

In the Matter of an Arbitration Between

**Service Employees International Union
Local 1000**

Claimant

- and -

**State of California, California Prison
Industry Authority**

Respondent

AWARD & OPINION

NB 4111
CalHR 19-01-0059
SEIU 2019-0394
(IWSP pay)

Arbitrator: Norman Brand, Esq.

Appearances:

For Service Employees International Union Local 1000
Anne M. Giese, Chief Counsel
By Yuri Kvichko, Esq.

For State of California, California Prison Industry Authority
Frolan R. Aguilin, Chief Counsel
By Joanna Y. Thomas, Esq.

Date: April 20, 2022

Background

On April 17, 2019, Service Employees International Union Local 1000 (“SEIU” or “Union”) filed a grievance with the State of California (“State” or “CalHR”), California Prison Industry Authority (“CALPIA”), on behalf of Christine Decko and all other similarly affected employees. It does not appear the State responded to the grievance. (See, Joint 1) The Union timely appealed the failure to respond and moved it to arbitration. By agreement of the parties, the Arbitrator held a hearing on the Zoom platform on January 10, 2022. Both parties were present at the hearing and represented by counsel. Each had a full opportunity to examine and cross-examine witnesses, present evidence, and argue its position. Neither party objected to the conduct of the hearing. A court reporter recorded the proceedings. At the close of the hearing the parties asked to file post-hearing briefs. The Arbitrator declared the hearing closed when he received the last brief on March 2, 2022.

Issue

At the hearing the parties presented the following issues:

1. Was the grievance timely filed?
2. Did the State violate Section 11.22.1 of the 2016-2020 Bargaining Unit 1 Master Agreement when CalHR refused to approval Institutional Worker Supervision Pay (“IWSP”) for Grievants?
3. If so, what remedy?

Stipulation

The parties stipulated that if, and only if, there is a remedy, the Arbitrator will retain jurisdiction over the remedy.

Contract Language

6.7 Formal Grievance -Step 1

A. If an informal grievance is not resolved to the satisfaction of the grievant, a formal grievance may be filed no later than thirty (30) calendar days after the employee can reasonably be expected to have known of the event occasioning the grievance.

11.22.1 Institutional Worker Supervision Pay Differential (Unit 1)

A. Unit 1 employees who have regular and direct responsibility for work supervision, on-the-job training, and work performance evaluation of at least two (2) inmates, wards, or resident workers who take the place of civil service employees for a total of one hundred seventy-three (173) hours a pay period shall, subject to the approval of the CalHR, receive a pay differential of three hundred twenty-five dollars (\$325) per qualifying pay period. This differential shall be called Institutional Worker Supervision Pay (IWSP).

Stipulated Facts

Stipulation No.1:

Grievants to this matter include the named grievant, Christina Decko, as well as Nicholas Parks, Richard Rios, Jason Nelson, Frank DeMattos, and Jacqueline Scroggins (collectively, Grievants).

Stipulation No.2:

Respondent, California Prison Industry Authority (CALPIA), is a state agency, and hiring authority of Grievants.

Stipulation No.3:

CALPIA develops and administers programs in the state's correctional institutions wherein incarcerated individuals (inmates) participate in an effort to develop work skills to obtain meaningful jobs upon release.

Stipulation No. 4

The Healthcare Facilities Maintenance (HFM) Program is administered by CALPIA and teaches inmates the knowledge and skills necessary to meet the highest maintenance standards of the healthcare environment (Title 22 standards). Inmates in the HFM Program maintain healthcare facilities at the institutions of the California Department of Corrections and Rehabilitation (CDCR) at an acceptable sanitary level.

Stipulation No. 5

The HFM Program administered at California Health Care Facility (CHCF), was unique to the CHCF institution and contained two units: one unit trained civil service custodians employed by CDCR and inmate porters to clean to Title 22 standards, and the second unit audited the environmental and janitorial work performed in the CHCF facility. The Audit Unit of the HFM Program at CHCF was operational from approximately April 2018 through June 2020 (hereinafter referred to as "relevant time period").

Stipulation No. 6:

During the relevant time period, Grievants were appointed to the Associate Governmental Program Analyst (AGPA) classification by CALPIA at CHCF. Except Jacqueline Scroggins was a Staff Services Analyst (SSA) and was promoted to AGPA in April of 2019, and Nicholas Parks was an SSA during the relevant time period.

Stipulation No. 7

The AGPA and SSA classifications are represented by the Service Employees International Union, Local 1000 and belong in the State of California Bargaining Unit I .

Stipulation No. 8

As AGPAs and SSAs at CHCF, Grievants were responsible for conducting the HFM program at CHCF for auditing and training, including serving as a trainer for the HFM curriculum and providing on-boarding support to the civil service employees and inmates.

Stipulation No. 9

The Audit Unit at CHCF had twenty inmate positions, for which inmates would apply, be interviewed, and subsequently selected for the positions. In the Audit Unit of the HFM Program at CHCF, four Grievants were responsible for supervising up to five inmates each, for up to 6.5 to 7 hours per workday. No more than four Grievants were working at any particular time in the Audit Unit of the HFM Program at CHCF.

Stipulation No. 10

Various factors, including institution lockdowns, medical appointments, and weather, impacted the number of inmates who would participate in the Audit Unit at CHCF on a given day.

Stipulation No. 11

The AGPA classification is not listed as an eligible classification under Pay Differential 067.

Facts

On July 13, 2017, Ms. Debi Kamakani, the Chief of Human Resources for CALPIA, wrote CalHR about the audit program they were creating. She asked for Institutional Worker Supervision Pay Differential (“IWSP”) for the SSA/AGPAs at CHCF in Stockton who would be supervising inmates in the audit program. She wrote: “This benefit is allowable by the Bargaining Unit 1 contract language.” (Respondent 2) She included a “Pay Differential Transmittal.” (U-4) CalHR denied the request saying it was a “bargaining issue.” (Tr. 60:3) In April 2018, Grievants began working exclusively on an audit team, comprised of four AGPA/SSA’s and approximately 20 inmates. The team supervised the inmates auditing the institution for environmental safety and cleanliness issues. (Tr. 99:11-22) It is uncontested that the number of inmates each supervised,

and the hours each spent doing that supervision meet the eligibility criteria for IWSP contained in Article 11.22.1.

In September 2018 Grievant Decko and other audit team members contacted their direct manager Mr. Gary Bush, and the program administrator, Mr. Darrol Vierra, about getting IWSP. Vierra told them the issue had been escalated to CHCF's central office. (Tr. 76:10-77:3; 93:2-17) Bush suggested the audit teams file a grievance because they were entitled to do so. (Tr. 95:1-3)) Decko sent the Union a grievance form signed by all the affected employees dated October 1, 2018. (U-6) After elevating the matter, Bush never got a response from the central office. (Tr. 94:15-16) Decko continued discussing the matter with Bush until December 2018, when they got so busy that she just began waiting. (Tr. 103:9-104:1)

About a year after CalHR's initial refusal to allow CALPIA to pay Grievants IWSP, a new – and higher -- administrator, the acting branch manager, asked Kamakani to try again using a different approach. Instead of asking CalHR to approve the pay, Kamakani did a full "Pay Differential Analysis" using the forms created by CalHR. (Tr. 55:1-9; 57:22-58:8) Kamakani corresponded with Buchanan, who was CALPIA's assigned analyst, answering her questions about adding the SSA/AGPAs at Stockton to Pay Differential 67. (Tr. 63:14-15; 64:25-66:3) Buchanan called Kamakani to tell her CALPIA would have to request CalHR bring the issue to the bargaining table. (Tr. 66:4-8) On December 6, 2018, Mr. Thomas Hunt of the CalHR Personnel Management Division officially denied CALPIA's request for the IWSP pay differential. Addressed to Kamakani, the operative portion of the denial reads:

The CalHR has thoroughly reviewed and considered this request.
Although CALPIA is self-funded, CalHR must evaluate these requests

from a statewide perspective. It is recommended that CALPIA include this request when the call out to departments is made as part of the Harvest Memorandum bargaining process. (Respondent's 4)

Buchanan, who drafted the denial, testified at the hearing.

Buchanan testified that "we denied this request because bargaining was going to be open soon." (Tr. 25:22-24) She testified vaguely about the possibility of statewide effects and the impact of adding the AGPA classification to Pay Differential 67. (Joint 3) Ultimately, she was obliged to admit she could not "say that there's any reason it [IWSP] couldn't be approved" solely for the program at HFMC Stockton. (Tr. 43:16-44:1)

Buchanan also testified that since beginning her assignment in the Personnel Management Division, she understood CalHR's position was that any IWSP request has to go through bargaining.¹ (Tr. 144:17-22) Buchanan's testimony was unreliable.

Discussion

Timeliness

The State argues, correctly, that the grievance was not filed within 30 days of the date Grievants first became aware they were not receiving IWSP. They knew it in September 2018 when they asked their supervisor and his manager about getting IWSP and were told it was being looked at by HFMC's central office. They were also told they could file a grievance.² In a memo dated December 6, 2018 CalHR refused CALPIA's request to pay these Grievants IWSP. The evidence does not establish that CALPIA HR

¹ In light of that understanding it is unclear why she "thoroughly reviewed and considered" CALPIA's request.

² Decko filled out a grievance form, which Grievants all signed, dated October 1, 2018. (Union 6) That is not the grievance that was ultimately filed.

informed Grievants, or their managers, of the refusal. The grievance before this Arbitrator was filed on April 18, 2019. Its language differs from the earlier grievance form completed by Decko and it is signed by the Union representative. CALPIA did not acknowledge the existence of the grievance at the first or second level. Nevertheless, the Union moved it forward. At the third level CalHR acknowledged receipt of the grievance but never responded to it. The Union timely moved the grievance to arbitration. (Joint 1)

The State argues the Arbitrator must dismiss the grievance as untimely because Grievants did not file it within 30 days of when they first knew they were not receiving IWSP. It is true that they did not file a written grievance within 30 days of knowing they were not getting IWSP. The Union argues, however, that the failure to provide IWSP is a continuing violation, re-occurring each pay period that Grievants are not provided IWSP. The State argues this is not properly considered a continuing violation that would allow it to be filed outside the 30 day contractual time limit. It cites four arbitral decisions to support its position this grievance cannot be considered timely as a continuing violation.

First, it cites *Porterville Developmental Center* (DPA 07-15-0004). Arbitrator D'Orazio found the Union knew Police Officers, rather than Security Guards represented by the Union, had been assigned certain duties for five years before the union filed a grievance. He concluded the "delay in filing the grievance was unreasonable" and found the grievance untimely. Second, in *State Lands Commission* (NB 3239) this Arbitrator found unbelievable Grievants' claimed continuing ignorance of a contractual right to significantly higher pay for eight years. He noted that allowing an 8

year delay in filing a grievance, during which time Grievants made no inquiries about their rights, would vitiate the timeliness provision of the Agreement. Third, in *CalTrans* (CalHr 13-11-001; SEIU 2012-1779) the Grievant requested a pay differential. His supervisor refused it because he did not have the contractually required degree that would make him eligible for the differential. Eight years later, Grievant still did not have the required degree but again asked his supervisor for the differential. He was again refused. This Arbitrator found the continuing grievance theory did not make the second refusal, eight years later, a new “event” that could be timely grieved. Fourth, in *State Water Resources Control Board* (CalHR 14-11-0022/SEIU 2014-1623) a permanent intermittent employee was denied Holiday Pay. Almost two years later the Union filed an “ongoing grievance” on behalf of all Scientific Aids. The Union argued the continuing grievance theory covered this situation. The Arbitrator disagreed.

These cases are instructive about what is not a continuing violation. They are all, however, quite different from this case. Here the delay occurred because CALPIA agreed Grievants were entitled to IWSP and was attempting to get permission to pay the differential. Grievants’ managers told them the central office was working on getting them the differential in September 2018. (Tr. 79:9-80:16) The evidence shows that was true. They were also told they could talk to their union. It would have been prudent to file the grievance before knowing whether CalHR would approve CALPIA’s request to pay them IWSP. Nevertheless, CalHR’s refusal to permit CALPIA to pay them IWSP was the event that occasioned this grievance.

The State has the burden of showing the grievance is untimely. It failed to establish a date when Grievants knew, or should have known, CalHR had denied

CALPIA's request to pay them IWSP. The evidence shows their managers forwarded the question to HR but never heard anything back. There is no evidence CALPIA advised Grievants, or their managers, that CalHR denied its request to pay them IWSP. The Union filed this grievance some four months after CalHR notified CALPIA that it had "thoroughly reviewed" the request from a "statewide perspective" and recommended CALPIA ask CalHR to bargain for contractually entitled AGPA/SSAs to receive IWSP. Before that denial CALPIA was seeking proper authority to pay Grievants the IWSP to which it believed they were entitled. Only after CalHR's denial could Grievants know they were not going to get IWSP. Because the State failed to establish, by any evidence or inference, when Grievants knew or should have known of that occurrence, it failed to prove the grievance is untimely. Given the relatively brief time between the expiration of the time limit and this grievance, reliance on the continuing violation doctrine is not without merit. On that basis, the Arbitrator finds the grievance is timely.

Merits

The Union makes two arguments to support its assertion the State violated Article 11.22.1(A). First, it asserts – without contradiction – that Grievants qualified for IWSP by virtue of their hours of work with multiple inmates on the audit team. Second, it asserts that CalHR is obliged to exercise its contractual right to approve IWSP reasonably. It has promulgated forms and procedures for an agency to request IWSP for employees. Here, the testimony shows, it ignored those procedures and simply refused to allow CALPIA to pay IWSP to qualified Grievants.

The State makes three arguments to support its assertion the Union has failed to show it violated the Agreement. First, it asserts the language of Article 11.22.1(A) specifically makes approval of IWSP subject to CalHR approval. Consequently, refusing to approve IWSP cannot violate the Agreement. Second, CalHR analyzed the potential statewide impact of including the AGPA classification among those that can receive IWSP. It determined the class was so numerous it would have been required to include the potential cost of Article 11.22.1(A) when it submitted the Agreement to the legislature for approval in 1992. Because it “was likely not costed” (Brief, 12:14-15) it would require bargaining to bring that classification under Article 11.22.1(A). Third, contrary to the Union’s argument, this refusal does not show the contractual provision is illusory. CalHR established Pay Differential 67 and has approved some BU 1 members for IWSP. Further, “nothing in the record demonstrates that CalHR has, or can, deny payment of the IWSPD to an employee in an eligible BU 1 classification if they fulfilled the criteria.” (Brief, 14:8-10)

The Arbitrator finds the State violated Article 11.22.1(A) when it denied IWSP for the CALPIA employees on the audit team at CHCF Stockton. CalHR applied its right to approve IWSP in an arbitrary way that rendered the promise of Article 11.22.1(A) illusory. There are three reasons for this finding. First, the State claims it did extensive research into the effects of approving IWSP for Grievants before determining it could not be approved. The evidence does not support the assertion. Buchanan, to the extent she was credible, made it clear she denied approval because of a ukase from Labor Relations. If she did any research, it was not considered in making the decision. Rather, she denied CALPIA’s request solely because Labor Relations told her it was a

“bargaining issue” that CALPIA would have to request be included in the State’s demands in the upcoming bargaining.³

Second, the State’s assertion that granting Grievants IWSP requires bargaining because it has statewide implications lacks any factual basis. CALPIA requested IWSP for a few employees in a specific program at CHCF Stockton. Pay Differential 67 shows that CalHR has previously granted IWSP for specific BU 1 groups, limited to specific correctional facilities. No record evidence supports the State’s assertion granting Grievants IWSP would have “statewide implications.” It appears this is an after the fact justification for an otherwise arbitrary decision. CalHR’s speculation about what did not happen when it submitted the Agreement for legislative approval in 1992, is unpersuasive.

Third, CalHR has established specific criteria for providing IWSP to BU 1 employees that reflect the requirements of Article 11.22.1(A). (Joint 3, p. 001) It promulgated forms for agencies to provide the information CalHR needs to analyze their requests for conformance to those criteria. (Respondent’s 3) These reflect a rational deliberative process for CalHR to use in exercising its approval authority to avoid ineligible BU 1 employees getting IWSP. It did not follow any rational deliberative process in this case. If CalHR can deny IWSP by simply asserting it is a “statewide” or “bargaining” issue, instead of conditioning approval on a deliberative process to enforce the requirements of Article 11.22.1(A), the promise of IWSP is illusory. While there are criteria for IWSP in Article 11.22.1(A), CalHR interprets its approval authority as giving it

³ The assertion that granting IWSP to Grievants who are AGPAs is a “bargaining issue” makes no sense. Article 11.22.1(A) does not include or exclude any classification from its operation. It already gives CalHR the right to approve IWSP for any BU 1 employees who meet the contractual criteria.

the absolute right to deny IWSP to employees who meet the criteria for any reason it chooses. An interpretation that renders contract language illusory cannot be correct. The Union has shown the State violated Article 11.22.1(A) when CalHR arbitrarily denied IWSP for Grievants who met the criteria set forth in that article.

Award

- 1. The grievance is timely.**
- 2. The State violated Section 11.22.1(A) of the 2016-2020 Bargaining Unit 1 Master Agreement when CalHR refused to approve Institutional Worker Supervision Pay for Grievants.**
- 3. The State will make Grievants whole by providing IWSP for each pay period from March 18, 2019 through June 2020 during which they were assigned to the auditing team.**

**San Francisco, California
April 20, 2022**



Norman Brand, Arbitrator