IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania, Department of Corrections, Petitioner	:	
v.	:	No. 1499 C.D. 2009
	:	Argued: March 16, 2010
Pennsylvania State Corrections Officers Association, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: April 29, 2010

The Commonwealth of Pennsylvania, Pennsylvania Department of Corrections (Commonwealth) petitions for review of the July 5, 2009 Amendment to the Award in a grievance arbitration filed pursuant to the Public Employe Relations Act.[1] We affirm.

The Pennsylvania State Corrections Officers Association (Association) represents approximately 10,000 employees of the Commonwealth of Pennsylvania (Commonwealth) employed in the Department of Corrections and the Department of Public Welfare, including corrections officers, food service employees, and tradesmen. The facility involved in the instant matter is the State

[1] Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§1101.101 - 1101.2301.

Correctional Institution at Pittsburgh (SCI-Pitt). SCI-Pitt closed in January 2005 and reopened in May 2006.

The instant dispute arises out of the refusal of the Commonwealth, when SCI-Pitt resumed operations, to re-implement and apply the terms of a supplemental agreement known as the "Shapp Agreement", unique to SCI-Pitt, dealing with the rights of unit employees to bid on posts and shifts. The grievance was initially denied by the Commonwealth. The matter proceeded to arbitration and a hearing was held on January 28, 2009 at SCI-Pitt. The issue considered by the arbitrator was whether the Commonwealth unilaterally changed the terms and conditions of employment or otherwise abrogated or repudiated the terms of the collective bargaining agreement (CBA) by refusing to re-implement an alleged supplemental agreement dealing with bid posts. The arbitrator (hereinafter referred to as "Arbitrator II") made the following facts.

Prior to 2005, SCI-Pitt operated as a level 5 institution, a high security facility, and employed more than 700 corrections officers. The employees first organized sometime around 1970 and the American Federation of State, County and Municipal Employees Local 2500 (AFSCME) was formed in September or October of 1970.[2] Thereafter, the AFSCME negotiated a series of CBAs starting with the 1972-73 contract. The initial agreement contained a provision that addressed the issue of shift assignment preferences which provided as follows:

> Section 5. In making shift assignments preference shall be granted on a seniority basis unless it is necessary to assign otherwise in order to protect the efficiency of operations. Seniority status in this regard shall be that status attained within a classification series at an institution.

[2] The Association became the representative for this bargaining unit in June 2001.

Article IX, Section 5; Reproduced Record (R.R.) at 235a. The AFSCME viewed this contract language as deficient.

According to the credible testimony of James S. Weaver, Jr., a retired corrections officer at SCI-Pitt,[3] the contract language related only to "shift assignments" and dealt merely with the hours of work that corrections officers would be assigned, but did not address the duties they were to perform or the specific posts within the institution where they would work. This was a matter of great concern to the corrections officers, who worked in daily close contact with dangerous inmates. According to Weaver, untrained and newly-hired employees were often assigned to duties for which they had no training and which put their safety at risk, and also risked the safety of other corrections officers and inmates. The second CBA negotiated by the AFSCME for the term July 1, 1973 through June 30, 1976, contained exactly the same language regarding "shift assignments" and failed to address the foregoing issues.

On December 10, 1973, Officer Lt. Walter Peterson, a corrections officer at SCI-Pitt since 1958, was brutally beaten and murdered by four inmates as he worked alone in the Restricted Housing Unit (RHU).[4] The murder of Lt. Peterson created an emergency situation at the prison with corrections officers calling in sick and others refusing to enter the detention areas of the facility. The Pennsylvania State Police were called in to secure the facility and investigate the murder.

[3] Weaver was employed at SCI-Pitt his entire career from June 1970 to January 2004. He served as union vice-president, recording secretary, chief steward and as a member of the union's bargaining committee.

[4] The RHU was reserved to house the most dangerous inmates.

The following day, then Governor Milton Shapp visited the prison in an attempt to resolve the situation with the corrections officers. Governor Shapp joined in discussions with the AFSCME representatives and he indicated to the Bureau of Prisons that he wanted an agreement that would ensure that there would be no repeat of the violence that had occurred.

After 4-5 months of negotiations, the parties reached an agreement which became known to the AFSCME as the "Shapp Agreement." According to Weaver, this agreement covered "ten or eleven items", addressing such issues as the structure of the RHU, training, safety, taking away razor blades and radios from the inmates, and shift assignments. Weaver credibly testified that the Shapp Agreement included three provisions regarding shift preference, and allowed bidding on days off, the hours of the day that corrections officers would work, and the exact post within the institution where they would be assigned. The agreement applied to at least 100 posts throughout the facility and basically excluded only the RHU and one administrative post. There was no evidence presented that the Shapp Agreement was ever reduced to writing.

Beginning in 1974, SCI-Pitt implemented a practice of posting vacant positions on a monthly basis, specifying the exact position, the hours of work, and the days off attached to each bid. In the CBA negotiations for the November 30, 1975 to June 30, 1978 contract, the parties agreed to revised shift preference language which provided:

> Section 10. In making shift assignments to shift openings, preference shall be granted on a seniority basis unless the Employer feels it necessary to assign otherwise in order to protect the efficiency of the operation. Seniority status in this regard shall be classification seniority.

Article XXX, Section 10; R.R. at 339a. According to Weaver, this exact language has appeared in every subsequent CBA and is found in Article 27, Section 11 of the current CBA. R.R. at 89a.

Weaver credibly testified, and without challenge, that at SCI-Pitt, the Shapp Agreement was implemented fully and remained fully in effect for more than 30 years. Weaver explained how each month, vacancies would be posted on a bid board for bidding in accordance with seniority, and that on the 15th of each month there would be a labor-management meeting at which bids would be awarded. Weaver testified that this arrangement was vigorously enforced by the AFSCME, up until his retirement in 2004. Weaver testified that while there were occasional local negotiations for the addition or deletion of certain positions within the Shapp Agreement, the underlying agreement remained in full force and effect until his retirement in 2004. Various letters exchanged between the AFSCME and the Commonwealth, including two letters in 1988, clearly established that there was some unspecified contractual practice of bidding job posts that was unique to SCI-Pitt and different from the practice in place elsewhere in the Commonwealth's correctional system.

Beginning in 2002, the Commonwealth began making plans to close SCI-Pitt. Unit employees were informed that they would be offered transfers to SCI-Fayette, which was characterized as a replacement facility for SCI-Pitt, and that SCI-Fayette would honor Pittsburgh seniority until the first new hire at Fayette. The Association was informed that management would begin the process of phasing out bid posts, except for a couple of posts, and that management would get together with the Association to come up with an agreeable procedure for this implementation.

The Association grieved management's unilateral changing of the bid protest practice on September 12, 2002. An arbitration hearing was held more than 4 years later on October 3, 2006. Arbitrator I issued his award on March 21, 2007, finding that "given the extent of the change in conditions accompanying the *shutdown* of SCI-Pittsburgh, management was justified in *suspending* the . . . bid post procedures at that location during the course of the shutdown." R.R. at 598a-610a (emphasis in original). Arbitrator I noted as follows:

> My mandate as arbitrator in this case does not extend to issues arising outside the scope of the grievance filed in 2002 in Pittsburgh. That being the case, I cannot consider the merits of any subsequent grievance raising a different, though related, issue that the [Association] filed at SCI-Fayette. Any such grievance must be dealt with in separate arbitration proceedings.

Id. at 610a.

During the time period between 2002 and 2006, when the Association's grievance protesting management's unilateral changing of the bid procedure at SCI-Pitt was proceeding through the contractual grievance-arbitration procedure, other events were unfolding. In addition to closing SCI-Pitt, the Commonwealth closed SCI-Waynesburg. The 780 unit employees at SCI-Pitt and the 104 unit employees at SCI-Waynesburg were all permitted to utilize their contractual rights to transfer to the new SCI-Fayette facility. The employees who wished to transfer began exercising their rights to do so. Over the next three years, the number of inmates and staff at SCI-Pitt gradually diminished with many of the dangerous RHU inmates transferring to SCI-Fayette, a level 4 institution. The transfer to SCI-Fayette was completed by January 1, 2005, at which time SCI-Pitt ceased operations and the facility was partially mothballed.

There was no evidence presented that there was any agreement between the Commonwealth and the Association terminating the contractual relationship between the Association at SCI-Pitt and the Commonwealth or otherwise extinguishing the rights of unit employees under the Shapp Agreement to bid for posts. The unit employees who transferred from SCI-Pitt to SCI-Fayette continued to work under the terms and conditions of the statewide CBA but the unique bid posting procedure that had existed at SCI-Pitt known as the Shapp Agreement was not applied at the Fayette facility.

The Commonwealth decided to reopen SCI-Pitt in December 2005 to alleviate overcrowding in other correctional facilities across the Commonwealth. SCI-Pitt was reopened as a level 2 institution, primarily providing drug and counseling services. The facility currently employs about 300 bargaining unit employees and houses over 1700 inmates. SCI-Pitt also houses inmates classified as level 3 and level 4, i.e., serious risks. SCI-Pitt still contains a RHU to house about 55 dangerous or uncooperative inmates. Major sections of SCI-Pitt have not yet reopened.

Bargaining unit employees were offered reinstatement in seniority order and began returning to SCI-Pitt in May 2006. Unit employees' job duties and functions were exactly the same as they were before the shutdown and their responsibilities vis-à-vis the inmates were the same. The unit employees worked under the same state-wide CBA that was in effect before the shut down; however, the Shapp Agreement governing post bidding was no longer in effect. Instead of unit employees being permitted to bid for specific days off, specific duty stations, and specific work shifts, employees now were merely allowed to engage in sort of limited "shift preference" bidding that was in effect before Lt. Peterson's murder.

Arbitrator II, in the instant grievance, pointed out that there was very little factual dispute in this matter and that there was no question that following the tragic murder of Lt. Peterson, the Association was able to obtain from management certain terms and conditions of employment that were not part of the statewide CBA; specifically, the right to bid not only for shift preference, but also for specific hours of work and specific duty posts. Arbitrator II found, based on the credible testimony of Weaver and other witnesses, that the Shapp Agreement served the parties well for more than 30 years until 2002 when the Commonwealth decided to close SCI-Pitt.

Arbitrator II pointed out further that the March 2007 arbitration decision by Arbitrator I did not find that the Shapp Agreement ceased to exist. Instead, Arbitrator I found that SCI-Pitt was within its right in "suspending" the prior bid post procedures during the course of the shutdown. The March 2007 award did not terminate the practice but merely permitted the suspension of the practice during the shutdown period. The Shapp Agreement was essentially placed in limbo. The March 2007 award by Arbitrator I did not preclude claims that the Shapp Agreement should be reinstated if and when SCI-Pitt was to reopen. Arbitrator II noted that the issues of whether the Shapp Agreement was forever nullified by the shutdown or by the brief hiatus that SCI-Pitt lay dormant or somehow became permanently void and without effect, were issues for the present arbitration.

Arbitrator II also discussed the Commonwealth's assertion that the Shapp Agreement is not an agreement at all, but a practice, and as such does not share the weight of an actual written clause of the CBA. Arbitrator II pointed out that the Commonwealth did concede that there was an unwritten "practice that was in place for over twenty-five years." Arbitrator II found that this practice came

about as the result of extensive meetings and discussions and was concluded by a handshake. Arbitrator II found that Weaver's testimony on this practice was not vague or chimerical but instead his testimony was clear and concise. Therefore, Arbitrator II gave great weight to Weaver's testimony in reaching the conclusion that there was at least a "past practice" with respect to post bidding. As such, that practice necessarily became a means to determine rights under the CBA.

Based on all of the credible and uncontroverted evidence, Arbitrator II found and concluded that the Shapp Agreement survived the wind down period prior to the closing of SCI-Pitt, and the brief interim period during which SCI-Pitt was shuttered. Arbitrator II found that the Association clearly never abandoned its claim to the supplemental Shapp Agreement and management had an opportunity to bargain the termination of the Shapp Agreement in the days leading to the closed of SCI-Pitt in early 2005, but failed to do so.

Thus, Arbitrator II found that the Shapp Agreement remains viable, was never concluded, and should be reimplemented. Therefore, the Shapp Agreement lives on and management must comply with its terms.

Accordingly, by award issued on May 19, 2009, Arbitrator II sustained the grievance and directed the Commonwealth to reinstate the terms of the supplemental Shapp Agreement at SCI-Pitt retroactive to the date of the recall of the first bargaining unit employee to the facility, and to make unit employees whole for any losses they may have suffered and to make no deviation in the terms and conditions of the Shapp Agreement unless and until a new agreement has been reached, or the parties have bargained to a good faith impasse. Arbitrator II retained jurisdiction over the remedy portion of the Award in the event the parties were unable to reach an agreement with regard to the remedy.

Thereafter, the Association requested a conference call with Arbitrator II concerning the Association's claim that the Commonwealth was refusing to comply with the original award by failing to reinstitute the terms of the Shapp Agreement. Counsel for the Association and the Commonwealth participated in the conference call.

By decision dated July 5, 2009, Arbitrator II rejected the Commonwealth's position that the 2008 interest arbitration award setting forth the terms and conditions of a new CBA met the requirement of a "new agreement" having been reached. Arbitrator II also rejected the Commonwealth's request that the record be reopened so that evidence could be presented about the 2008 interest arbitration award. Arbitrator II held that the Commonwealth had waived any right to present such evidence or argument with regard to the terms of the 2008 interest arbitration award due to its failure to raise this issue at the January 28, 2009 hearing in this matter. Arbitrator II clarified that when he stated that the Shapp Agreement was to continue in effect "unless and until a new agreement had been reached, or the parties have bargained to a good-faith impasse", he was not referring to the comprehensive labor agreements that have previously been negotiated or have resulted from interest arbitration. Arbitrator II stated that he was referring to the separately negotiated and long standing Shapp Agreement which has never been a written provision of the overall CBA. Finally, Arbitrator II stated that even assuming arguendo that he had agreed to reopen the record, without the actual contract language in the 2008 interest arbitration award specifically modifying or eliminating the Shapp Agreement, he would not have considered changing his decision as no such assertion was made that such specific contract language existed. This appeal by the Commonwealth followed.

This issue presented herein is whether Arbitrator II exceeded his authority and jurisdiction by fashioning a remedy which extends well beyond the temporal parameters by which the parties to the CBA agreed to be bound and, in so doing, intruded upon those bargaining powers traditionally vested in the parties themselves.

This Court's standard of review in a grievance arbitration arising under the Pennsylvania Public Employe Relations Act is the "essence test," a standard that requires great deference to an arbitrator's interpretation of the CBA. Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association, PSEA/NEA, 595 Pa. 648, 939 A.2d 855 (2007). The essence test is comprised of two prongs. The first prong requires the Court to determine whether the issue as properly defined was within the terms of the CBA. The second prong requires the Court to determine whether the arbitrator's interpretation of the CBA was rationally derived therefrom. Id., 595 Pa. at 661, 939 A.2d at 863.

In State System of Higher Education (Cheney University) v. State College and University Professional Association (PSEA/NEA), 560 Pa. 135, 743 A.2d 405 (1999), our Supreme Court noted that a reviewing court should not inquire into whether the Arbitrator's decision is reasonable or even manifestly unreasonable, but rather the question should be whether the award may in any way be rationally derived from the agreement between the parties, "viewed in light of its language, its context, and any other indicia of the parties' intention." Cheney University, 560 Pa. at 146, 743 A.2d at 411.

Evidence of "past practices" is used in arbitrations in four situations: (1) to clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous

language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the CBA. County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 34, 381 A.2d 849, 852 (1977); Central Susquehanna Intermediate Unit Educational Association v. Susquehanna Intermediate Unit No. 16, 459 A.2d 889 (Pa. Cmwlth. 1983). The meaning of "past practice" has been appropriately defined as follows:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by [parties] involved as the normal and proper response to the underlying circumstances presented.

County of Allegheny, 476 Pa. at 34 n.12, 381 A.2d at 852 n.12 (citation omitted).

In support of this appeal, the Commonwealth argues that the remedy imposed by Arbitrator II exceeded his authority and jurisdiction. The Commonwealth contends that Arbitrator II issued an award that extended beyond the life of the relevant CBA, which was the July 1, 2005-June 30, 2008 CBA. The Commonwealth argues that a remedy for any period commencing after the expiration of the CBA was outside the arbitrator's authority.

The Commonwealth argues further that Arbitrator II erred by specifically dictating to the parties how to effect a change in the practice at issue in this matter. The Commonwealth contends that Arbitrator II did not have the

authority to formulate a remedy that provides the parties specific direction regarding how to change the bid post practice at SCI-Pitt. The Commonwealth contends that based on the limiting language of the CBA, the grievance and the issue submitted, Arbitrator II lacked any authority to remove from the parties the traditional bargaining powers which would allow the parties to alter the bid post practice, through the interest arbitration process without specifically mentioning the Shapp Agreement. The Commonwealth contends that Arbitrator II's authority was confined by the four corners of the CBA and he exceeded his powers when he concluded he had jurisdiction to address matters beyond the scope of the CBA.

The Commonwealth argues further that Arbitrator II simply had no authority to curtail the ability of the Commonwealth to obtain through general collective bargaining or interest arbitration the ability to make changes to past practices at SCI-Pitt. The remedy of Arbitrator II which purports to bind the parties to a practice until that practice is altered only in the manner specifically defined by the arbitrator, is clearly without foundation in, and fails to logically flow from the CBA. Therefore, the Commonwealth argues that this Court must vacate the offending portion of the arbitration award.

In response, the Association argues that the remedy draws its essence from the CBA and the Commonwealth's argument that the remedy exceeds the temporal bounds of the CBA must fail. Arbitrator II merely ordered a typical remedy – the restoration of the status quo by specifically restoring the Shapp Agreement and further ordered that there could be no deviations from this long standing past practice unless and until it was replaced with a new "local agreement" or the parties have bargained to a good-faith impasse."

The Association argues further that our courts have acknowledged that under certain circumstances particular remedies awarded may in fact continue

in effect beyond the expiration of the CBA. The remedy does not create any new obligation but simply requires the Commonwealth to continue a long standing past practice that was specifically protected by the CBA. The Association contends that an arbitrator may examine evidence of past practice which may be used to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the CBA. The Association argues that under the law, this past practice would survive the expiration of the CBA and the Commonwealth would be required to continue the practice until there was a mutual agreement to change the practice or there was an impasse.

As stated by Arbitrator II, there is no factual dispute that the Commonwealth and the Association had a long standing practice of bid posting that was unique to SCI-Pitt. Based on the Commonwealth's arguments in support of its appeal in this matter, it is not taking issue with the fact that there was such a practice or agreement. Nor is the Commonwealth taking issue with that portion of the remedy that requires the Commonwealth to reinstate the Shapp Agreement. Instead, the Commonwealth contends that the remedy is not drawn from the essence of the CBA because Arbitrator II allegedly directed the manner in which the parties may alter the Shapp Agreement.

As pointed out by the Commonwealth, the CBA does include a past practice provision. Article 33, Section 6, entitled "Miscellaneous Provisions", provides as follows:

> Employee benefits and working conditions now existing and not in conflict with the Agreement shall remain in effect, subject, however, to the right of the Employer to change these benefits or working conditions in the exercise of its management rights reserved to it under Article 2 of this Agreement.

R.R. at 94a. The Commonwealth does not dispute that the terms of the Shapp Agreement created a separate, enforceable condition of employment which cannot be derived from the express language of the CBA. The practice of post bidding is a custom that has evolved over time under a recurrent set of facts and has evolved into an accepted course of conduct at SCI-Pitt. The Commonwealth also does not challenge Arbitrator II's findings and conclusions that: (1) the Shapp Agreement remains viable, was never concluded, and should be reimplemented; and (2) the Shapp Agreement lives on and management must comply with its terms. As such, pursuant to Article 33, Section 6, the Shapp Agreement remains in effect, as a past practice, under the current CBA.

The Association is correct that the effect of the arbitration award in this matter is to maintain the status quo by reinstating the Shapp Agreement and requiring the continuance of that supplemental agreement until the parties reach a new agreement or an impasse. Contrary to the Commonwealth's contention, Arbitrator II did not mandate that the parties enter into collective bargaining for a new Shapp Agreement nor did he limit the means by which the parties may negotiate a new agreement. In other words, Arbitrator II did not curtail the ability of the Commonwealth to obtain through general collective bargaining or interest arbitration, the ability to make changes to past practices at SCI-Pitt. The parties are still free to renegotiate the terms of the Shapp Agreement during interest arbitration or in separate negotiations.

Therefore, the Association is again correct that this past practice would survive the expiration of the CBA and the Commonwealth would be required to continue the practice until there was a mutual agreement to change the

practice or there was an impasse regardless of the arbitrator's remedy.[5] See Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978) (So long as good faith negotiations remained in progress between the contracting parties, an employer may not terminate the benefits of employees even though the CBA has expired.). Moreover, there is nothing in Arbitrator II's decision that would prevent the Commonwealth and the Association from including provisions in a new state-wide CBA, after negotiations or good faith bargaining, that encompasses the terms of the Shapp Agreement.

Accordingly, it is clear that compliance with the decision by Arbitrator II would not result in a remedy being fashioned well beyond the temporal parameters by which the parties to the collective bargaining agreement agreed to be bound. Therefore, the arbitration award draws it essence from the CBA. Therefore, we reject the Commonwealth's contention that Arbitrator II exceeded his authority and jurisdiction in fashioning the remedy in this matter. The amended award is affirmed.[6]

JAMES R. KELLEY, Senior Judge

[5] The Court notes that the Commonwealth has not advanced an argument that the 2008 interest arbitration award, that it previously requested be entered into evidence for Arbitrator's II consideration after the initial May 19, 2009 award was issued in this matter, contained language specifically modifying or eliminating the terms of the Shapp Agreement. It appears as though the Commonwealth has abandoned its position on appeal that the 2008 interest arbitration award setting forth the terms and conditions of a new contract met the requirement of a "new agreement" having been reached within the meaning of the May 19, 2009 arbitration award.

[6] We note that the Commonwealth did not petition for review of the initial award issued by Arbitrator II on May 19, 2009 in this matter.

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Pennsylvania State Corrections Officers Association, Respondent	:	

O R D E R

AND NOW, this 29th day of April, 2010, the arbitrator's Amendment to the Award, dated July 5, 2009, entered in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge