officer classification. The Employer replies to this allegation in several ways.

First, The Employer argues that the trash run has become a regular part of R&Ms' duties through its inclusion into the post orders. It is undisputed that R&Ms have been conducting the trash run on Sundays since 1995 or longer. Each of the Grievants bid on their positions already knowing that the trash run is a regular part of that post.

Secondly, even if the trash run had not been included into the post orders, the specifications for correctional officer do not disallow for the assignment of such a duty to the position. "Besides transporting the offenders to each unit to pick up the trash, the duty of trash run requires the officers to do nothing more than supervise, observe, and monitor offenders while they perform their work" (Employer's brief p. 17). All of these functions come under the Grievants' position specification.

Lastly, the Employer notes that the Position Description for R&Ms includes a small reserve of time for the performance of other duties as may be required. Each of

the Grievants has 5% of their time assigned to other tasks, except for Mr. Perry who has 2%. As there are five R&M officers to conduct the Sunday trash run, each of them does it about once every five weeks. This amounts to approximately seven tenths of one percent of each Grievants' total time at work.

The grievance also mentions Article 19.2, but as this Article concerns the employees' responsibilities during the bid process, it is irrelevant to the issue of assigning R&Ms to the trash run.

The Employer believes that the Union has failed to present a case that the assignment of R&Ms to the trash is in violation of Article 19 of the agreement.

Conclusion

It is generally accepted by arbitrators that the Union has the burden of proof in disputes concerning contract interpretation. The Employer believes that the Union has not met its burden in this case and has failed to demonstrate that either Article 13.1, 13.2, 19.1 or 19.2 was violated when, for the past decade, the Employer has assigned the duty of trash run to R&M officers. Thus, the Employer requests that the grievance be denied.

ANALYSIS ON MERITS

The Arbitrator's authority to resolve a grievance is derived from the parties' collective bargaining agreement (CBA) and the issue that is presented to him. The issue is whether or not management's practice of assigning the duty of trash run to R&M Officers constitutes a violation of any of the following articles of the CBA: Article 13.1, 13.2, 19.1, 19.2. The Arbitrator notes that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters the union is assigned the burden of proof. As the instant grievance does not involve an issue of discipline or discharge, the burden lies with the Union. In order to sustain the grievance, the Union must show by a preponderance of evidence that the Employer's actions constitute a violation of a contract provision.

The issue presented to the Arbitrator concerns management's decision to assign work to employees in a way which the Union feels is not consistent with the language of Articles 13². Specifically the Union argues that the assignment of the trash run to R&M Officers on Sunday morning creates a safety problem of sufficient concern that it is prohibited by Article 13. The

² While Article 19 is included in the original grievance filed by the Union, the Arbitrator notes that the Union, in its written arguments, does not set forth arguments in support of the allegation that there is a violation of Article 19. Thus the Arbitrator's analysis will focus on those arguments raised by the Union regarding a possible violation of Article 13.

Employer disagrees with the Union and argues that proper consideration has been given to the safety issues and that assigning the trash run on Sunday morning to the R&M Officers does not violate Article 13. Since the burden of proof has been assigned to the Union, in order to sustain its position over that of the Employer, the Union must support its case by a preponderance of the evidence.

Having carefully reviewed the testimony of witnesses, the documentary evidence and the arguments of both Parties, the Arbitrator finds that the Union has not met its burden and therefore the grievance must be denied. The Arbitrator's reasoning is set forth below.

First, the Arbitrator begins his analysis by noting that, generally, there is a presumption in labor relations that work assignments are a matter of management discretion. That is to say, decisions regarding staffing mainly come under management's purview and, while they may be questioned by the Union, the Employer is generally not obligated to negotiate work assignments.

Beyond this general presumption, in the instant case the Parties' labor contract explicitly grants management the discretion to allocate personnel resources and assign tasks to employees. Article 3, Management Rights, provides that:

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:

C. Plan, direct, control, and determine the operations or services to be conducted by employees.

D. Determine the size, composition, and direct the workforce.

O. Determine the method, technological means, number of resources and types of personnel by which work is performed by the Department.

What is clear from the above language is the recognition that the Employer has retained discretionary right over work assignments. That right, however, is subject to the specific provisions of the CBA. The provision which is of primary concern to the Union in the instant case (Article 13), addresses the issue of employee safety and it is a provision that can clearly interface with staffing decisions. Understandably, the inherent risks of prison employment make the staffing decisions of management a matter of particular importance to employees. The opening sentence of Article 13.1 clearly demonstrates that the Parties negotiated their CBA with the full understanding of the risks:

The Employer and the Union agree that the nature of work performed in correctional facilities by employees is recognized as potentially hazardous.

Controversy is particularly likely to arise in situations such as the present one, where the staffing decisions of management inevitably interact with safety concerns of the bargaining unit. Since the Employer's discretionary right to assign work is limited by any pertinent language of the CBA, the safety concerns addressed in Article 13 give the Union a viable method by which to challenge staffing decisions.

In Article 13, the Parties recognize the fact that not all safety concerns are foreseeable and direct the Employer to be responsive when safety concerns are raised. As the Arbitrator reads it, the language of Article 13.2 is necessarily broad to encompass safety issues at their most widely applicable level and it assures employees that their safety concerns will not go ignored by management. The Article places an obligation on the Employer to take safety issues seriously and it prohibits the Employer from dismissing outright the safety concerns of workers, even when those concerns trespass on the right of management to make staffing decisions.

Specifically, Article 13 requires the Employer to respond "to legitimate safety concerns raised by employees." In the Union's view, the Employer failed to adequately respond to the safety issues created by assigning the Sunday morning trash run to the R&M officers. Thus, concludes the Union, the continuing decision to use the R&M officers for this purpose violates Article 13.

The Arbitrator sees the matter somewhat differently. Obviously, there are safety issues involved in assigning duties to R&M Officers that divert them from their prime function as members of the Quick Response Team. This fact, however, has to be viewed in the larger context of the institution, including the overall staffing requirements of the institution, the institution's contingency plans for emergency situations (testimony of Duenich) and the fact that the work is inherently hazardous.

Given the risks involved in prison employment, it seems to the Arbitrator that all staffing decisions carry with them an element related to safety. One obvious example is the decision to have but five R&M Officers. Why not ten? Or, how about having one R&M Officer for every 300 inmates? If the Arbitrator's math is correct, this would mean a total of seven R&M Officers. Obviously there may be situations where five will simply not be enough and where the institution would be better served if there were more R&M Officers available. The Arbitrator's point is that there is no specific safety magic about the number five. Clearly there will be times when five, from a safety standpoint, is not enough, times when five is sufficient, as well as situations which do not require all five.

This analysis is not attempting to minimize the safety issues raised by the Employer's practice of diverting R&M Officers from their primary quick response duties and placing

them in a situation where they are not available for immediate action. Rather, this analysis is focused on the question of whether assigning the duties of the trash run to R&M Officers violates Article 13. Ultimately the Arbitrator believes that recognizing that there is a safety issue in a staffing decision does not necessarily indicate that Article 13 has been violated. The inherently hazardous nature of prison employment ensures that safety concerns never go away, regardless of management's decision. There must be a greater showing on the Union's part than just a safety concern for the Arbitrator to determine that a violation has taken place.

This fact leads the Arbitrator to conclude that any decision regarding a potential violation of Article 13 needs to properly balance the right of management to assign work as it sees fit against the safety requirements found in Article 13. In other words, the Arbitrator has the somewhat difficult task of protecting the discretionary rights of management as found in Article 3 while honoring the safety concerns found in Article 13. He will attempt to achieve this balance as the analysis moves to the next point.

Second, considering the rather broad language of Article 13 and the specific facts concerning the assignment of Sunday morning trash run duties to R&M Officers, the question before the Arbitrator is what constitutes an appropriate response to this safety concern? In the context of this grievance, the Arbitrator

determines that Article 13 places two requirements on the Employer. The first involves process to the extent that the Employer is committed to "cooperate" with the Union to address safety issues and to respond "to legitimate safety concerns." The second involves outcome in that "the Employer is obligated to provide a safe workplace."³ The Arbitrator will examine each of these in the context of the Union's claim that they have been violated by the assignment of the trash run.

Process

As noted above, the Employer is obligated by Article 13 to respond to a legitimate safety issue. The Arbitrator begins his specific analysis of this process requirement by noting that the Union's concerns over the assignment of the Sunday morning trash run to R&M officers clearly constitutes a legitimate concern. The Union was able to provide at least two examples where this assignment diminished the ability of R&M Officers to respond to a situation. Moreover, it is clear to the Arbitrator that the trash run issue is linked to other work assignments which also have the capability of further diminishing the ability of R&M Officers to perform a prime function. The Arbitrator is additionally persuaded by Union arguments that responding in force minimizes safety risks.

³ The third requirement of Article 13 has to do with Employer obligations regarding safety statutes. As the Employer's compliance with safety statutes is not presently in dispute, discussion of this requirement is omitted from the Arbitrator's analysis.

Thus, the Article 13 question is partly whether the Employer has cooperatively responded as required? In response to this question, the Arbitrator first notes that the requirement to respond does not inherently place a burden on the Employer to agree. Good faith discussions can occur and reasonable people can disagree. In the Arbitrator's view, the process requirements of Article 13 mandate that the Employer engage in good faith discussion on legitimate safety issues, but does not require that the Parties reach a mutual understanding.

Did the Employer engage in good faith discussions on this issue? The evidence indicates that the Union filed a grievance when it was unable to reach a satisfactory resolution to the matter. There is no evidence that the grievance was filed because the Employer refused to discuss it. Moreover a review of the Employer's first level response to the grievance (Joint #3) further assures the Arbitrator that the Employer took seriously its obligation to fully consider the issue.

With regard to the good faith nature of the discussions, the Arbitrator takes specific notice of the Union's arguments regarding substituting locked trash containers for the Sunday morning trash run. Does the Employer's refusal to implement this suggestion constitute bad faith? Again, reasonable people can disagree and the Arbitrator simply does not find evidence that the Employer's refusal to implement this suggestion was done in bad faith. While this suggestion would have resolved the issue

as related to the R&M Officers, the Employer was able to point out a new safety issue, and there is the obvious issue of the cost of implementing this suggestion. The bottom line, from this Arbitrator's perspective, is that in order to prevail the Union needed to show that the Employer either stonewalled the discussions or failed to engage in good faith discussions.

In summary, the fact that the Parties did not reach a solution during the discussions on the issue does not lead to the conclusion that the Employer stonewalled the matter. The evidence before this Arbitrator indicates that the Parties had good faith discussions on the matter, but that those discussions did not lead to a mutual agreement. Thus the evidence indicates that the Employer complied with the process requirement of Article 13.

Outcome

Under its Article 3 right to assign work, the Employer has assigned the Sunday morning trash run to R&M Officers since at least 1995. Article 13 requires that the Employer provide a safe workplace for employees. The Union claims that assigning the Sunday morning trash run to R&M Officers creates a significant safety issue.

Is the Employer obligated to exercise its discretion in making work assignments consistent with the safety requirements of Article 13? Obviously the answer is yes. The difficulty for the Arbitrator, of course, is that the Union contends that the

trash run assignment is unsafe and the Employer contends that it is safe within the context of the generally hazardous nature of prison in employment.

In evaluating the Union's case, the Arbitrator must necessarily ask: has the Union established a basis for directing the Employer to end its 12+ year practice of assigning the trash run to R&M Officers. After all, the Employer's right to assign this work is clearly established by Article 3. Moreover, arbitrators are generally reluctant to interfere with a discretionary right of management absent a particularly strong showing by the union. Oftentimes the criterion used is whether management's action can be shown to be arbitrary and capricious. In the instant case, the Arbitrator does not believe that the matter revolves around a finding of arbitrary and capricious actions, but rather a finding that management's exercise of discretion resulted in a clear and present danger to employees.

In other words, under Article 3 the Employer has the right to make work assignments. Under Article 13, the Union has a right to challenge the assignment and ought to prevail in an arbitration hearing so long as it can show that the impact of the assignment creates a clear and present danger. If it can do so, then clearly the Employer's responsibility, under Article 13, to provide a safe workplace has been compromised and the Arbitrator should order the rescission of the action.

For the reasons outlined below, the Arbitrator does not find that the Union has presented a persuasive case that the trash run assignment creates a clear and present danger.

- The evidence indicates that the practice has been ongoing for over twelve years without serious incident.
- As the Employer emphasizes in its written arguments, this is a once a week event that takes but a very small portion of the workday for one officer.
- While there is evidence of at least two incidents that have occurred during the time period in question and where the R&M Officer handling the trash run had difficulty getting to the incidents, there is no evidence that a specific safety problem was created by this fact. Rather, as Lt. Duenich testified, plan B was capable of safely dealing with the problem. The Arbitrator draws a distinction between an unsafe practice and a preferred practice. The evidence indicates that having all of the R&M Officers available to respond to an incident is a preferred practice (plan A) but that does not make a plan B response unsafe.

The Union raises the concern that waiting until something goes terribly wrong (Brief p. 12) should not be required in order to enforce the requirements found in Article 13. The Arbitrator gave careful consideration to this point, but ultimately came back to the conclusion that the Union has failed to provide sufficient evidence of a clear and present danger. Absent that evidence, the Arbitrator does not find the basis to interfere with the Employer's discretionary rights around work assignment. On the other hand, the Arbitrator wants to be on record that this decision is not an endorsement of the Employer's decision to continue to assign the trash run to R&M Officers. This arbitration decision should be read to affirm the right of

management, as conferred in Article 3, to make the decision but, as with all management decisions, the Employer carries a continuing responsibility for the potential effects of the decision. In this Arbitrator's view, that responsibility has increased because of the fact that the Union has placed the Employer on notice of its safety concerns related to the practice.

CONCLUSION

The Union asserts that the Employer violates Article 13 when it assigns the trash run to R&M officers on Sunday morning. In the Union's view, this assignment creates a significant safety issue, sufficient to violate the requirements of Article 13. The Arbitrator determined that the Union has the burden to establish that the Employer's continuing assignment of the trash run to the R&M officers violated one of the tenants of Article 13. The Arbitrator further determined that the Union's arguments must be considered in light of the Employer's traditional right to assign work and in light of the inherent hazardousness of prison employment. In that context, the Arbitrator finds that the Union did not meet its burden to establish that the practice created a clear and present danger sufficient to find a violation of Article 13.

An award is entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	AWARD
)	
STATE OF WASHINGTON DEPARTMENT)	
OF CORRECTIONS)	
)	
"THE STATE" or "THE EMPLOYER")	
)	
AND)	
)	
TEAMSTERS LOCAL NO. 117)	Darren Kelly
)	Trash Run Grievance
"LOCAL 117" OR "THE UNION")	

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer did not violate Article 13.1, 13.2, 19.1 or 19.2 by assigning the duty of trash run to response and movement officers.
2. The grievance is denied.
3. Per the requirements of Section 9.6 of the CBA, the Arbitrator is splitting his fees between the two Parties.

Respectfully submitted on this the of 3rd of July, 2007, by,

Timothy D.W. Williams
Arbitrator