

**In the Matter of Arbitration Between**

<b>American Federation of State, County and Municipal Employees, Council No. 5</b>	)	<b>BMS Case No. 08-PA-0312</b>
	)	
<b>(“AFSCME” and Union”)</b>	)	<b>Issue: Shift Exchange</b>
	)	
	)	<b>Hearing Site: St. Paul, MN</b>
	)	
<b>and</b>	)	<b>Hearing Dates: 12-10-07;</b>
	)	<b>12-11-07; and 01-28-08</b>
	)	
	)	<b>Brief Filing Date: 02-29-08</b>
	)	
	)	<b>Award Date: 04-27-08</b>
<b>State of Minnesota, Department of Corrections</b>	)	
	)	<b>Mario F. Bognanno,</b>
<b>(“State” and “Employer”)</b>	)	<b>Labor Arbitrator</b>
	)	

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**JURISDICTION**

Pursuant to the relevant provisions in the parties’ 2007-2009 Collective Bargaining Agreement (CBA) the above-captioned matter came before Arbitrator Mario F. Bognanno on December 10 and 11, 2007, and January 28, 2008, in St. Paul, Minnesota. Appearing through their designated representatives, the parties jointly stipulated that the Arbitrator may frame the issue in dispute with the understanding that the issue would not incorporate the specific grievances of Messrs. Brent Weegman and Michael McGee. (Employer Exhibits Nos. 8 and 9) They further stipulated to waive the “30-day” provision in Article 17, Section 2(D), Step 4 in the CBA. (Joint Exhibit 1) Finally, at the onset of the evidentiary hearing, the Employer objected to the admissibility of Union Exhibit 8, arguing that in relevant part that exhibit states that it “...shall not be construed to set precedence for future grievances and actions.” After reflecting on the record as a whole, the undersigned overrules the Employer’s objection: This exhibit is

admitted into the record for the limited purpose of explaining a portion of the historic evolution of the shift exchange language in the parties' CBA.

Each side was given a full and fair opportunity to present its case, witness testimony was sworn and subject to cross-examination and exhibits were introduced into the record. The evidentiary record was closed on January 28, 2008. The parties submitted post-hearing briefs on February 29, 2008. Thereafter, the matter was taken under consideration.

### **APPEARANCES**

#### **For the Employer:**

Paul A. Larson, Deputy Commissioner, DOER

Dennis Bensen, Deputy Commissioner, Department of Corrections

Connie Jones, Human Resource Manager, Department of Corrections

Mark Wilmes, Captain, MN Corrections Facility, Rush City, MN

Thomas Koch, Lieutenant, MN Corrections Facility, Willow River/Moose Lake

Kevin Moser, Captain, MN Corrections Facility, Willow River/Moose Lake

Laura Westphal, Lieutenant, MN Corrections Facility, Shakopee

David Crist, Assistant Commissioner, Department of Corrections

Amy J. McKee, Former Labor Relations Representative, Principal, DOER (via  
telephonic testimony)

#### **For the Union:**

Bob Buckingham, Business Representative

Sid Helseth, Business Representative

## I. **FACTS AND BACKGROUND**

The Employer, State of Minnesota, Department of Corrections, currently operates ten (10) correctional facilities that house criminal felony residents or inmates. Approximately 1,700 correctional officers supervise the facilities' 8,900 and 200 adult and juvenile residents, respectively. The correctional facilities are 24/7 operations with correctional officers working around the clock to warranty the safety/security of the inmates, staff and public.

The Union, AFSCME, Council No. 5, is the bargaining agent that represents the correctional officers. Pursuant to Minnesota's Public Employment Labor Relations Act (MPELRA), the parties have entered into numerous agreements, dating back to the 1973 – 1975 CBA, their first. Ever since that time, the parties have negotiated agreements every two (2) years. To state the obvious, each CBA sets forth policies covering the terms and conditions of employment, including Shift Exchanges.

### A. **RELEVANT CONTRACT LANGUAGE**

At the heart of this case is the shift exchange language appearing in the 2007-2009 CBA. Said language reads as follows:

#### **Article 5 – Hours of Work**

##### **Section1. General**

**B. Work Shift.** A work shift is defined as a regularly recurring period of work with a fixed starting and ending time, exclusive of overtime work. ...

**D. Shift Exchanges.** Employees who are qualified and capable may mutually agree to exchange days, shifts and/or hours of work with the advance approval of the watch commander(s) or the employee's scheduling supervisor, which shall not be unreasonably denied and provided such changes does not result in the payment of overtime. A

voluntary change of shifts results in the payment of overtime only when it places the employee's hours of work in excess of those permitted by the Fair Labor Standards Act (FLSA). The watch commander(s) or the employee's scheduling supervisor(s) signature of approval shall be obtained prior to the occurrence of the exchange. Such exchanges shall be subject to the following conditions:

1. All requests for exchanges must be reduced to writing on a Department of Corrections form and must state the exact days, shifts and/or hours of both employees that are involved in the shift exchange request(s).
2. For all facilities except Willow River/Moose Lake, the exchanges shall be completed within twelve (12) weeks of the date the form is submitted, unless approved in advance by the Appointing Authority. For Willow River/Moose Lake only, forms may be submitted up to twelve (12) weeks in advance of the first exchanged shift; however, the exchange must be completed within twelve (12) weeks of the date of the first exchanged shift, unless approved by the Appointing Authority.
3. No employee may agree to a shift exchange that would result in the employee working more than eighteen (18) consecutive hours.
4. Employees failing to work on the payback day or any part thereof due to illness of self or others will be treated in accordance with Article 9, Sick Leave.
5. Failure to work the payback day or any part thereof shall constitute just cause to discipline and shall be subject to the provisions of Article 18, Discipline and Discharge.
6. **Cancellation**. Cancellation of a previously approved shift exchange can only occur if neither part of the exchange has occurred and is subject to the following provisions:
  - a. **Within Fifteen (15) Calendar Days**: Upon mutual agreement of all parties involved, including the Appointing Authority, a previously approved shift exchange may be cancelled within fifteen (15) calendar days of the first exchanged shift.
  - b. **Fifteen (15) Calendar Days or Longer**: The Appointing Authority may cancel any previously approved shift exchange for reasons including, but not limited to, transfers, separation, death, military leave, FMLA leave, or other types of statutory leave, so long as the

cancellation occurs fifteen (15) calendar days or more in advance of the first exchanged shifts.

Either employee may cancel a previously approved shift exchange upon written notice to the watch commander(s) or the employees' scheduling supervisor(s), so long as the cancellation occurs fifteen (15) calendar days or more in advance of the first exchanged shift.

7. Once an exchange is approved,
  - a. no proration of vacation or holidays shall be applied to the exchange unless the employee would be prorated for reasons other than the exchange.
  - b. neither employee may subsequently agree to exchange with another employee which would alter the original exchange.
8. Employees working on a shift exchange shall be allowed to compete for available vacation time consistent with Article 8, Vacation.
9. Once an employee has been approved for vacation leave for his/her regularly scheduled shift, the employee may not subsequently cancel the vacation for the purpose of engaging in a shift exchange.
10. Exchanges shall be to a shift, not a specific post. The Appointing Authority retains the right to assign the employee to any work area and/or post necessary to meet the needs of the facility.
11. Exchanges involving initial probationary employees must be initiated by the probationary employee and must be approved by the Captain/designee or the employee's scheduling supervisor.

(Joint Exhibit 1; emphasis added)

In addition to the Shift Exchanges language, Appendix N, Letter #10 in the current CBA is a Memorandum of Understanding dated March 22, 2004, entitled "**Interpretative Guidelines – Shift Exchanges**" (hereafter referred to as the Guidelines). The parties jointly prepared this memorandum, which is reproduced below:

DATE: March 22, 2004

TO: Wardens, Human Resource Directors and Designees, Watch Commanders, Captains and Lieutenants

FROM: Amy J. McKee, LR Rep., Principal, Department of Employee Relations; Sid Helseth, Senior Business Agent, AFSCME, Council 6, AFL – CIO

RE: Interpretive Guidelines – Shift Exchanges

On Thursday, January 8 and Friday, January 30, 2004, representatives of the Bureau of the Mediation Services, Department of Employee Relations, AFSCME Council 6, AFL – CIO, Department of Corrections, and Unit 208 – Correctional Officers met to discuss a variety of issues surrounding shift exchanges. The outcome of these meetings resulted in some substantive changes to the correctional language regarding Shift Exchanges (see Article 5, Hours of Work) and these Interpretive Guidelines. The Guidelines are intended to be a resource to all parties involved with respect the interpretation of the language contained in Article 5 as well as establish a uniform interpretation of language. While nothing in this letter is grievable or arbitrable, it is intended to set a precedent for the utilization and interpretation of the language contained in Article 5. The guidelines are as follows:

1. Once an exchange has been approved, the exchange follows the employee. If either employee bids to a new shift, the payback transfers to the new shift(s). For example, Employees A and B both work first watch, but have different days off, and agree to a shift exchange. Employee A works for Employee B but before Employee B works for Employee A, Employee A bids to second watch. When the date of payback arrives for Employee B, Employee B must work Employee A's second watch shift.
2. If an employee bids to the same shift and days off that the employee is scheduled to work the payback, the employee must notify the Appointing Authority of the conflict. The employee owes the Appointing Authority the time and will work with the Appointing Authority to find a mutually agreeable alternative payback date. If the parties cannot agree on an alternative payback day, then the Appointing Authority may adjust the employee's schedule for one (1) work week to accommodate an alternative payback day. The alternative payback day may include the employee's scheduled day off.

3. The Appointing Authority retains the right to deny a shift exchange based on the institutional needs of the facility. Such denial will not be deemed unreasonable if approving the exchange would result in:
  - a. No CO3's on shift;
  - b. No A or B Level Responders on shift;
  - c. No weapons qualified employees on shift;
  - d. No respirator qualified employees on shift;
  - e. No warrants qualified employees on shift;
  - f. No court control qualified employees on shift;
  - g. No first turn-key qualified employees on shift.

Additionally, an Appointing Authority may deny a shift exchange if one of the parties to the exchange is on light duty assignment that cannot be accommodated if the exchange were to be approved.

4. It is the intent of the parties to treat an approved shift exchange as the employee's regularly scheduled shift to every extent possible. Therefore, the Appointing Authority will treat failure to report to duty, lateness for duty, or sick call in (see Article 9, Sick Leave) for a shift exchange payback in the same or similar manner as if the payback had been the employee's regularly scheduled shift. This may, however, result in the Appointing Authority issuing discipline, up to and including discharge for such infractions.
5. Previously approved shift exchanges that are part of a continuous vacation period cannot be cancelled by either party once the vacationing employee has left for vacation. For example, Employee A requests a period of vacation but is unable to get two days of vacation in the middle of the request. Employee B agrees to participate in a shift exchange with Employee A so that Employee A may take a continuous vacation. Once Employee A completes his/her last scheduled shift prior to the commencement of the vacation period, the shift exchange cannot be cancelled by either party even if the cancellation would be fifteen (15) calendar days or longer.
6. When employee cancels a shift exchange fifteen (15) calendar days or more in advance of the first exchanged shift, the canceling employee must also notify the other party to the exchange of the cancellation in addition to the written notice to the watch commander(s) or employee's scheduling supervisor(s).

cc: Josh Tilson, Mediator, Bureau of Mediation Services

(Joint Exhibit 1)

The shift exchange language appearing in Article 5, Section 1D and in the Appendix N Guidelines represent the parties' contemporary terms and conditions covering shift exchanges. The evolution of both the present-day shift exchange language and the Guidelines began with the parties' 1975–1977 CBA. (Employer Exhibits 12 and 13) At that time, the negotiated shift exchange policy simply stated that:

Employees may mutually agree to exchange days, shifts, or hours of work with the approval of their supervisor provided such change does not result in the payment of overtime.

(Employer Exhibit 13) This language remained largely unchanged until modified in the 1983 – 1985 CBA. The modified language is underlined below:

Employees who are qualified and capable may mutually agree to exchange days, shifts, or hours of work with the approval of their supervisor which shall not be unreasonably denied and provided such changes does not result in the payment of overtime.

(Employer Exhibits 15 and 16)

During the negotiations of the 1989 – 1991 CBA, the parties added the following series of conditions and limitations to the above-quoted shift exchange language:

Such exchanges shall be subject to the following conditions:

1. All requests for exchanges must state the exact days, shifts, or hours of both employees involved in the exchange.
2. Exchanges shall not extend beyond three (3) pay periods, unless approved by the Appointing Authority on recommendation of the supervisor, which exception shall be discretionary with the Appointing Authority.

3. Employees failing to work on the payback day shall not be paid for that day nor shall they be permitted to use other paid leave for it.
4. Failure to work the payback day shall result in a six (6) months exclusion from use of exchanges by said employee.
5. Once an exchange is approved, no proration of vacation or holidays shall be applied to the exchange unless the employee would be prorated for reasons other than the exchange.

(Employer Exhibit 46)

The 1991 – 1993 CBA modified this list of conditions and limitations as follows:

1. All requests for exchanges must be reduced to writing on a Department of Corrections form and must state the exact days, shifts, or hours of both employees involved in the exchange.
2. Exchanges shall not extend beyond two (2) pay periods unless approved by the Appointing Authority.
3. Employees failing to work on the payback day or any part thereof shall have appropriate hours deducted from their pay and shall not be permitted to use other paid leave for it, unless otherwise authorized by the Appointing Authority, which authorization shall only be made if it can be clearly proven that the absence was caused by an unavoidable emergency.
4. Failure to work the payback day or any part thereof or failure to follow the procedure as outlined in this article shall result in a six (6) months exclusion from use of exchanges by said employee, unless otherwise authorized by the Appointing Authority, which authorization shall only be made if it can be clearly proven that the absence was caused by an unavoidable emergency.
5. Once an exchange is approved, no proration of vacation or holidays shall be applied to the exchange unless the employee would be prorated for reasons other than the exchange.

(Union Exhibit 15)

The next round of negotiations led to still more changes to the above list of conditions and limitations. Specifically, the 1993 – 1995 CBA renumbered this list after inserting a new item 3, which states:

3. Once an exchange has been approved, neither employee may subsequently agree to exchange with another employee, which would alter the original exchange.

(Union Exhibit 15)

The 1995 – 1997 CBA modified the phrasing of item 1 in the above-quoted list by changing its last line from “...in the exchange.” to “...in the shift exchange request(s).” (Union Exhibit 15) The shift exchange language remained as is in the 1997 – 1999 CBA. (Union Exhibit 15) However, the 1999 – 2001 CBA three (3) more substantive items were added to the above list, namely:

7. Employees working on a shift exchange shall be allowed to compete for available vacation time consistent with Article 5 of the DOC Supplement or as modified by the facility supplement.
8. Exchanges shall be to a shift, not a specific post.
9. Exchanges involving initial probationary employees must be initiated by the probationary employees and must be approved by the Captain/designee.

(Union Exhibit 15) During the 2001 – 2003 round of negotiations the parties added the phrase “...or the employee’s scheduling supervisor” to the end of item 9 above: A very modest modification. (Union Exhibit 15)

However, the parties’ shift exchange policy became the subject of broad discussions during the negotiation of their 2003 – 2005 CBA. (Union Exhibits 9 and 10) Initially, the parties held several Meet and Confer meetings dedicated to resolving a host of shift exchange issues but, ultimately, these issues were put to

rest in subsequently held Interest Base Bargaining (IBB) sessions that were facilitated by Josh Tilsen, Mediator, Bureau of Mediation Services. (Union Exhibit 11) The IBB sessions resulted in the Guidelines. A part of Appendix N in the current CBA, as previously discussed. (Union Exhibit 12) In addition, the parties modified the shift exchange language in Article 5, Section 1D as follows:

**D. Shift Exchanges.** Employees who are qualified and capable may mutually agree to exchange days, shifts and/or hours of work with the advance approval of the watch commander(s) or the employee's scheduling supervisor, which shall not be unreasonably denied and provided such changes does not result in the payment of overtime. A voluntary change of shifts results in the payment of overtime only when it places the employee's hours of work in excess of those permitted by the Fair Labor Standards Act (FLSA). The watch commander(s) or the employee's scheduling supervisor(s) signature of approval shall be obtained prior to the occurrence of the exchange. Such exchanges shall be subject to the following conditions:

1. All requests for exchanges must be reduced to writing on a Department of Corrections form and must state the exact days, shifts and/or hours of both employees that are involved in the shift exchange request(s).
2. For all facilities except Willow River/Moose Lake, the exchanges shall be completed within six (6) pay periods of the date the form is submitted, unless approved in advance by the Appointing Authority. For Willow River/Moose Lake only, forms may be submitted up to six (6) pay periods in advance of the first exchanged shift; however, the exchange must be completed within six (6) pay periods of the date of the first exchanged shift, unless approved by the Appointing Authority.
3. Employees failing to work on the payback day or any part thereof due to illness of self or others will be treated in accordance with Article 9, Sick Leave.
4. Failure to work the payback day or any part thereof shall constitute just cause to discipline and shall be subject to the provisions of Article 18, Discipline and Discharge.
5. **Cancellation**. Cancellation of a previously approved shift exchange can only occur if neither part of the exchange has occurred and is subject to the following provisions:

- a. **Within Fifteen (15) Calendar Days**: Upon mutual agreement of all parties involved, including the Appointing Authority, a previously approved shift exchange may be cancelled within fifteen (15) calendar days of the first exchanged shift.
- b. **Fifteen (15) Calendar Days or Longer**: The Appointing Authority may cancel any previously approved shift exchange for reasons including, but not limited to, transfers, separation, death, military leave, FMLA leave, or other types of statutory leave, so long as the cancellation occurs fifteen (15) calendar days or more in advance of the first exchanged shifts.

Either employee may cancel a previously approved shift exchange upon written notice to the watch commander(s) or the employees' scheduling supervisor(s), so long as the cancellation occurs fifteen (15) calendar days or more in advance of the first exchanged shift.

6. Once an exchange is approved,
  - a. no proration of vacation or holidays shall be applied to the exchange unless the employee would be prorated for reasons other than the exchange.
  - b. neither employee may subsequently agree to exchange with another employee which would alter the original exchange.
7. Employees working on a shift exchange shall be allowed to compete for available vacation time consistent with Article 8.
8. Once an employee has been approved for vacation leave for his/her regularly scheduled shift, the employee may not subsequently cancel the vacation for the purpose of engaging in a shift exchange.
9. Exchanges shall be to a shift, not a specific post. The Appointing Authority retains the right to assign the employee to any work area and/or post necessary to meet the needs of the facility.
10. Exchanges involving initial probationary employees must be initiated by the probationary employee and must be approved by the Captain/designee or the employee's scheduling supervisor.

(Union Exhibit 15)

The 2005 – 2007 CBA modified the above Article 5, Section 1D language in two (2) respects, namely: (1) the three (3) references to “six (6) pay periods”

was changed to “twelve (12) weeks”; and (2) a new item 3 was inserted into the above list of conditions and limitations and the balance of items were renumbered, now totaling eleven (11) items. Said new item 3 was as follows:

3. No employee may agree to a shift exchange that would result in the employee working more than eighteen (18) consecutive hours.

(Union Exhibit 15) With these two (2) modifications, the parties’ bargaining history with respect to shift exchanges is now completed, leading us back to Article 5, Section 1D and to the Guidelines, as they appear in the 2007 – 2009 CBA.

## **B. THE FIGHTING ISSUE**

The fighting issue in this case arose out of the parties’ 2007 – 2009 collective bargaining negotiations when the shift exchange issue once again found its way to the bargaining table. On April 24, 2007, the State notified the Union of its intent to discuss shift exchanges and identified its proposals to modify Article 5, Section 1D. For example, the State specifically sought to limit the number of employee shift exchanges to “ten (10) instances per fiscal year.” (Union Exhibit 14) With the Employer seeking to ensure (1) that shift exchanges would not compromise the safe and secure operations of its correctional facilities and (2) that each correctional facility apply Article 5, Section 1D and the Guidelines consistently, and the Union seeking to maintain the more liberal shift exchange policy for its members, it is not surprising that shift exchange negotiations would languish, as they did.

Next, on May 17, 2007, the following memorandum was directed to the attention of the Union:

DATE: May 17, 2007

TO: Sid Helseth, AFSCME Council 5  
John Westmoreland, AFSCME Council 5

FROM: Connie Jones, DOC HR Manager

RE: Shift Exchanges

As you are aware, management has been concerned about the proliferation of the use of shift exchanges for quite some time. As a result of those concerns a review of the current contract language has been completed in relations to our practice of granting requests. Effective July 1, 2007 the following new work rules will be effective:

1. An exchange must be for a minimum of two (2) hours.
2. An exchange may be denied when it appears the employee requesting the exchange is creating a new work schedule for themselves (sic).
3. An exchange may be denied when the duration of the exchange creates an extensive absence in the workplace.
4. If an employee has been unreliable (i.e., calling in sick, tardy, no call/no show, etc.) on a past exchange, future exchange(s) may be denied.
5. Staff will be required to accurately reflect on their own timesheets the number of hours their co-worker worked on the exchange. For example, Employee A works 2<sup>nd</sup> watch. He agrees to work the 3<sup>rd</sup> watch on March 13 for Employee B. Since Employee A is technically only working 7.83 hours Employee B must only record 7.83 hours on his/her timesheet. If an employee does not record the correct number of hours on his/her timesheet, he/she will be subject to corrective action which may include denial of a future shift exchange.

If you would like to discuss these changes I would be happy to arrange a meeting. Feel free to contact me at (651) 361-7312.

cc: Institutional Heads

(Union Exhibit 14 & Employer Exhibit 51 and hereafter referred to as the “Jones memorandum”) On this same date, May 17, 2007, Mr. Helseth wrote to Paul Larson, DOER, Deputy Commissioner, asserting that Ms. Jones memorandum represented a “substantive” change in the parties’ agreements governing shift exchanges and he suggested that the matter be handled in one (1) of the following two (2) ways:

1. Withdraw your document with the commitment not to implement and request a Meet and Confer regarding those proposals, as well as your proposals under Article 5.
2. We provide you with a step 3 grievance in regard to Article 5, Section 1D, and we put the case before an arbitrator immediately. The expedited process would provide sufficient award to determine policy or language.

(Union Exhibit 14 & Employer Exhibit 52) The Employer opted to follow Mr. Helseth’s first suggestion by withdrawing the Jones’ memorandum and agreeing to take up this matter in downstream negotiations. Subsequently, the parties reached a mediated 2007 – 2009 CBA, leaving Article 5, Section 1D and Appendix N Guidelines remaining intact. Concurrently, at the parties’ last negotiating session on July 12, 2007, Mr. Larson advised the Union that henceforth the State would be denying shift exchange requests whenever:

- The employee is attempting to make a new schedule;
- If someone wants to take extended leave;
- If the person doing the shift exchange is not qualified;
- The person doing the shift exchange is unreliable

(Employer Exhibit 53) It is “reasonable” to deny shift exchanges for these reasons, opined Mr. Larson. (Employer Exhibit 53)

Dated August 9, 2007, a training memorandum was sent by the Employer to MCF – Rush City Lieutenants, directing them to attend one (1) of three (3) scheduled meetings on “...the up-coming changes on shift exchanges.” (Union Exhibit 2) The above bulleted comments by Mr. Larson and the training materials accompanying the August 9, 2007 training memorandum suggested to the Union that the State intended to implement Ms. Jones memorandum’s “new work rules”.<sup>1</sup> (Union Exhibit 3) And, the August 16, 2007 memo from Warden Robert Feneis addressed to All Correctional Officers (hereafter referred to as the Feneis memorandum) further corroborated the Union’s concern. The Feneis memorandum, for example, identifies when shift exchange requests may be deemed to be unreasonable, such as when:

1. One of the parties to the exchange is not qualified or capable, risking institutional security or staff safety.
2. One of the parties to the exchange has demonstrated that s/he may not honor their portion of the exchange.
3. The exchange creates an extensive absence from the workplace.
4. The request results in the appearance of a new work schedule.

In addition, to avoid a duplication of wages paid, staff shall will be required to accurately reflect on their own timesheet the number of hours s/he will work on the exchange. ...

(Union Exhibit 4 & Employer Exhibit 1)

On behalf of all correctional officers, the Union filed a Step 3 grievance on August 14, 2007, contesting the Employer’s “new work rules” that it plans to

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<sup>1</sup> The training materials identify the factors that should be considered as grounds for denying shift exchange requests. For example, items #2, #3 and #4 in the Jones’ memorandum are referenced, plus other factors including (1) requests received after the 14-day schedule is posted shall be “reviewed and approved by the Captain” ; (2) once an employee has engaged in ten (10) shift exchanges in a fiscal year, additional requests shall be “reviewed and approved by the Captain”; and (3) once an employee has engaged in fifteen (15) shift exchanges in a fiscal year, additional requests shall require “review and approval by both the Captain and the Associate Warden of Operations”. (Union Exhibit 3).

consider when evaluating shift exchange requests. (Union Exhibit 5 & Employer Exhibit 2) On August 29, 2007, the State rejected the Union's grievance, contending that the controlling language in the 2007 – 2009 CBA permits the Employer to deny unreasonable requests and that the challenged “new work rules” are a reasonable basis for reviewing and acting on requests. (Union Exhibit 5 & Employer Exhibits 3 and 25 – 33) The parties were unable to resolve this grievance and the matter was appealed to the instant arbitration proceedings. (Union Exhibit 5 & Employer Exhibit 7)

## **II. UNION'S POSITION**

Initially, the Union acknowledges that Article 24 spells out Management Rights, including the right to determine “policy”; provided, however, that said rights have not been “specifically established or modified by this Agreement”, which the Union avers clearly has been the case with respect to shift exchange terms. (Joint Exhibit 1) In a related vein the Union points out that over the past thirty (30) years the parties' shift exchange language has been modified several times. What began as a one (1) sentence statement of policy in the 1975 – 1977 CBA now runs more than one (1) page in Article 5, Section 1D, not to mention the Appendix N Guidelines. Significantly, the Union urges, all of these changes were negotiated and so too must the State's “new work rules”.

Next, the Union argues that the Employer's “new work rules” conflict with existing contract language. For example, the Union notes the Employer's suggestion that shift exchange paybacks resulting in correctional officers working multiple 16-hour shifts can adversely affect their job performance. Yet, the Union

contends, Article 5, Section 1D prohibits shift exchanges that require an employee to work “more than eighteen (18) consecutive hours”, not sixteen (16) consecutive hours. In addition, with reference to Article 6 – Overtime – a correctional officer having the requisite seniority may work double shifts (16-hour shifts) for several days in a row and that same right exists under the terms of Article 5, Section 1D. Further, the Union observes that the Employer did not provide a shred of credible evidence to support its contention that an adverse relationship exists between working double-backs and employee job performance. Still further, the Union points out that correctional employees are acting within their contractual rights when they combine shift exchanges (Article 5) and vacation (Article 8) days to design extended periods of non-work time. The Employer refers to such designs as non-bargained leave of absences when in fact they were bargained absences and, the Union continues, such leave arrangements are consistent with established practices.

Next, with regard to the Employer’s rule to deny shift exchanges to employees who cannot be relied on to perform paybacks due to sickness, tardiness, no calls/no shows and so forth, the Union argues that said rule conflicts with Article 5, Sections 1D(4) and 1D(5), which respectively state:

4. Employees failing to work on the payback day or any part thereof due to illness of self or others will be treated in accordance with Article 9, Sick Leave.<sup>2</sup>
5. Failure to work the payback day or any part thereof shall constitute just cause for discipline and shall be subject to the provisions of Article 16, Discipline and Discharge.<sup>3</sup>

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<sup>2</sup> Article 9, Section 3B notes that if it has reasonable cause to believe the employee has abused or is abusing sick leave, the Employer may require an employee to furnish a medical practitioner statement. It also states that said abuse is cause for discipline. (Joint Exhibit 1)

(Joint Exhibit 1) The Union concludes that neither items 4 and 5 above, nor Articles 9 and 16 allow the Employer to deny shift exchanges involving at fault employees. In addition, the Union observes that while the parties' 1991 – 1993 CBA, *supra*, did provide that employees who failed to work payback days could be “excluded” from participating in shift exchanges, that provision was subsequently deleted and replaced with the current language in Article 5, Section 1D, as it first appeared in the 2003 – 2005 CBA.

Further, the Union objects to the suggestion that requests for shift exchanges that are received after the 14-day schedule has been posted must be “reviewed” prior to being approved by the Captain. The Union points out that supervisor approvals and not “reviews” are required under Article 5, Section 1D. In this same regard, the Union argues that the rule requiring a “review” of the shift exchanges histories of employees who have participated in more than ten (10) shift exchanges in a fiscal year is not compliant with Article 5, Section 1D.

Still further, the Union contends that the Employer failed to factually demonstrate that Article 5, Section 1D, as currently administered, is compromising the safety and security at the State's correctional facilities. That is, the Employer failed to identify an adversely affected inmate or correctional officer, and it failed to factually demonstrate that its “new work rules” would improve safety and security; whereas, said rules certainly would limit unit employees ability to use shift exchanges.

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<sup>3</sup> Article 16, Section 3 makes clear that the disciplinary actions or measures includes only oral reprimand, written reprimand, suspension, demotion and discharge. (Joint Exhibit 1)

Finally, for the reasons discussed above the Union requests that its grievance be sustained. As remedy, the Union begs that the Employer be ordered to comply with both Article 5, Section 1D and the Guidelines and that it cease and desist for giving effect to its “new work rules”.

### **III. EMPLOYER’S POSITION**

The Employer begins by noting that Article 5, Section 1D allows it to deny shift exchange requests as long as its decisions for doing so are reasonable; and, the Employer argues, it is reasonable to deny requests that compromise the (1) operational safety and security of its facilities and (2) effect of other articles in the CBA. Further, the Employer urges that the criteria in Jones’ memorandum form a reasonable basis for denying shift exchange requests. First, the Employer contends, shift exchanges that result in a pattern of days off that are outside of a “normal work schedule” (Jones’ item #2) may be denied because said pattern circumvents the job and vacation bidding processes in Article 12 of the CBA, where “seniority” governs.

Second, the Employer argues that shift exchange requests that result in “extended leaves of absence” (Jones’ item #3) may be denied, when, for example, the requests are designed to take time off during a hunting season. Article 10 regulates personal leaves of absence and, the Employer points out, that under Section 2 of that provision the Employer may deny requests for personal leaves of absence when a reasonable basis for doing so exists; and, similarly, the Employer may deny shift exchanges designed to effect extended leaves of absence: An unintended and abusive use of shift exchanges.

Third, the Employer contends that “unreliable” (Jones’ item #4) employees (i.e., those with poor attendance-payback records) may reasonably be denied shift exchanges, regardless of the remedial aspects of Article 5, Section 1D (4) and (5). The Employer urges that the employee’s attendance-payback record, which is retrospective in nature, may be used to determine whether the employee is prospectively “reliable” and, therefore, “qualified and capable”, as provided under Article 5, Section 1D. In addition, the Employer argued that it may reasonably deny shift exchange requests to employees who repeatedly work double shift paybacks, leaving them tired, less attentive and less committed to their responsibilities. Exhibit 25, for example)

Next, the Employer asserts that its actions in this case do not constitute unilateral changes to Article 5, Section 1D. Rather, the Employer contends that it has the right to set forth standards for enforcing Article 5, Section 1D’s “qualified and capable” and “reasonable denial” language, and that simply because it had not previously asserted this right does not mean that its right to do so now was forfeited. Clearly, the Employer argues, under Article 5, Section 1D, the State has the right to determine who is and is not “qualified and capable”; and the State has the discretion to deny shift exchange request, provided that the grounds for said denial are reasonable.

Further, the Employer contends that it did not circumvent its bargaining duty in this case. Rather, the Employer points out that the 2007 shift exchange proposals it put on the bargaining table were rejected by the Union; that all of its proposed changes are now moot; and that the Employer’s shift exchange

proposals are not replicated in either the Jones memorandum or Feneis memorandum. (Union Exhibits 14 and 4, respectively, & Employer Exhibits 51 and 1) The Employer observes that the Jones memorandum was provided to the Union during negotiations to provide “notice” of grounds for the reasonable denial of shift exchange requests, as Ms. Jones testified; and the Feneis memorandum to was prepared after the parties had reached a tentative agreement – again to provide “notice” regarding the Employer’s interpretation of the contractual language that may limit an employee’s right to shift exchanges. The Employer observed that neither memoranda limits the number of shift exchanges to ten (10) per fiscal year, as it had proposed; and further, by way of example, the Employer notes that while facility Captains will “review and approve” shift exchanges beyond ten (10) per fiscal year and Associate Wardens in each facility will “review requests” in excess of sixteen (16) per fiscal year, these activities do not imply numeric criteria for use in denying shift exchange requests (Employer Exhibit 1).

The Employer also contends that the Guidelines do not limit its right to reasonably deny shift exchange requests to only those situations identified therein, as testified by Amy McKee, former Labor Relations Representative, Principal, DOER. That is, the Guidelines were never intended to be substituted for the “reasonable denial” provision in Article 5, Section 1D.

Finally, for all of the above-discussed reasons, the Employer requests that the instant grievance be denied.

#### **IV. STATEMENT OF THE ISSUES**

The Union's phrasing of the statement of the issue is:

Did the Employer violate Article 5, Section 1D and Appendix N, Letter No. 10 when it implemented the Jones' new "work rules"? If so, what is an appropriate remedy?

The Employer's suggested statement of the Issue are:

1. Is it reasonable to deny a shift exchange request that results in a new work schedule? (Item #2 in the Jones' Memorandum)
2. Is it reasonable to deny a shift exchange request that would create an extensive absence from the workplace? (Item #3 in the Jones' Memorandum)
3. Is it reasonable to deny a shift exchange request in cases where the employee has been deemed unreliable (calling in sick, tardy, on call/no show, etc) on a past exchange? (Item #4 in the Jones' Memorandum)
4. Do items #2, #3 and #4 in the Jones' Memorandum represent a unilateral change to Article 5, Section 1D, or the Interpretative Guidelines of the current CBA?

The undersigned adopts as his statement of the Issues #1 through #3 in the Employer's submission statement. These three (3) Issues identify key elements in Jones memorandum, which was a triggering aspect of the instant grievance. In addition, the undersigned adopts the Union's submission statement, substituting it for the Employer's Issue #4. The Union's statement is more general than the Employer's phrasing of Issue #4.

#### **V. DISCUSSION AND OPINIONS**

The Union alleges that the Employer's implementation of items #2, #3 and #4 in the Jones memorandum and the other conditions and limitations posted in both the Feneis memorandum and the August 9, 2007 training materials manifest

an Employer attempt at unilaterally modifying the terms of employment appearing in Article 5, Section 1D and the Guidelines of the CBA. Because the alleged modifications were not negotiated and agreed upon and, in so many words, because the Employer is attempting to achieve through arbitration what it failed to achieve through collective bargaining, the Union urges that the undersigned order the Employer to cease and desist in giving effect to Ms. Jones' modifications, and that the Employer conform to the terms of Article 5, Section 1D and the Guidelines.

The Union's position is compelling. It is clear that the shift exchange language has been a negotiated term in the parties' CBAs for approximately three (3) decades. The 1975 – 1977 CBA shift exchange language, *supra*, was simple, expansive and constraining in only two (2) respects, namely: That shift exchanges needed supervisory approval; and that they not result in overtime payments. Since that time, as previously indicated, language modifications have been bargained on multiple occasions and, in the main, the resulting changes have served to "limit" or "narrow" the otherwise relatively unfettered rights of unit members to utilize shift exchanges.

Currently, for example, Article 5, Section 1D requires, *inter alia*, that shift exchanges (1) be completed within twelve (12) weeks; (2) may not require an employee to work more than eighteen (18) hours; and (3) may result in discipline for failure to work payback days. Further, the parties' negotiated Guidelines impose still more conditions and limitations on employee shift exchange rights some of which are as follows: Exchange requests may be reasonably denied if

(1) CO3's would not be on the shift; (2) a weapon qualified employee would not be on the shift; and (3) if one party to the exchange is on a light duty assignment that cannot otherwise be accommodated. The Union argues that the items listed in the Jones memorandum are in the same genre or class as the above illustrative conditions and limitations: The latter having been the product of specific bargaining that resulted in mutual agreements. In so many words, the Union's view of the matter may be stated as follows: The contractual modifications summarized as the Jones memorandum may be achieved either through a negotiated agreement or awarded by an interest arbitrator, but said modifications ought not to be achieved through rights arbitration.

Does the Jones memorandum "expand" existing Article 5, Section 1D language, as the Union alleges? The Employer would answer this question with an unambiguous "no". The Employer draws a distinction between its 2007 bargaining table proposals, which it withdrew, and the content of the Jones and Feneis memoranda and the August 9, 2007 training materials. The latter, the Employer urges, represent nothing more than its legitimate exercise of managerial discretion. Regarding the matter at hand, the Employer holds that management discretion is required if the State is to (1) determine whether a shift exchange applicant is "capable and qualified"; and (2) decide when it is otherwise "reasonable" to deny shift exchange requests: Both are contractual terms in Article 5, Section 1D that demand interpretations and applications that only management can execute. Accordingly, the Employer concludes, its actions in

this case do not amount to making unilateral changes to Article 5, Section 1D, as the Union claims.

This case is unique, as the arbitral conclusions presented below suggest. To begin, after carefully considering the record evidence and arguments in this case, the undersigned is willing to take the Employer at its word, namely: that the items/criteria in the Jones memorandum are not “extensions” of the terms in Article 5, Section 1D. Accordingly, the undersigned concludes that Issue #4, where the Union claims that items #2, #3 and #4 in the Jones memorandum represent unilateral changes to Article 5, Section 1D and/or the Guidelines, is rejected.

Of some confusion in this matter is the usage of the term “work rules”. Normally, when industrial relations specialists refer to “work rules”, they are referring to a list of “do’s” and “don’ts” that the Employer typically posts in order to notify employees of its expectations with regard to their work-related conduct and of the consequences resulting from “work rule” violations. It is well recognized in arbitration that management has a fundamental and largely unlimited right to enumerate such “work rules:”, with the caveat that their application may be challenged *via* the grievance procedure on grounds like “reasonableness”, “unfairness”, “arbitrariness” or “discrimination” and so forth. Thus, arbitrators are often called upon to judge whether non-negotiated “work rules” are “reasonable”.

Examining whether “work rules” are “reasonable”, when the former phrase is used in its non-negotiated way, is distinguished from examining whether Ms.

Jones' "work rules" are "reasonable" as the latter term is used in Issues #1, #2, and #3, which ask: "Is it reasonable to deny a shift exchange request that ...?" These questions demand judging whether a shift exchange request is being "unreasonably denied" when the Employer finds that a request would result in (1) a new work schedule, (2) an extensive absence, and/or in finding that (3) the employee is unreliable based on his/her payback history. That is, this Arbitrator is being asked to judge whether these three (3) criteria for denying shift exchange requests are implied by the negotiated phrase, "unreasonably denied". Accordingly, the phrase "work rules" can be used in at least two different ways: A fine but critical distinction.

Absent a negotiated agreement declaring that shift exchanges may always be denied under Ms. Jones' "work rules", Issues #1, #2 and #3 cannot be definitively answered, at least not in the abstract (i.e., lacking specific fact scenarios). For this reason, the undersigned cannot reach declaratory conclusions about these three (3) Issues. In some instances, the application of the challenged "work rules" may represent an "expansion" of existing contract terms and/or may be inconsistent with existing contractual terms and enforceable past practices, as the Union's case suggests; but, in other instances, the reverse may be true. It all depends on the facts of the case at hand!

Obviously, the parties chose to use language like "qualified and capable" and "unreasonably denied" when they negotiated Article 5, Section 1D, for the very reason that they could not anticipate all possible fact scenarios warranting shift exchange denials. Hence, the parties did not define these phrases. In the

alternative, they implicitly agreed that management could interpret them; and based on its interpretations, management could make denial determinations that, of course, would be subject to challenges through the grievance procedure. This Arbitrator is no better positioned than the parties themselves at anticipating all possible fact scenarios. For this reason, this Arbitrator and rights arbitrators in general typically do not enjoy the flexibility of making declaratory judgments.

From the Union's contentions, the undersigned recognizes that future arbitrators will have to evaluate and judge specific case-based evidence relating to the interpretation of Article 5 (shift exchanges) and the relationship among Article 5 (shift exchanges) and Articles 6 (overtime) and 8 (vacation) when considering shift exchange denials based on criteria such as an employee missing payback work assignments, working consecutive double-back shifts, creating new work schedules and/or extensive absences from the workplace.

The Employer's rationale for each of the criteria in the Jones memorandum have face validity and there is no question that the volume of shift exchange requests that the correctional facilities process annually creates scheduling nightmares.<sup>4</sup> Nevertheless, whether said rationales and corresponding criteria conform to contract language and enforceable past practices cannot be judged in a vacuum. Going forward, the Employer has the right to "act", denying shift exchanges based on specific sets of facts that warrant application of the criteria in the Jones memorandum, and the Union has the right to "react", grieving said decisions. Ultimately, the Employer's decisions may

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<sup>4</sup> The Employer showed that employees requested over 64,000 shift exchange hours between July 1 and November 27, 2007, involving over 1,227 correctional officers. (Employer Exhibit 21)

indeed be adjudicated by rights arbitrators on a case-by-case basis unless, of course, Ms. Jones' items are folded into the CBA through negotiations and agreement or through the actions of an interest arbitrator.

## **VI. AWARDS**

For the reasons previously discussed, the instant record does not invite an easy answer to Issues #1, #2 and #3. Absent specific fact scenarios, the Arbitrator cannot evaluate and judge whether any one of Ms. Jones' criteria are compliant with the terms of the "whole" Agreement. From this perspective, Issues #1, #2 and #3 are not determined to be universally reasonable under all fact scenarios.

With respect to Issue #4, the content of the Jones memorandum does not constitute a unilateral change to Article 5, Section 1D and/or the Guidelines. Instead, the content of the Jones memorandum represents nothing more than management's right to interpret the discretionary "qualified and capable" and "unreasonably denied" language in Article 5, Section 1D. When the criteria derived from this language are applied, denying shift exchange requests, such determinations may be grieved. Thus, the probative standing of these criteria will probably be determined by settlement agreements reached in future grievance negotiations and/or in future rights arbitration fora.

Issued and ordered on the 27<sup>th</sup> day  
of April, 2008 from Tucson, AZ.

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Mario F. Bognanno,  
Labor Arbitrator