Department of Personnel Administration
Memorandum

TO: Personnel Management Liaisons (PML)

SUBJECT: Bargaining Unit 3 Arbitration Decision on Alternate Work Weeks	REFERENCE NUMBER: 2005-007
DATE ISSUED: 02/01/05	SUPERSEDES:

This memorandum should be forwarded to:

Employee Relations Officers
Personnel Officers

FROM: Department of Personnel Administration
Labor Relations Division

CONTACT: Kathryn Cervantes Peterson, Labor Relations Officer
(916) 324-0476
Fax: (916) 322-0765
Email: KathrynCervantesPeterson@DPA.CA.GOV

As a result of a recent arbitration decision concerning alternate work week (AWW) schedules (attached), departments employing Bargaining Unit 3 rank-and-file employees shall adhere to the procedures outlined below, effective as indicated:

- Effective July 1, 1999, departments could have charged the appropriate hours of leave time for employees on AWW schedules. All departments that have not been charging the appropriate hours for Unit 3 employees on AWW schedules must begin to adjust employees' leave balances beginning January 1, 2005.

- Effective January 1, 2004, the Department of Corrections (CDC) must continue to implement the directive from the Personnel Liaison Unit (Office of Personnel Management) dated January 20, 2004. Questions regarding CDC's implementation should be directed to the assigned Personnel Liaison Unit analyst.

The arbitration decision in DPA No. 02-03-0122 (*California State Employees Association (Olsen) v. Department of Corrections*) involved an Academic Instructor (Bargaining Unit 3) working a 4-10-40 alternate work week schedule. The question in this case was whether to charge the employee ten hours while he was on sick leave or vacation.

The arbitrator decided in the State's favor. Arbitrator Alexander Cohn held that the 1999-2001 Bargaining Unit 3 MOU established formal alternate work weeks under Sections 19.1 B (Hours of Work) and 19.6 (Flexible Work Hours). Section 19.1F.5[1] of the MOU reads, "*FLSA-exempt/excluded employees shall not be charged paid leave or docked for absences in less than whole-day increments.*" Arbitrator Cohn found that "*whole-day increments*" must be interpreted as the number of hours an employee is regularly scheduled to work in a day, e.g., an employee's workday could be either 4, 8, 9, or 10 hours.

[1] DPA's Web site version of the Unit 3 MOU inadvertently omitted the letter "F" denoting the Article 19 subsection "Workweek group policy for FLSA-Exempt/Excluded Employees."

In other words, it has been lawful since July 1, 1999, to charge an employee on a 4-10-40 AWW schedule ten hours when the employee is absent from work for an entire work day.

If you have questions, please contact Kathryn Cervantes Peterson, listed in the Contact section above.

/s/Dave Gilb

Dave Gilb
Chief of Labor Relations

ALEXANDER COHN
Arbitrator - Mediator
P.O. Box 4006
Napa, CA 94558.
(707) 226-7096

IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between **CALIFORNIA STATE EMPLOYEES' ASSOCIATION, SEIU LOCAL 1000,** and **STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS.** Involving a dispute over alternate work weeks; Centinela State Prison; 4/10/40; C. Olsen, Grievant. DPA #02-03-0122	**ARBITRATOR'S OPINION AND AWARD**

This Arbitration arises pursuant to Memorandum of Understanding ("MOU") between the CALIFORNIA STATE EMPLOYEES' ASSOCIATION, SEIU LOCAL 1000, hereinafter referred to as the "Union," and the STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS, hereinafter referred to as the "State" and/or "Department," under which ALEXANDER COHN was selected to serve as sole, impartial Arbitrator and whose decision shall be final and binding upon the parties.

Hearing was held on April 28 and May 12, 2004, in Sacramento, California. The parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits, and for argument. Post-hearing briefs were received on July 15 and 31, 2004, from the Union and State, respectively, and

the matter was submitted.[1]

APPEARANCES:

On behalf of the Union:

MARCIA MOONEY, SLRR, CSEA, 1108 "O" Street, Suite 327, Sacramento, California 95814.

On behalf of the Department:

ROY J. CHASTAIN, Esquire and GREGORY T. LYALL, Esquire, Labor Relations Counsel, Department of Personnel Administration, State of California, 1515 "S" Street, North Building, Suite 400, Sacramento, California 95814-7243.

ISSUES

1. Did the State of California, California Department of Corrections violate Article 19.1 (Hours of Work) and Unit 3 Side Letter #13 (Work Week Group 4C to Work Week Group E or SE Agreement) of Bargaining Unit 3 2002-2003 Memorandum of Understanding when it deducted ten (10) hours of leave credit from [Grievant's] leave bank(s) when [Grievant] took off a scheduled workday while working an alternate workweek schedule?

2. If so, how many hours should be deducted from [Grievant's] leave bank(s) when he takes off a scheduled workday while working an alternate workweek schedule?

3. If the answer to Issue #1 is yes, what is the period of time in which [Grievant] may be afforded a remedy?

---

[1]Pursuant to the agreement of the parties, the Award in this matter was not to be issued until the parties filed their post-hearing briefs on or about December 22, 2004, in the consolidated multi-grievance FLSA-exempt, off-site prep, et al. case.

4. If the answer to Issue #1 is yes, should the remedy be applied to all similarly situated employees (i.e., Bargaining Unit 3 teachers and librarians) working for the California Department of Corrections?

RELEVANT PROVISIONS OF 2002 - JULY 2, 2003 MOU

. . . .

ARTICLE 4 - State's Rights

A. Except for those rights which are abridged or limited by this Contract, all rights are reserved to the State.

B. Consistent with this Contract, the rights of the State shall include, but not be limited to, the right to determine the mission of its constituent departments...; to maintain efficiency of State operations; set standards of service; to determine, consistent with Article VII of the Constitution,... the procedures and standards of selection for employment and promotion, layoff, assignment, scheduling and training; to determine the methods, means and personnel by which State operations are to be conducted; to take all necessary action to carry out its mission in emergencies; to exercise control and discretion over the merits, necessity, or organization of any service or activity provided by law or executive order. The State has the right to make reasonable rules and regulations pertaining to employees consistent with this Contract, provided that any such rule shall be uniformly applied to all affected employees who are similarly situated.

. . . .

ARTICLE 6 - Grievance and Arbitration Procedures

. . .

6.7 Formal Grievance - Step 1

If an informal grievance is not resolved to the satisfaction of the grievant, a formal grievance may be filed no later than twenty-one (21) calendar days after employee can reasonably be expected to have known of the event occasioning the grievance.

. . .

6.11 Formal Grievance - Step 4

. . .

E. The arbitrator shall not have the power to add to, subtract from, or modify this Contract. Only grievances as defined in Section 6.2 (A) of this Article shall be subject to arbitration. In all arbitration cases, the award of the arbitrator shall be final and binding upon the parties.

. . . .

ARTICLE 19 - <u>Hours of Work and Overtime</u>

19.1 Hours of Work

A. Unless otherwise specified herein, the regular workweek of full-time employees shall be forty (40) hours Monday through Friday, and the regular work shift shall be eight (8) hours.

B. Workweeks and work shifts of different numbers of hours may be established by the employer in order to meet varying needs of the State agencies.

C. Employees' workweeks and/or work shifts shall not be permanently changed by the State without adequate prior notice. The State shall endeavor to give thirty (30) calendar days, but in no case less than fifteen (15) calendar days notice.

D. The State shall endeavor to provide employees with at least five (5) working days advance notice of a temporary change in their workweek hours and workday. This advance notice is not required if:

1. The change is due to an unforeseen operational need;

2. The change is made at the request of the employee.

E. Classifications are assigned to the workweek groups as shown in the List of Classifications attached to this Contract.

F. Workweek group policy for FLSA-Exempt/Excluded Employees:

State employees who are exempt/excluded from the FLSA are not hourly workers. The compensation they receive from the State is based on the premise that they are expected to work as many hours as it is necessary to provide the public services for which they were hired. Consistent with the professional status of these employees, they are accountable for their work product, and for meeting the objectives of the agency for which they work.

Following is the State's policy for all employees exempt/excluded from the FLSA:

1. Management determines, consistent with the current Contract, the products, services, and standards which must be met by FLSA-exempt/excluded employees;

2. The salary paid to FLSA-exempt/excluded employees is full compensation for all hours worked in providing the product or service;

3. FLSA-exempt/excluded employees are not authorized to receive any form of overtime compensation, whether formal or informal;

4. FLSA-exempt/excluded employees are expected to work within reason as many hours as necessary to accomplish their assignments or fulfill their responsibilities and must respond to directions from management to complete work assignments by specific deadlines. FLSA-exempt/excluded employees may be required to work specific hours to provide services when deemed necessary by management;

5. FLSA-exempt/excluded employees shall not be charged paid leave or docked for absences <u>in less than whole day increments</u>. Less than full-time employees shall be charged time proportionate to their scheduled hours of work. Record keeping for accounting, reimbursements, or documentation relative to other applicable statutes, such as the Family Medical Leave Act, is permitted. (Emphasis added)

For Unit 3 employees: Partial day absences for medical appointments should be scheduled during non-student contact time unless otherwise authorized by management;

6. FLSA-exempt/excluded employees shall not be suspended for less than five (5) days when facing discipline;

7. With the approval of the appointing power, FLSA-exempt/excluded employees may be allowed absences with pay for one or more whole days due to excessive workload or other special circumstances without charging leave credit.

8. Subject to prior notification and management concurrence, FLSA-exempt/excluded employees may alter their work hours. Employees are responsible for keeping management apprised of their schedule and whereabouts. Prior approval from management for the use of formal leave (e.g., vacation, sick leave, personal leave, personal day) for absences of an entire day

or more is required.

For Unit 3 employees: Partial day absences for medical appointments should be scheduled during non-student contact time unless otherwise authorized by management.

. . .

19.6 - Flexible Work Hours

A. Upon request by the Union or an employee, the State shall not unreasonably deny a request for flexible work hours, an alternate workweek schedule or reduced workweek schedule. Employees who have flexible work hours or are placed on an alternate workweek or reduced workweek schedule will comply with procedures established by the department.

. . .

C. An "alternate workweek schedule" is a fixed work schedule other than standard work hours. "Flexible work hours" allows for the change of work schedules on a daily basis. "Reduced work time" is defined in Government Code Sections 19996.20 through 19996.29.

. . .

. . . .

RELEVANT PROVISIONS OF UNIT 3, SIDE LETTER #13

. . .

1. In the current agreement between the parties (7/1/99 to 7/2/01), the parties agreed to place all Unit 3 employees in workweek group 4C.

2. Section 19.1, Paragraphs A through D, generally describe hours of work for State employees. However, Section 19.1, Paragraph F, Workweek Group Policy FLSA - Exempt/Excluded employees specifically describes the provisions of the workweek group designation specified in 1. above.

3. In February 2000, in order to be consistent with the structure of the Fair Labor Standards Act (FLSA), the Employer changed the name of the workweek group 4C to either E or SE.

4. However, in Unit 3, all employees designated E or SE remained covered by Section 19.1, Paragraph F, regardless of E or SE designation.

5. The parties agree that clarifying the existing provisions of the Unit 3 contract in Article 19, Hours of Work and Overtime, will be a priority during successor contract negotiations.

6. The Employer shall distribute this Agreement to all affected departments within ten days of signature by the parties.[2]

. . . .

FACTS[3]

Background

Grievant, an academic instructor and Union Steward at Centinela State Prison ("Centinela"), has worked a 4/10/40 schedule since the start of his employment, March 19, 1997, through the first date of this arbitration. He teaches adult basic education for individuals with a reading ability between the 7th and12th grades. His class schedule on Wednesday is from 12:00 to 3:00 p.m., and on Thursday, Friday, and Saturday, from 6:45 a.m. to 3:30 p.m.

Beginning in 1999, when Bargaining Unit 3 ("U3") teachers were made FLSA-exempt, the State continued its practice of deducting 10 hours from Grievant's leave bank for scheduled days off, but Grievant was no longer allowed to accumulate excess hours worked to put into his leave bank.[4] On August 30, 2002, Grievant filed a grievance alleging that the State violated Articles 19.1 and 22.1 of the MOU[5] and requested the

restoration of 2 hours leave credit for every full-day leave where the employee was

[2]The Side Letter signed March 2, 2001.

[3]Because much of the evidence in this case is the same as a portion of that presented in the Statewide FLSA case between the State and the Union, also before this Arbitrator, the parties agreed to present exhibits and testimony from the Statewide case as direct evidence in this matter.

[4]On the second day of hearing, the Union clarified that, at the time the grievance was filed, the State was not charging 4/10/40 employees additional hours for holiday leave time. The Union maintained its position that the State should not charge 4/10/40 employees more than 8 hours a day in any situation.

[5]The language of Article 19.1 of the 2002 MOU (effective 1/31/02 to 7/2/03) is almost identical to

///

charged 10 hours leave credit.[6] The grievance was denied and the case proceeded to arbitration.[7]

Bargaining History: Article 19.1

The bargaining history for Article 19.1 comes from negotiations for the 1999-2001 MOU and is quite extensive. The testimony shows that Article 19.1 was discussed at the master table during negotiations in 1999; that Frances Low, Senior Labor Relations Officer, was the chief negotiator for the State; that J.J. Jelincic, Investment Officer II with the California Public Employees Retirement System, was the Union's chief spokesperson for Article 19.1 at the master table; that the parties at the master table agreed to use the existing Bargaining Unit 4 (Unit 4) contract as the basic starting point[8]; that the Union's first proposal deleted Section 19.1.B., but only for the purpose of eliminating the State's unilateral right to establish different workweeks and work hours; that this same proposal included the State's right, with the Union's mutual agreement, to establish "work weeks, work shifts or work schedules of a different number of hours"[9]; and, that the State rejected the mutual agreement provision and the parties agreed to language establishing the State's unilateral right to establish work schedules.[10]

With regard to whether or not Sections A through D of Article 19.1 were

---

Article 19.1 of the 1999 MOU (effective 7/1/99 to 7/01).

[6]See, JX 2.

[7]Despite the fact that Grievant filed previous grievances on this issue that may have had procedural flaws, the parties stipulated that the grievance underlying this arbitration was timely and that all prior steps of the grievance and arbitration procedures were met or waived.

[8]Jelincic testified that he is not aware of any FLSA-exempt employees in Unit 4.

[9]See, JX 3 (Statewide case, JX 8A).

[10]See, JX 31 (Statewide case, JX 81).

intended to apply to U3 employees after they became FLSA-exempt/excluded, the bargaining history shows that U3 employees were hourly employees, neither FLSA-exempt nor excluded, until shortly before the conclusion of bargaining; that Jelincic testified that when the tentative agreement for Article 19.1 was signed, the teachers were not FLSA-exempt[11]; that after the teachers became FLSA-exempt, the State did not attempt to renegotiate Section 19.1; that, based on discussions at the bargaining table and between the parties, he believes that subsections A through D do not apply to FLSA-exempt employees; and, that subsection F is the State's policy for FLSA-exempt employees, but Subsection A's statement that the regular workweek of full time employees shall be 40 hours does not apply to FLSA-exempt employees.

Low testified that the parties discussed the interrelationship between the provision of 19.1.A. that the regular workweek was 40 hours, Monday through Friday, and the language in 19.1.F. that employees will work as many hours as necessary to perform the job; and, that it was discussed that the regular workweek applied to everybody who was covered by the Contract, but that it was just the basis, and could be more for an exempt employee.

Jelincic testified that Section 19.1.F.5. of the Union's initial proposal attempted to give FLSA-exempt employees discretion to establish their own work hours, using language from a "Work Policy for FLSA Exempt Employees", previously issued by the

[11] Jim Hard, Employment Program Representative with the Employment Development Department, was chief negotiator for the Union during negotiations for the 1999 MOU. Hard testified that neither the State nor the Union made a proposal at the master table to make teachers FLSA-exempt; that at the very end of negotiations, on September 8, he met with Marty Morgenstern, Director of DPA, and Andy Hsia-Coron, Academic Instructor with CDC and BUNC Chair for U3, to discuss the major sticking points of the U3 contract; that Hsia-Coron raised, again, the possibility of off-site prep for teachers; that Morgenstern agreed, with the condition that teachers would become FLSA-exempt, and that this would mean that the teachers would not get overtime and it was an average 40-hour workweek; and, that Hard and Hsia-Coron agreed.

State[12]; that the State objected to this, saying that the nature of some jobs required that an employee be there at set times, giving examples such as officer of the day, employees with hearings and scheduled classes, and employees in training; that with regard to whether the State expressed an intent to have FLSA-exempt employees keep regular work hours, it depended on the nature of the job and whether the employee was hired for that purpose; and, that the Union agreed to the language proposed by the State regarding specific work hours, and that the examples given were for officers for the day, and employees who had hearings or classroom times.

Low testified that around September 2, it was determined that teachers were not called FLSA-exempt, but should be called excluded[13]; that FLSA changed their status[14]; and, that when they determined they were going to add teachers to Section 19.1.F., the only effect on the other portions of Article 19.1 was that the teacher's workday was different from the other employees because they had classroom time, core hours that they were expected to be in the classroom, so they put in the language to address partial day absences[15]. With regard to the discussion concerning the

[12]See UX 4, Attachment A (Statewide case, UX2).

[13]It was at this point that the State changed its Section 19.1.F. proposal to refer to "FLSA-exempt/excluded employees" rather than "FLSA-exempt employees". See, JX 3G, dated 9/2/99, 7:10 p.m. (Statewide case JX 8G).

[14]When questioned about whether the negotiators ever expressed that U3, an hourly pay group, was going to become excluded like other teachers, Low stated that the teachers were hourly employees prior the 1999 contract and became salaried on the date of the tentative agreement, and were excluded pursuant to the FLSA.

[15]The language referred to is the second paragraph of 19.1.F.5.:

> For Unit 3 employees: partial day absences for medical appointments shall be scheduled during non-student contact time unless otherwise authorized by management.

See, JX 3G (Statewide case JX 8G).

This sentence (other than the designation "For Unit 3 employees") was first proposed by the State on 8/26/99. Low testified that, as discussed, this language was directed toward teachers, because it would be difficult to break up the period of time they were supposed to be with students, and,

change to "exempt/excluded employees", Jelincic testified that the State said that it wanted to make the term broader; that the State explained that there were exempt and excluded employees other than just 4C, and that they were working on changing workweek groups and wanted to be sure the term covered everybody who was exempt or excluded; and, that the State did not explain that the term would include all teachers in U3.

On March 2, 2001, DPA and the Union entered into an Agreement (hereinafter referred to as the "3/2/01 Agreement"), in which the parties clarified that U3 employees remain covered by Section 19.1.F. of the 1999 MOU, regardless of E or SE designation.[16] This Agreement was incorporated into the 2002 MOU as Side Letter 13.

Gloria Moore Andrews, DPA Chief of Labor Relations, testified that she developed the language of the 3/2/01 Agreement in conjunction with Kathryn Cervantes Peterson, Labor Relations Manager for the Department, and, for the Union, Ron Landingham, Hsia-Coron, and Keith Wimer; that this document was intended to resolve an outstanding issue for U3, which was whether U3 employees were WWG 4C or WWG E/SE employees, and whether there was a difference between these designations; that DPA's position was that although it had redesignated 4C employees to E/SE, there was no change in the provisions of the contract; that some Union

---

that the discussion addressed the difficulty of disrupting the school day, especially in Corrections, where students must be sent back to their cells. Jelincic testified that when the State first proposed this language, it said that it was for the special schools because they wanted these teachers to make their appointments early in the morning. Low further testified that this language was not added to prevent confusion, due to the fact that special schools teachers were considered exempt from civil service, but because these terms are used under FLSA.

[16]"SE," which denotes "statutorily excluded" and "E," which denotes "exempt," replaced WWG4C effective February 1, 2000. DPA Pay Letter 00-05, issued February 1, 2000, lists Teachers and Vocational Instructors as those removed from WWG4A to WWGSE, and Librarians from WWG4A to

members were of the opinion that when the State moved them to E/SE, they thought something had been taken away from them, when, in fact, nothing had; and, that Landingham had told her that it would help if she could clarify that WWG 4C and WWG E/SE were the same thing.

Moore Andrews also testified that she went over every paragraph with the Union; that the State's initial proposal did not include paragraph 2; that Hsia-Coron said the Union would like language that said that subsections A through D did not apply to them; that Moore Andrews responded that she was hesitant to do something like that, because subsections A through D apply to all state employees, as a carry-over from the old Government Code providing that how many hours full-time employees work; that she told him that it applied to her, even though she has an administrative exemption; that subsections A through D, in some version, have been present in most collective bargaining agreements since 1982; that paragraph 2 was not intended to say that these subsections did not apply to U3 employees; and, that paragraph 4 reinterated that, regardless of the change in title of WWG, paragraph F continues to apply to U3 employees.

Hsia-Coron testified that he told Moore Andrews that MOU Article 19.1, paragraphs A through D, did not apply to U3 members; that in response, the State agreed to put in paragraph 2; that he does not recall Moore Andrews saying that U3

WWE. See, JX 4.

employees were still covered by A through D and had a 40-hour workweek; and, that if she had said that, he would have come up with another paragraph expressly stating that teachers were not 40-hour workers.

The Grievance

Grievant has worked a 4/10/40 schedule, consisting of 4 10-hour days, since his first day of employment. He testified that he did not volunteer for this schedule, but was assigned it; that he had set work hours from 6:30 a.m. to 5:00 p.m.; that, prior to being FLSA-exempt, if he took a day off he was charged 10 hours sick leave or vacation leave; that if he worked over 40 hours a week, he received overtime pay at a rate of time and a half of his hourly rate; that if a State holiday fell on a day that he was scheduled to work, he had to make up an additional 2 hours from vacation or accumulated holiday credit; and, that he earned excess time.[17]

According to Grievant, after becoming FLSA-exempt pursuant to the MOU, he did not continue to earn excess time. He testified that, at that point, he had more than 40 hours of surplus time; that he was told that the excess time would be placed in his leave bank and he could use it as vacation or accrued holiday credit; that he was charged 10 hours for one day of sick leave or vacation leave; that he filed a grievance in 2002 because he did not want to be charged an extra 2 hours for scheduled time off[18]; that he listed Patrick Clark, Senior Labor representative for U3, as the representative; and, that neither Clark nor any other Union staff member helped him write the grievance, but when he informed Clark that he was filing the grievance, Clark

[17]Grievant testified that excess time resulted from the fact that the state had pay periods that varied from 160 to 178 hours, based on an 8-hour day schedule; that 4/10/40 employees might work 190 hours during one period, which exceeds the 8-hour standard, but they might work less than the 8-hour standard the next month, and would accumulate either a surplus or deficit of hours for that pay period; and, that the hours did not even out throughout the year.

told him to put Clark's name down because Clark would be the one handling it at DPA headquarters.

Grievant also testified that he based the grievance on a memorandum issued by C.A. Terhune, Department Director, stating that:

> Consistent with the salaried nature of WWG 4C employees, employees shall not be charged and shall not have any paid leave absences recorded in less than or more than 8-hour increments or comparable full day increments if fractional[19];

that he had filed three similar grievances at the local level before 2002, where they were denied, and once they were received at the area office, they stayed there[20]; and,

---

[18]See, JX 2.

[19]The 2 ½ page memorandum, dated December 13, 1999, is addressed to "Wardens" and states:

> In accordance with the [DPA's] interpretation of the [WWG] system, the teachers, instructors, librarians, and senior/supervising librarians are viewed as exempt under the [FLSA] and are assigned to WWG 4C.

Employees appointed to WWG 4C classifications, such as [U3] employees, are compensated as salaried employees, not hourly workers. Specifically, the compensation they receive is based on the premise that they are expected to work as many hours as necessary to provide the public services for which they were hired. Unless otherwise specified, the regular work week for full-time employees shall be 40 hours, Monday through Friday, and the regular work shift shall be 8 hours. Thus, the current established work schedule remains the same. ...

* * *

Consistent with the salaried nature of WWG 4C employees:

1. **Employees shall not be charged for and shall not have any paid leave absences recorded in less than or more than eight-hour increments** (or comparable "full day" increments if fractional). (Emphasis added)

2. Employees shall not be disciplined by a suspension of less than 5 days.

3. Staff working alternate work schedules (i.e., 4-10-40) shall accrue 8 hours of holiday credit for holidays falling on their regular day off (RDO). Staff who are ordered to work on a holiday, which does not fall on an RDO, shall receive holiday credits for the number of hours worked – up to a maximum of 8 hours.

See, JX 10.

[20]At the conclusion of the hearing, the Union submitted a grievance dated 3/9/01, on this same issue, on which "CSEA" was the name listed as Grievant. The parties stipulated that if Grievant were re-called to testify, he would testify that he filed this grievance on March 9; that it was responded to at the first and second levels, but he is not sure if it reached the third level; and, that if Jan Sale, Assistant Deputy Director for Labor Relations, was re-called to testify, she would testify that it did not reach her

that he listed only his name where it says, "Grievant's name," but he thought he was filing on behalf of all teachers who were on the 4/10/40 schedule, because he asked for time to be returned to anyone in the same situation.

Grievant further testified that some Centinela teachers work a 5/8/40 schedule, or 5 8-hour days; that when he takes a regularly scheduled day off ("RDO"), he misses 10 hours of work, or 25% of his workweek; that when a 5/8/40 employee takes a day off, that employee misses 8 hours, or 20% of his workweek; that it is not inequitable for a day off to be charged as 25% of one employee's schedule and charged as 20% of another employee's schedule, because employees are never treated the same; that if he takes 5 days off sick, 50 hours of his sick leave is used, but if a 5/8/40 employee takes 5 days off sick, 40 hours of their sick leave is used; and, that if he takes a week off, he is taking 40 hours of time off and 40 hours of leave should be deduced from his leave bank.

Grievant testified that as job steward, his duties are to have a good understanding of the contract, to represent employees when they are having problems, to protect the contract, and to pursue violations of the contract; that he received 4 or 5 days of training for this position, and did not hear of class action grievances until after the Statewide FLSA grievance was filed, about 4 or 5 years ago; that he is familiar with the State's rights clause; that in 1999, he was not a member of the Bargaining Unit Negotiating Council ("BUNC"); and, that he is familiar with the 1999 and 2001 (presumably 2002) contracts.

Grievant further testified that he should be treated differently from 5/8/40 employees because he works differently; that his grievance does not address the 2-

---

level. See, UX 8.

hour charge for holidays[21]; that his main focus in writing the grievance was the interpretation of FLSA as it applied to alternate work schedules; and, that based on his reading of the PML, formal workweeks were abolished[22].

Jerri Judd, Personnel Manager in the policy and operations division at DPA, reports to the Chief of the Policy and Operations Division, who in turn reports to the Director of the DPA. She has served in this position since 1981 and currently supervises 13 staff. As part of her duties with regard to leave administration, she is responsible for responding to departments on any questions on workweek group ("WWG") designations, FMLA and FLSA. Prior to this, she worked as a personnel specialist at the State Personnel Board.

Judd testified that WWG 1 existed prior to the FLSA, and WWG 2 was established around 1994, when the State came into compliance with FLSA, for covered employees; that WWGs 4A and 4C existed prior to the FLSA; that WWG 4C

---

[21]The Union clarified that it was not pursuing this issue.

[22]See, UX 2, Personnel Management Liaison memoranda (PML) 94-32" (hereinafter "PML 94-32"), issued by DPA and dated June 2, 1994. The memorandum states that it is intended to assist in "implementing the Work Policy for FLSA Exempt Employees for WWG 4C employees who are either excluded from collective bargaining or represented by [CSEA]" and includes an attachment in question and answer format:

2. May employees continue to work alternate work schedules such as a 4/10/40 or a 9/80?

While these types of work schedules must be discontinued on a formal basis for 4C employees thereby precluding the earning of "excess time", the work schedule flexibility of salaried employees clearly allows a variety of work schedules mutually acceptable to the employee and the supervisor.
7. Does a full-day absence always equal 8 hours or does it vary?

For full-time employees eight hours equals a full day absence. For employees with less than a full-time base, a full day will be calculated on the number of hours that is equivalent to the employee's time base; e.g., 3/4 time equals 6 hours, ½ time equals 4 hours, etc. This is true even if the employee is working a schedule other than a 5/8/40 (see number 2 above). (Emphasis added)

See also, UX 3, PML 95-014, dated 4/11/95, which applies the FLSA to employees exempt from civil service. The memo reiterates that "formal individual agreements between departments and 4C regarding alternative work schedules must also be terminated", and attached the "Work Policy for FLSA-Exempt Employees" that was originally set forth in the 1994 settlement agreement, discussed below .

was for employees exempt from or not covered by FLSA; that WWG 4C was used until the State restructured in 2001 to WWG E; that MOUs after the 90's referred to WWG 4A; and, that DPA has not yet asked to change its rules, which will require a public hearing, to refer to WWG E and SE.

Judd also testified that she worked with Betty Gildersleeve, former Department Manager of Personnel Liaison, for almost 30 years; that a memorandum from Gildersleeve dated November 29, 1995, was an accurate reflection of the practice of debiting leave time for employees[23]; that the State's FLSA manual is published on its website, but has not been updated since the 1990s[24]; that the DPA Policy and

---

[23]The memorandum states that it is confirming a previous discussion between Gildersleeve and Judd:

> **WWG 4C Employees:**
>
> As you stated, it is the intent of the ... DPA that full time WWG 4C employees are *NOT CHARGED LESS NOR MORE THAN EIGHT HOURS* of leave for one workday. This includes full-time WWG 4C employees who may work less or more than an eight hour day on an irregular schedule and those who may be on a fixed schedule such as 4/10/40, 9/8/80, etc.
>
> The daily *MINIMUM AND MAXIMUM* of debited leave for any full-time WWG 4C employee will be eight hours.
>
> **WWG 1, 2, and 4A Employees:**
>
> It is the intent of DPA that full-time WWG 1, 2, and 4A employees are *CHARGED LEAVE FOR WHATEVER HOURS THEY ARE NORMALLY SCHEDULED TO WORK ON A WORKDAY*. The includes 4/10/40 schedules for which leave is debited at 10 hours per workday, 9/8/80 where leave is debited at 8 or 9 hours per workday, or any other schedule the employee may be on.

See, UX 7 (emphases in original)

[24]See, UX 1. In the section on white-collar exemptions, which includes teachers as professional employees, the Manual states:

> In order to be considered for exemption under the "White Collar" exemptions described below, all employees, with the exception of certain professional employees, must meet the so called "salary test". ...
>
> Based on the 9th circuit Federal appeals court rulings and/or [DPA's] current policy determinations, any one of the following conditions undermines the salary test:
>
> (a) Docking for absences of less than a day.
> (b) Charging paid leave for absences of less than a whole day. A whole day is based on the

Operations division publishes the manual, and that she could be assigned the responsibility of updating the manual; that PML memos are state policy and posted on the state website; that an employee on an alternate workweek schedule may not work the same number of hours in a month as an employee on an 8-hour schedule; that excess time applies to employees who work part-time or on an alternate work schedule and reflects either an excess or a debit of hours from 40 hours per week; and, that she did not know whether employees on an alternate workweek schedule could work less hours a month.

According to Judd, the Department's academic teachers were WWG 4A employees until they were changed to SE employees. She testified that academic teachers were never 4C employees; that she got this information from the civil service pay scale file from the state controller's database; that, at the time of the Gildersleeve memo, they were addressed as Group 4A employees[25]; that DPA Rule 599.703.1 refers to WWG 4C[26]; that the new classifications of E and SE are defined in the bargaining unit agreements, which do not have to go through the regulatory process, and in the state civil service pay scales; that she has not seen any references to "SE"

---

employee's time base. Thus, a full-time employee has an 8-hour day, a 3/4 time employee has a 6-hour day, and a ½ time employee a 4-hour day. **An employee working an alternative workweek such as a 4/10/40 or 9/80 is on a full-time time base and thus a whole day is 8 hours regardless of whether the employee works a 9 or 10-hour day**. (Emphasis added)

...

[25]Judd testified that a 9/8/80 schedule reflects a 2-week period in which employees work one 8-hour day and the remainder 9-hour days.

[26]Rule 599.703.1, found in Article 6, Overtime, reads:

> (A) Excluded employees in [WWG] 4C and those excluded employees in [WWG] 4D who are not compensated for overtime at 1 ½ times their hourly salary rate, shall not have their salary reduced (docked) for absences of less than an entire day.

See, JX 11.

in the U3 MOU[27]; and, that she has seen, but was not a party to negotiating, the 3/2/01 Agreement.

The parties stipulated that U3 employees worked under Agreements running from 1992-1995, March 1999 to June 1999, June 1999 through 2001, and, currently, January 31, 2002 through July 2, 2003.

Randy Fisher, the Department's Labor Relations Manager, testified that Section 19.1(e) of the 1992-95 Agreement provided that WWG 4C employees shall not have their salary reduced for absences of less than one day[28]; that at that time, teachers were not in WWG 4C; that about 2 years ago, under the current contract, R.J. Donovan administrators wanted to change a 4/10/40 schedule that applied to some of their employees; that he directed the Department to send a notice to the Union and he held discussions about impacts with respect to that change; that the Union wanted to maintain a different alternate work schedule; and, that the Department withdrew its notice and stopped the negotiations for budget and other reasons.

Fisher further testified that sections 19.1.B and 19.6 of the Contract authorize alternative workweek schedules[29]; that the alternative workweeks used by the Department are formalized; that when DPA issued PMLs in the mid-1990s to eliminate formal alternative workweek schedules, this did not apply to teachers because they were not in that workweek group at that time; that these PMLs are still not applicable to U3 employees because the Department has formalized alternate work schedules and the PMLs deal with employees who have no formalized alternate work schedules;

---

[27]Judd testified that WWG SE is specific to teachers, doctors, and attorneys, and that WWG E refers to those who are not covered by FLSA classifications.

[28]See, JX 20.

[29]See, JX 1.

that in addition, the PMLs were not intended to deal with the uniqueness of U3 teachers; and, that in his opinion, contract language that conflicted with a previously issued PML would supercede the PML or any previous policies, memos, or MOUs if the language had changed.

Fisher testified that in 1994, teachers were in WWG 4A and were considered hourly employees; that the teachers became WWG 4C employees when the 1999 MOU came into effect, and then became SE employees; and, that, according to the Contract, the appropriate remedy period for the grievance is 21 days from the date the grievance was filed.

According to Fisher, prior to his assignment, Cervantes Peterson was the DPA employee assigned to U3. He testified that the teachers went from 4A to 4C at the end of negotiations two contracts ago, with Gerry Radeleff; that he was at the Department of Education when the teachers moved from 4A to 4C; that paragraph 5 of the 3/2/01 Agreement was intended to move the teachers from 4C to E and SE, but that he was not present at those discussions; and, that he has seen the January 24, 1994 Settlement Agreement,[30] but at that time he was working at the Department of Food

---

[30]The document was offered only as evidence of bargaining history. It is a settlement agreement between DPA and CSEA, and states that it is intended to settle disputes concerning the meaning of flexible work schedules for "represented employees in [WWG] 4C and 4D7". The Agreement states:

* * *

> 2. It is the understanding of the parties that the document titled "Work Policy for FLSA Exempt Employees," Attachment "A" hereto, shall become the adopted policy for all FLSA exempt State employees. As it applies to the bargaining units involved in this case, i.e., CSEA bargaining units 1, 3, 11, 20 and 21, the language of this policy shall be incorporated into the existing [MOU] in these bargaining units and shall supersede existing [WWG] definitions for 4C and 4D7 under these various MOUs and existing pay scales. All other language in these MOUs, however, remains in effect.

* * *

9. **Nothing** contained in this Settlement Agreement **shall be considered as binding precedent by the parties in any subsequent dispute concerning this issue or similar issues**. (Emphasis added)

* * *

and Agriculture, which does not employ teachers.

Fisher also testified that, when he says the Department has a formalized 4/10/40 alternate workweek schedule, he means that based on the nature of the work, the employees are required to work a specific schedule; that the institution issues the work schedules to the employees, but there are no individual contracts with employees; and, that he does not know if these schedules were negotiated in the past with the Union.

Sale has worked for DPA or a State Labor Relations Office since 1985, and currently manages the labor relations shop of about 14 staff. Sale testified that she agreed with the third level response denying the instant grievance, issued in her name[31]; that Section 19.1.F.5. of the MOU provides that you cannot deduct for less than a full day; that Sections 19.1.B. and 19.6 refer to alternate workweeks; that the PMLs that discuss WWG 4C do not apply to academic teachers because they were written prior to teachers being included in 4C; that when the PMLs were written, the practice was that a teacher on a 4/10/40 schedule would be charged 10 hours for taking a full day leave; that Sections 19.6 and 19.1 continue this practice, because

---

Attachment "A" is titled, "Work Policy for FLSA Exempt Employees", and includes the following statement:

> State employees who are exempt from the FLSA are not hourly workers. The compensation they receive from the State is based on the premise that they are expected to work as many hours as is necessary...

* * *

6. Consistent with the salaried nature of FLSA exempt employees, these employees:
   a. Shall not be charged any paid leave for absences in less than whole day increments. ...

See, UX 4 (Statewide case UX 2)..

[31]The third level response states, "FLSA exempt/excluded employees shall not be charged paid leave or docked for absences in less than whole-day increments. ... In this case, a "whole-day" increment would be 10 hours. As a result, charging 10 hours paid leave for an absence of a whole day is appropriate for an Academic Instructor working a 4-10-40 schedule and does not represent a violation

Section 19.6, which authorizes alternate work schedules using Departmental policies and procedures, supercedes the PML; that their policy is to charge 10 hours; that charging 5/8/40 and 4/10/40 employees 40 hours for taking 5 days and 4 days off, respectively, is to treat each the same, because both were charged 40 hours for taking a full work week; and, that charging a 4/10/40 employee 50 hours for taking off 5 scheduled workdays is not disparate treatment because the 5th scheduled work day is in the next work week.

Sale also testified that prior to 1999, a U3 teacher working a 4/10/40 schedule had the ability to earn excess time; that these teachers no longer have this ability; that although the Contract contains nothing to give them the authority to eliminate excess time, the Department derived the authority to do this from the fact that U3 employees were no longer hourly employees, but salaried, and so there was no need for excess deficit; that she had not seen PML 94-32 or its statement that alternate work schedules such as 4/10/40 must be discontinued on a formal basis for 4C employees[32]; that she knows of no other document that discusses discontinuation of excess time as a 4C employee; that she knows of no other time the issue of deducting 8 hours for a 10-hour absence has come up at the Department, for any employees; and, that she does not know whether the instant grievance is the first that the Department has received in regards to this issue.

The parties stipulated that Minerva Cullors, supervisor of the correctional education program at Centinela, would testify that some of her teachers work 5/8/40 schedules, including the same class as that taught by Grievant, and that Grievant has

---

of the FLSA or the MOU." See, JX 2.

[32]See, UX 2.

never requested a change to the 5/8/40 schedule; that all teachers at Centinela were changed to a 5/8/40 schedule effective Monday, May 3, 2004; that the teachers were notified of this change as early as January 2004; that on January 23, Grievant, as Union steward, wrote a letter to the warden arguing against the change, and stated, "Plus many of these teachers only took the job because of 4/10/40 shift and consider it to be a condition of employment"[33]; and, that Grievant filed a grievance on August 12, 2000, 18 days prior to the instant grievance, in which he filed on behalf of all U3 members, not under his name[34].

Brigid Hanson, Assistant Director for the California Youth Authority ("YA"), has been involved in labor relations for 9 years, 4 years with teachers in U3 during stints with the Departments of Education, Corrections, and YA. Hanson testified that she sat at the master table during negotiations with the Union about 3 years ago when Frances Low was the negotiator; that the topic being discussed was Section 19.1, Hours of Work, including subsection F.; that some Union members asked, "what do you do when you have staff on formal or informal alternate workweek schedules?"; that the question was general and not specific as to salaried or hourly employees; that Low said they took the hours of work scheduled; that the Union members said that was not true, and some departments do it less, some do it more; that the question was then posed to the department representatives at the front, who stated that they took the hours worked on an alternate work schedule, for example, they took 9 or 8 hours for employees on a 9/8/90 schedule and 10 hours for employees on a 4/10/40 schedule; that the departments responding were the Department of Developmental

[33]See, SX 1 (date of January 23, 2003 is presumably intended to be 2004).
[34]See, SX 2.

Services, Corrections, YA, and the Franchise Tax Board; and, that the Union disagreed with the practice, and then moved on to the next topic.

California Civil Service Pay Scales, 2000/2001 51st Edition (undated, although revised 8/31/00), provides definitions for WWGs, including SE (Attorneys, Physicians, Teachers), which states:

> If the provisions of this definition are in conflict with the provisions of a collective bargaining agreement, the collective bargaining agreement shall be controlling.
>
> [WWG] "SE" applies to classes and positions with an average work week of 40 hours. The regular rate of pay is full compensation for all time that is required for the employee to perform the duties of the position. However, these employees shall receive up to eight hours of holiday credit when ordered to work on a holiday. Hours of work in excess of the average work week are not compensable, and shall not be deemed overtime. If an employee is not required by the appointing power to work a normal workday or part thereof, the employee nevertheless shall receive the regular rate of pay without deduction for the entire pay period.
>
> For rank and file employees, refer to the appropriate collective bargaining agreement for specific provisions that may otherwise be addressed and not contained in the above [WWG] definition.[35]

POSITION OF UNION

The grievance should be sustained and Grievant and all similarly situated employees made whole for any loss of leave time due to the State's violation of Article 19.1 (Hours of Work) and U3 Side Letter #13. The last item negotiated for the 1999 MOU was that U3 teachers and librarians would be allowed off-site preparation and, in conjunction, would be treated as exempt from the overtime provisions of the FLSA. With this change from hourly to salaried status, U3 employees automatically were assigned to WWG 4C, which has long consisted of salaried workers exempt from the

FLSA with no minimum or maximum weekly hourly requirement.

The policy for FLSA-exempt employees, as consistently stated and practiced in MOU Section 19.1.F.5. and underlying policies, has been to charge FLSA-exempt employees neither more nor less than 8 hours leave time for an absence of one full workday. The State knowingly violated this policy in its treatment of Grievant and **all** employees working alternate schedules required by the State.

The State's policy toward 4C or FLSA-exempt employees, has been consistent for many years. Because of the State's unfortunate lack of one comprehensive document establishing the salary terms for WWGs, the terms and conditions applicable to WWG 4C are located in DPA rules, PMLs and the DPA FLSA Manual. The PMLs were promulgated to clarify the treatment of WWG 4C employees after the State and the Union agreed to a side letter in 1994 which settled numerous grievances concerning flexible work schedules for WWG 4C and 4D7 employees.[36] They set forth the "work policy" for FLSA-exempt employees. The policy attached to the side letter was incorporated into the 1999 MOU as 19.1.F., and, as testified to by Jelincic, the intent was not to change the previous practices for FLSA-exempt employees. The MOU, PMLs, and FLSA Manual combine to create the policy adopted and practiced by the State for its FLSA-exempt employees.

Despite its scattered nature, the State's policy **consistently** has been that full-time WWG 4C employees, regardless of their actual work schedule, cannot be

---

[35]See, JX 4.

[36]The purpose of these DPA issuances was to further define the language of the 1994 Agreement. As such, they are State Policy, and should be considered by the Arbitrator in order to reach the complete understanding of the parties. (See, *City of Hartford and Hartford Police Union*, 97 LA 1016; *United Furniture Workers of America, AFL-CIO, Local 395 v. Virco Manufacturing Corporation*, 257 F.Supp. 138 (E.D. Arkansas 1962) (Arbitrator could consider collateral materials, including pamphlet, bulletin, and actual practices, in order to construe entire contract).

charged more or less than eight hours of leave for one workday, and that formalized alternative work schedules are prohibited. This is stated in PMLs 94-32 and 95-014. The application of this rule to Department employees was confirmed by the Gildersleeve memo in 1995 as well as the Terhune memo, which was issued **after** the 1999 MOU had made U3 employees FLSA-exempt. The FLSA Manual, which, again, is State policy, supports this rule.

Although alternate work weeks and FLSA exemption are concepts that are almost contrary to each other, the State, through its FLSA Manual and PMLs, has provided a **clear** explanation of the differences in how hourly and salaried employees on alternate work weeks are treated:

///

///

///

Hourly Employees	Salaried Employees
Must account for each hour paid for.	Accountable for work product only.
Charged paid leaves for partial days of absence.	Not charged paid leaves for partial days of absence.
Earns overtime.	Does not earn overtime.
Receives excess time.	Does not receive excess time.
Charged number of hours taken off per day.	Full-time employee is charged eight (8) hours of time for a day off regardless of schedule.

The State cannot now pick and choose which of the rules it will apply to the FLSA-exempt employees in U3. The Department has taken a selective approach, implementing only some of the salaried employee terms, and ignoring others, a clear violation of the MOU sections, and the implementing regulations, that establish the terms for FLSA-exempt employees.

The argument that the PMLs do not apply to U3 employees is nonsensical, as shown by the fact that the State's current treatment of U3 employees relies on one section of PML 94-32, yet rejects another section of that same PML. PML 94-32 is the only document that precludes the earning of excess time for FLSA-exempt employees working an alternate schedule, which DPA applies to U3 employees.[37] DPA's actions acknowledge that PML 94-32 applies to U3 employees. Yet this same PML provides that an employee cannot be charged more than 8 hours for a workday. If the State argues that PML 94-32, and the 8-hour charge, does not apply, then the State has improperly eliminated a previous benefit for the employees. Grievant testified that he had accumulated approximately 40 hours of excess time between 1997 and 1999, and

[37]As evidenced by Grievant's testimony that his ability to earn or use excess time was eliminated by the State shortly after becoming FLSA-exempt in 1999.

that if this benefit still existed, he would have accrued 90 hours of time for calendar years 2003 and 2004.[38]

None of the State's possible arguments can change the facts. The fact that the State now uses the titles "E" and "SE" to refer to employees previously designated as WWG 4C in no way changes the actual conditions that apply. Furthermore, WWGs E and SE do not even officially exist, as the State has not taken the necessary steps under the California Administrative Procedure Act to amend the state rules. The current DPA rules governing WWGs still refer to WWG 4C, with no mention of WWG E or SE. Thus, the State's reliance on a purported WWG E or SE is not enforceable because it is considered an "underground regulation".[39] Even if the E and SE designations existed, no different working conditions were negotiated, as expressed in the 3/2/01 Agreement. Clearly, U3 employees must be treated as previously defined for WWG 4C, and these conditions have not been altered, regardless of a new title.

Regarding its assertion that MOU Section 19.6 authorizes the State to establish procedures for alternate workweeks, this language does not specify what "procedures" may be established. In addition, any procedures must be consistent with the MOU. Therefore, this language is irrelevant to the issue here.

In addition, there is no evidence of **formal** alternate work schedules. Although Fisher testified that the Department has formalized alternative work schedules, this was a bare assertion, unsupported by any documentary evidence. In contrast, State policy unequivocally states, in the PMLs, that formal alternate schedules are prohibited for FLSA-exempt employees. Fisher's mere assertion does not change the

---

[38]See also, Attachment A to Union's Closing Brief.

[39]See, *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198.

facts in this case.

Furthermore, it is irrelevant whether alternate work schedules are mandatory or voluntary, or that employees may prefer alternate work schedules. The MOU and related policies prevail regardless of employee preference; the MOU does not provide different sets of rules for employees who desire to work alternate work weeks and those who do not.

Finally, the testimony of Hanson, regarding the alleged payroll practices of State departments for employees on alternate workweeks, must be ignored as hearsay. First, she did not provide direct testimony of the actual practices of the departments, but simply stated how she answered a question during negotiations.[40] Second, she also testified that the Union disagreed with her statements, and similar statements from other department representatives. This questionable testimony is insufficient to prove that a practice exists that is contrary to written State policy.

The appropriate remedy is for the State to make whole any leave amounts deducted which exceed 8 hours for a scheduled work day back to the implementation of the 1999-2001 MOU. This remedy should be awarded to all employees in this matter.

The evidence (specifically, the Gildersleeve memo and the Terhune memo's directive, "Employees shall not be charged for and shall not have any paid leave absences recorded in less than or more than 8-hour increments...") shows that the Department has been aware of the correct policy for many years, but that various Department managers failed to follow it. Instead, the Department chose to implement

---

[40]Hanson did not show that she was involved in her department's payroll practices, nor did she discuss which classification of Union employees work in her department, or whether these employees

only that portion of PML 94-32 that accrued to its benefit. Such "unjust enrichment" at its employees' expense[41] is clearly a mistake or inequitable condition, and may even rise to the level of fraud.

Under these conditions, the appropriate remedy is to make whole "all departmental employees who have been adversely affected by the wrongful change". See, *In the Matter of CDC and CSEA, SEIU Local 1000, AFL-CIO*, (Caraway 2004), DPA No. 02-03-0034.

It is clear from the grievance history that Grievant intended to include all impacted employees. Grievant testified that he filed 4 grievances related to this issue, one of which was filed on March 9, 2001 and responded to at the first and second levels. The 2001 grievance is a class action grievance with "CSEA" identified as Grievant; clearly, Grievant was concerned about all similarly-situated employees, and the Department was aware of this concern. Although Grievant identified only himself as the Grievant in the grievance at issue here, the attached cover letter specifically requests the remedy "restore teachers time back to 1994"[42]. This language clarifies that the remedy stated on the grievance form, "restore 2 hours leave credit... " did not apply just to his time, but to the time of all employees. Based on his previous grievances and the cover letter for his instant grievance, the Department was on clear notice that Grievant was filing his grievance on behalf of all similarly-situated

---

are FLSA-exempt.

[41]See, *Elkouri and Elkouri*, How Arbitration Works, Sixth Edition, The Bureau of National Affairs, Inc., p. 1232) "... The general principle of unjust enrichment is that one person should not be permitted to enrich himself unjustly at the expense of another, but the party so enriched should be required to make restitution for property or benefits received, where it is just equitable, and where such action involves no violation or frustration of the law. ..."

[42]The Union concedes that the proper remedy is retroactive only to the date the U3 employees became FLSA-exempt in 1999.

employees.

POSITION OF DEPARTMENT

The grievance should be denied because Grievant's claim, that he is entitled to an 8-hour leave deduction for missing 10 hours of work, violates common sense and the Contract as a whole, and is disparate treatment toward similarly situated employees. The flawed logic of this claim quickly becomes apparent. Grievant works a 40-hour workweek consisting of 4 10-hour days. He argues that if he takes 1 day off, he should be charged 8 hours; 2 days off, 16 hours; 3 days off, 24 hours; yet he concedes that if he takes a full week off, 4 days, he should be charged 40 hours. Grievant makes no attempt to explain this nonsensical result.

The Union's interpretation would cause the State to treat similarly situated employees differently, in violation of Article 4.B. If the Union's argument were to be accepted, the State would charge full-time employees who work a 5/8/40 schedule the full amount of their absence, while the full-time 4/10/40 employees would be charged 8 hours leave time for a 10-hour absence. Such a practice would be to the detriment of full-time 5/8/40 employees and an obvious violation of the State's duty in Article 4.B. to uniformly apply the rules to all similarly situated employees.

The State expects the Union to argue that because a regular workday is 8 hours, the term "whole day" in the 19.1.F.5. provision, "FLSA-exempt/excluded employees shall not be charged paid leave "in less than whole-day increments", must be read as 8 hours, regardless of the actual length of the employee's shift. This interpretation is clearly incorrect when the Contract is read as a whole.

The Union's erroneous conclusion on which its entire argument lies, that a "regular" workday can only be 8 hours, ignores the fact that the MOU contemplates

alternate work shifts. Section 19.1.B. states that the employer may establish workweeks and work shifts of different numbers of hours, and 19.6 permits the Union or employee to request an alternative work schedule.[43] Because the Contract authorizes work shifts other than an 8-hour day, the term "whole-day" in Section 19.F.1.5. can refer to shifts other than 8 hours. In this case, because the State established a 4/10/40 schedule for Grievant, a "whole-day increment" is 10 hours.

The Union may argue that formal alternative workweek schedules are prohibited, based on statements made in PMLs that formal alternative workweeks were discontinued for WWG 4C employees. This argument is a red herring and should be dismissed.

The PMLs on which the Union relies address issues concerning FLSA-exempt employees but were issued long **before** U3 teachers became FLSA-exempt. Therefore, by their own terms, the PMLs did not apply to U3 teachers.

The 1999 MOU, which effected the change in teacher status from hourly to salaried employees, also contained Sections 19.1.B. and 19.6 authorizing alternative

/ / /

workweeks.[44] This new Contract language superceded the conflicting statements found in the PMLs that formal alternative workweeks were to be discontinued. Because these statements were no longer valid, neither was the ultimate conclusion of

[43]Although the Union may argue that Section 19.1.F. is the exclusive provision governing FLSA-exempt employees, State witness Moore Andrews testified that Hsia-Coron had wanted language to this effect, and that she refused, saying that subsections A through D applied to all state employees. This conclusion is further supported by the fact that the Union submitted a proposal during negotiations in which they deleted Section 19.1.B. However, the State rejected the proposal, and Section 19.1.B. remained in the MOU.

[44]Despite the State's attempt to discontinue 4/10/40 schedules for teachers, both the Union and the Grievant have attempted to keep the schedule. This undercuts the Union's argument that there are no formal alternative workweek schedules for teachers.

the PMLs that "whole day increments" could only be 8 hours. Instead, the MOU language must control, and, as shown, the MOU authorizes alternate work shifts for U3 teachers, and permits "whole day increment" to be read as the amount of time scheduled to work, which, in Grievant's case, is 10 hours.[45]

This same reasoning applies to make the memoranda issued November 29, 1995 (the "Gildersleeve memo") and December 13, 1999 (the "Terhune memo") inapplicable to teachers, and thus irrelevant to the question presented here. The Gildersleeve memo, which stated that employees in WWG 4C could not be charged more than 8 hours, was based on the DPA policy set forth in the PMLs.[46] As explained above, the statements contained within the PMLs were no longer valid with the adoption of the alternative workweek schedules in the 1999 MOU. Therefore, even if the WWG 4C portion applied to the teachers in 1999, it was no longer an accurate statement of policy because of the language permitting alternative workweek schedules in the 1999 MOU.

In addition, the Terhune memo, although issued in 1999, is based on the 1994/95 PMLs, and mistakenly states that the only available schedule for teachers was 5/8/40. In light of the inclusion of Sections 19.1.B. and 19.6 in the 1999 MOU, this was an inaccurate statement of State policy and the MOU language, and should not be followed here. Even given this inconsistency, the Terhune memo provides for leave deductions of other than 8 hours; it expressly provides that employees may be charged in 8-hour increments or "comparable 'full day' increments if fractional". (See,

---

[45]Although the Union may argue that the 3/2/01 Agreement (Side Letter 13) makes the PMLs applicable to the U3 teachers and prohibits alternative workweeks, this argument must fail. The agreement was executed **after** the teachers were redesignated from WWG 4C to WWG SE, and merely states that Section 19.1.F., and Sections 1. A. - D. generally, apply to the U3 teachers. See, JX 5.

JX 10) Grievant is seeking an 8-hour leave deduction for 10 missed hours of work, or an 0.80 fractional leave deduction. The Terhune memo provides that the deduction should be in a full-day increment. Therefore, since Grievant works a 4/10/40 schedule, 10 hours should be deducted from his leave bank when he takes a scheduled day off.

In fact, during negotiations for the 1999 MOU, the parties specifically discussed at the bargaining table the amount of leave credits deducted for employees with alternative workweek schedules, and the Union was informed of the State's practice of charging leave credits based on the number of hours scheduled. The Union tried to amend the Contract, but was unsuccessful, and the State retained its right to deduct leave credits based on the number of hours scheduled. The Union cannot now attempt to acquire through arbitration what it failed to achieve through negotiation. The State's practice is consistent with the language of the MOU, and was not bargained away.

Even if the grievance were sustained, two provisions in the MOU limit the scope of a possible remedy. Article 6.11.E. states that the arbitrator "shall not have the power to subtract from, or modify this MOU"; Article 6.7.A. states that "a formal grievance may be filed no later than 21 calendar days after the employee can reasonably be expected to have known of the event occasioning the grievance". (See, JX 1). Since this grievance was filed on August 30, 2002, a remedy may only be awarded from August 9, 2002, to the present. Furthermore, any remedy must be limited solely to Grievant. As an experienced steward for the Union, he knows how to

---

[46] It is worth noting that the Gildersleeve memo accurately stated that teachers, then hourly employees in WWG 4A, were charged the same number of leave hours as the teacher was scheduled.

file class action grievances. The fact that he chose to file his grievance on his own behalf, and not on behalf of all teachers, mandates that any remedy be limited to him.

OPINION

Preliminary Matters

The Union bears the burden of persuasion in this contract interpretation case. In contract interpretation cases, the Arbitrator's first obligation is to determine whether the disputed language is clear and unambiguous. If so, he must give the language its plain meaning, even if one party finds the result harsh or contrary to its initial expectations. If, however, disputed language is found unclear and ambiguous, or sometimes silent, extrinsic evidence (bargaining history, past practice, etc.) may be used to help determine the parties' intent. In addition, words and phrases are rarely interpreted alone. To give force and effect to the entire agreement, disputed language must be interpreted in context with its section, article, and the MOU as a whole.

Statewide, Multi-Grievance Case

The pending multi-grievance Statewide FLSA, prep time, et al. case contains additional detail in bargaining history and other testimony. Thus, this Award may – or may not – impact one or more of the grievances in that case.

The parties rely on the MOU, bargaining history, and past practice for their respective positions. For the reasons that follow, the Arbitrator finds and concludes that the Union has not carried its burden of persuasion to show that the Department has violated the MOU, and, therefore, the grievance must be denied.

Merits

This is a more nettlesome matter than the Department seems to believe. It is true that common sense and experience indicate an employee working a 4/10/40

schedule, who takes a day off, is charged for the lost day – 10 hours. However, the Department clearly issued policy guidance/memos in the 1990s, before U3 employees became either WWG 4C or S/SE, that anticipated the contrary; i.e., it would charge the employee "no more or less" than 8 hours for a day off, even if on a 4/10/40 schedule. The Department's prior guidance did not indicate how the extra 2 hours would be treated. Simply put, as often happens in bargaining, the parties could not anticipate each and every impact a major change would have on every preexisting rule, PML, policy or benefit; e.g., converting from hourly paid employees (earning overtime and excess time) to salaried, FLSA exempt status. Although it is not difficult to understand why the Union argues its case so vigorously, there is somewhat of a disconnect in the remedy it seeks. Apparently, the Union seeks to restore the two (2) hours of leave credit charged to every teacher or librarian who worked a 4/10/40 and were paid ten (10) hours when they took leave for a full day. As a general rule, public bodies do not gift public funds; i.e., if 8 hours are deducted from such a employee's leave bank, the employee would have to add 2 hours of leave to be paid 10 hours for the day.

Without question, the failure to specifically recognize the change in status for U3 employees created numerous ambiguities and uncertainty. However, the bottom line is that the MOU trumps inconsistent and/or conflicting Departmental rules, policies, PMLs, etc. For example, whether or not a PML prohibits alternate workweek schedules, Article 19.6 (A) unambiguously recognizes the existence of an alternate workweek schedule.[47] More specifically, during the term of a labor contract, the parties

[47] To a lesser extent, Article 19.1.B shows that the 19.1.A regular 5/8/40 workweek is not the only available workweek for an employee.

often decide how it is to be administered. Side Letter 13, among other things, demonstrates the Union's recognition that the State changed WWG 4C to either E or SE and, that whether designated E or SE, U3 employees remain covered by 19.1.F specifically and 19.1.A-D generally.[48]

Accordingly, absent more persuasive evidence to the contrary, for U3 employees, how ever designated by WWG, 19.1.F.5 of the MOU controls the deduction of Grievant's leave time:

> FLSA-exempt/excluded employees shall not be charged paid leave or docked for absences in less than whole-day increments.[49]

The MOU does not define "whole-day increments." However, on this record, for U3 employees, the phrase must be sensibly interpreted as the number of hours an employee is regularly scheduled to work in a day; e.g., 4, 8, 9, or 10 hours.

The Union disagrees, arguing that the State has interpreted the MOU as prohibiting, for FLSA-exempt employees (a) "formal" alternate workweek schedules, (b) the earning of excess time that had resulted from alternate workweek schedules, and (c) the deduction of more or less than 8 hours for a full-time employee's full-day absence, even if the employee's workday was more than 8 hours. Thus, as the Union sees it, State policy for FLSA-exempt employees, as it has consistently been expressed by the State since 1994, should apply in <u>identical</u> fashion to the U3 FLSA-exempt employees.

The fatal flaw in the Union's argument is that this policy does not apply equally to U3 employees because the terms of the 1999 MOU established a condition that

---

[48]From an evidentiary standpoint, the specificity of Side Letter 13 defeats contrary evidence found in the 2/1/00 DPA Pay Letter and the testimony of Judd.

[49]See, JX 1.

was not present for the other employees: alternate workweek schedules. Thus, the Department is correct when it points out that, because alternate work schedules are expressly authorized for U3 employees, the portion of the PMLs prohibiting formalized alternative work schedules does not apply, nor, therefore, does the conclusion that such employees could only be charged 8 hours for a full day's absence, regardless of length.

Redundantly, the Union's argument rests, in large part, on its assertion that the MOU does not authorize "formal" alternate work schedules for any FLSA-exempt employees, including those in U3. Although the Union bears the burden of persuasion, its focus, in support of its position on this issue, is the fact that PML 94-32 prohibits formalized alternative work schedules for employees who became FLSA-exempt in 1994 through 1999,[50] and the argument that since the State has applied the portion of PML

94-32 that eliminates excess time, the State is equally bound to apply the portion that

///

prohibits charging more or less than 8 hours leave time.[51] However, no evidence was

---

[50]Although the Terhune memo was directed to U3 employees **after** they became FLSA-exempt in the fall of 1999, this document is not enough to bind the Department to a contrary position. The memo itself contains, again, similar ambiguous language that underlies this case – "Unless otherwise specified, the regular work for full-time employees shall be 40 hours, Monday through Friday, and the regular work shift shall be 8 hours. Thus, the current established work schedule remains the same" – which fails to recognize the fact that since 1997, Grievant had worked a 4/10/40 schedule. There is no allegation by the Union that U3 employees with alternate work schedules were charged only 8 hours leave time for a full day's absence – in other words, the interpretation that would conform to the Union's argument. It is clear that the Department has treated U3 employees with alternate schedules consistently since 1999 by deducting the full hours of work missed; this memo, therefore, cannot be seen to bind the Department to a different interpretation than what it now asserts.

[51]With regard to the Union's argument that the FLSA Manual supports the position that neither more than less than 8 hours can be deducted, this is not relevant to the central inquiry here. It is possible that the State is jeopardizing the U3 employees' FLSA-exempt status with its decision to deduct 10 hours, or it is possible that it has determined that this will not affect the teachers' statutory exclusion. Regardless, it does not impact the interpretation of the MOU.

provided on the actual practice, recognition, or significance of designating an alternate work schedule as "formalized" or "informalized". Given the lack of evidence on this point, the Arbitrator ignores the distinction and resorts to basic principles of contract construction.

Grievant worked an alternate 4/10/40 schedule from his hire in 1997, until the State ended the practice in 2004.[52] His class schedule lasted 3 hours on Wednesday, and 8 hours and 45 minutes on Thursday, Friday, and Saturday. His workweek was, apparently, based on the class schedule established by the Department, and it was accepted as such, without a challenge to the State's right to require it. This evidence persuades the Arbitrator that, at the time of the 1999 negotiations, Grievant had a recognized alternate work schedule, such as that contemplated by Article 19.1.B.

In addition, the 1999 bargaining history for Section 19.1.F.5. demonstrates that the Union had originally proposed to give FLSA-exempt employees the discretion to establish their own work hours, but that the State objected, saying that the nature of some jobs, such as employees with scheduled classes, required the employee(s) to be there at set times. The Union agreed to drop its proposed language. Other than this reference to work hours, the parties did not discuss changing either the class schedule or employees' scheduled workweeks. This evidence reinforces the fact that the parties did not contemplate changing the existing practice regarding alternate workweek schedules, even after agreeing to make U3 employees FLSA-exempt.

---

[52]The Union is correct that Grievant's opinion of the desirability of the alternate schedule is not relevant here; it is clear to all that a schedule that was originally imposed by an employer, would at some point, after scheduling one's life around it, become acceptable, and a change to that schedule would be objectionable. The relevant point is that the State, at that time, exercised its right to require employees to work an alternate schedule as a condition of employment, and this has not been questioned. The evidence did not persuasively show why the State chose to end the alternate work schedule.

Therefore, even if it applied to Grievant, the condition precedent to the State's rule that WWG 4C employees may be charged neither more nor less than 8 hours for a day off, is not present here. Accordingly, the State (Department) is not required to apply this rule to U3 employees working alternate workweek schedules. Simply put, on this record, when (1) Side Letter 13 specifically recognizes the applicability of 19.1.F.5. and, (2) the MOU is read in context and as a whole, the phrase "whole day increments" must be given its plain meaning; i.e., the regularly scheduled daily hours for a U3 employee working either a regular (19.1.A) or alternate workweek (19.1.B; 19.6) schedule. For Grievant, this meant ten (10) hours a day.

The grievance is denied.

AWARD

The State of California, California Department of Corrections, did not violate Article 19.1 (Hours of Work) and Unit 3 Side Letter #13 (Work Week Group 4C to Work Week Group E or SE Agreement) of the Bargaining Unit 3 2002-2003 Memorandum of Understanding when it deducted ten (10) hours of leave credit from C. Olsen's leave bank(s) when C. Olsen took off a scheduled workday, while working an alternate work week schedule.

DATED: December 30, 2004

ALEXANDER COHN - Arbitrator