IN THE MATTER OF THE ARBITRATION BETWEEN

TEAMSTERS, LOCAL 839,	)	
	)	OPINION AND AWARD
UNION,	)	
	)	PERC CASE NO. 133236-P-20
-AND-	)	
	)	UNION ACCESS
FRANKLIN COUNTY CORRECTIONS,	)	GRIEVANCE
	)	
EMPLOYER.	)	
	)	
	)	
	)	

BEFORE: ROBIN A. ROMEO, ESQ
ARBITRATOR

FOR THE UNION: JACK HOLLAND
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BACKGROUND

Teamsters Local 839, (Union) represents a bargaining unit of correction officers, corporals and sergeants who work inside the Franklin County jail facility (Jail) in Pasco Washington. The Union and the Franklin County Corrections (Employer)[1] are parties to a collective bargaining agreement (CBA) effective August 1, 2018, to December 31, 2020.[2]

On October 30, 2020, the Union filed a grievance alleging a violation of the CBA, Article 25, Association Management Relations, section 25.2 - Association Investigative and Visitation Privileges, for adopting new rules regarding the union business agent's access to the Employer's facility for purposes of union representation.[3]

On November 23, 2020, the Union filed an unfair labor practice complaint with the Public Employment Relations Commission (PERC) alleging a violation of RCW 41.56.140(1) and (4) docketed as Case 133175-U-20 arising out of the same facts. In a letter dated December 10, 2020, PERC ordered the matter deferred to arbitration herein.[4]

The undersigned was notified of her appointment and a hearing was held on November 5, 2021.[5] Both attorneys represented their clients zealously and conducted themselves in a professional manner. The Parties were afforded a full and fair opportunity to present their case. A total of 4 witnesses testified; McKenzie Burgess, Corrections Corporal/Deputy; Jesus Alvarez, Teamsters Business Agent, Stephen Sultemieir, Corrections Commander, and Carlee Nave, Human Resources Director.

The witnesses were sworn and subject to direct-examination, cross-examination, re-direct and re-cross examination. A total of 13 exhibits were received into evidence. A reporter was present and produced a transcript of the proceedings. The arbitrator was provided a copy of the transcript. Post-hearing briefs were submitted and received electronically on January 21, 2021.

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[1] The Employer is referred collectively as Franklin County, Franklin County Corrections, Franklin County Sheriff's Office.

[2] The parties are currently in negotiations for a successor agreement.

[3] Teamsters Local 839 began representing the employees herein in 2020 and adopted the previous collective bargaining agreement between the Employer and the Franklin County Correction Officers Association. Hence the reference to "Association" in the contract language.

[4] Pursuant to the order, the arbitrator was furnished a copy of the letter.

[5] Due to health concerns related to the COVID-19 pandemic, the parties agreed to conduct the hearing via teleconference on Zoom which was controlled by the arbitrator. The parties and witnesses were kept in a waiting room until they were simultaneously admitted and offered the opportunity for break out rooms.

ISSUES

The parties were unable to agree on an issue at the hearing and stipulated to allow the arbitrator to frame the issue.

The Union proposed:

> Did the Employer violate Article 25.2 of the labor agreement when it implemented new rules concerning the Union's ability to access the work location to meet with bargaining unit employees?
>
> If so, what is the appropriate remedy?

The Employer proposed:

> Whether or not Franklin County's Sheriff Office complied with Article 25.2 Association and Investigative Privileges?

Arbitrator:

> Did the Employer violate Article 25.2 on October 22, 2020, and October 29, 2020, when it changed the Union's access to employees by prohibiting the Labor Representative from entering the jail and unilaterally changing the hours, location and escort for union access to employees?
>
> If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 4 - MANAGEMENT RIGHTS

4.1 County Prerogatives Recognized.
The Association recognizes the prerogative of the Sheriff to determine how to provide public services of the Sheriff's Office and operate and manage the affairs of the Sheriff's Office in all respects.

4.2(d) The right to determine the size and composition of the work force and to assign employees to work locations and shifts.

ARTICLE 9 – HOURS OF WORK/OVERTIME

ARTICLE 16 – GRIEVANCE PROCEDURE

16.6 Grievance Procedure.

…

(e) Limitation, Scope and Power of Arbitrator.
(i) The arbitrator shall not have the authority to add to, subtract from, alter, change or modify the provisions of this Agreement.

(ii) The power of the arbitrator shall be limited to interpretation of and application of the terms of this Agreement or to determine whether there has been a violation of the terms of the Agreement by either the County or the Association.

ARTICLE 25 - ASSOCIATION MANAGEMENT RELATIONS

…
25.2 Association Investigative and Visitation Privileges
The Labor Representative of the Association may visit the **work location** of employees covered by the Agreement at **any reasonable time** for the purpose of investigating grievances. Such representative shall limit activities during such investigative matters relating to this Agreement. County work hours shall not be used by employees or Association Representatives for the promotion ofAssociation affairs other than stated above.

(Emphasis added)

RELEVANT FACTS

In April 2020, the Teamsters, Local 839, replaced the Franklin County Correction Officers Association as the certified bargaining representative of employees in the bargaining unit of correction officers, corporals and sergeants, employed by Franklin County (Employer) at the Franklin County Correctional Facility (Jail).[6] From April 2020, until the time the grievance was filed, Teamster Business Representative, Jesus Alvarez (Alvarez), was the labor representative assigned to the correction officers.

The Jail is located in the Franklin County Justice Center which also houses the Sheriff's Office and the Pasco Municipal Court. The Franklin County Justice Center is located in the Franklin County Campus (Campus) in Pasco, Washington, which is comprised of several buildings including the Franklin County Superior Court House, County administrative buildings and the Franklin County Justice Center. Employees at the Jail are scheduled to work twelve (12) hour shifts, twenty-four (24) hours a day, seven (7) days a week. The business hours of the Sheriff's office are 8:00 am to 5:00 pm.

Outside of the Campus, there is a black perimeter fence and an outbuilding known as the "security shack" which form the outer secure border. The general public, or anyone who is not employed by the County, typically have to go through the security shack to access any building on the Campus. Once through the security shack, one could walk west and then north in order to reach the front door of the Franklin County Justice Center. Once a person enters through the front door of the Justice Center, they can walk upstairs to the administrative offices of the Sheriff; turn right to visit the Municipal Court; or walk straight to reach the administrative offices of the Jail.

The second, inner layer of security is a secure door just next to the Correction Commander's and Corrections clerks' offices, which is reached by heading straight (west) upon entry through the front door of the Justice Center. This door can only be opened via key fob or if someone within the clerks' office presses a button to unlock the door. Accordingly, one can only enter if they are an employee of the County or if they are cleared for entry by a Corrections clerk. From that door, one could access the areas of the Jail where corrections officers work,

[6] *Franklin County,* Decision 13181 (PECB, 2020).

including the corporals or sergeants group offices, kitchen/ lounge, locker rooms, interrogation room, training rooms and the master control station.

The master control station is an octagonal-shaped observation and communications hub of the jail facility from which corrections officers can view inmates and observe other areas of the Jail via security camera screens. There are additional locked doors to inner corridors and secure areas where inmates reside. Access to these inner areas of the Jail require the unlocking of numerous doors as one moves through the various areas used in the detention of the inmate population.

From April 2020, when the Union began representing bargaining unit employees to October 22, 2020, when the grievance was filed, in order to meet with bargaining unit employees, Alvarez would call the Commander ahead of time to notify him of his visit. On his first few visits to the Jail, he went through the security procedures used for all members of the public. Following that time, he no longer needed to go through the security procedures. He was met at the gate immediately in front of the entrance and led inside by someone inside the Jail.

Ordinarily, Alvarez would meet with an employee in the corporals' or sergeants' group offices. If it was necessary to visit a location within the Jail, he was escorted to the master control station to observe the areas of the inmates. Alvarez never walked around the Jail unattended. He visited areas including the employees lounge, the locker rooms, the master control station, the cafe, the Commander's office.

Alvarez met with employees for the purposes of investigating workplace grievances, sometimes for an extended period of time. He investigated a potential grievance regarding contractual meals for employees working overtime, the overtime sign-up bulletin board, employees method of passing medication to inmates, obtaining copies of warrants, the security of inmate trustees cleaning the locker rooms, the availability of hand sanitizer during the outbreak of a global pandemic, and the representation of the members while the Employer was conducting interviews pursuant to an investigation of a complaint of harassment. Sometimes, the issue would be resolved with the Employer without the need to file a grievance.

Alvarez met with employees during disciplinary investigative interviews and during interviews

related to a harassment complaint. These meetings occurred five (5) or six (6) times.

On October 1, 2020, a corporal was called to a meeting with her supervisor. During the meeting, the supervisor threatened the corporal with discipline for insubordination. The corporal called Alvarez for help. In response, Alvarez went to the Jail to speak to the Commander.

On October 6, 2020, the Sheriff sent an email to Alvarez about the October 1 meeting. The Sheriff stated Command staff would no longer respond to Alvarez. Specifically, the Sheriff wrote: "This developing environment of corrections deputies squealing to their union rep when they don't get their way is coming to an end."

On October 22, 2020, when Alvarez went to the Jail to meet with an employee, he was told he was not allowed into the Jail and instead would have to meet with the employee in one of the interview rooms in the Sheriff's office.

On October 27, 2020, Alvarez sent the Employer a request for clarification and information concerning his access to employees. On October 29, 2020, he received a response from HR, stating he would no longer be allowed inside the jail facilities and if he needed to inspect an area in the jail facility, he would need to be escorted by the Sheriff or someone from HR.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Union argues the Employer's decision to implement new rules restricting the Union's ability to visit its members for representational purposes constitutes a clear breach of the labor agreement. The Union argues the plain language of Article 25.2, is supported by the parties' conduct between April and October 2020, and confirms the Union's interpretation.

The Union argues the limitation of only visiting employees during business hours violates the provision in Article 25.2 permitting visitation at "any reasonable time." The Union also argues the prohibition from visiting employees inside the Jail violates the provision in 25.2 permitting access to the "work location."

The Union argues terms of the CBA are to be construed consistently throughout and the Union's definition is corroborated by the use of "work location" in another part of the contract. The Union points to Sec. 4.2(d), the contract and argues it memorializes management's right to assign employees to work locations and shifts and there is only the one jail facility, so the clause can only be read as defining the work location as the physical place where members actually perform their duties – rather than the entire Campus as the Employer asserts.

The Union refutes the Employer's witness, Carlee Nave, the only witness present for negotiations of the 2018-2020 CBA, where she claimed that "work location" refers to everything "behind the black fence," or the whole Campus as she conceded at the hearing that she never expressed that particular understanding to the union representatives who negotiated the contract, so her interpretation is immaterial.

The Union argues "reasonable time" is also undefined by the CBA, but its meaning depends on the factual landscape and it should not be read as including only business hours. The Union notes in order to have access to individual members to investigate a grievance, the Union representative must have access to the facility when those members are at work and for half the bargaining unit, their shifts do not overlap at all with public business hours, so the County's new requirement has cut the night shift bargaining unit members off from their union.

The Union argues where particular contract language may be less than clear, arbitrators may look to the parties' mutual understanding as evidenced by past practice to assist the interpretative process. The union notes, it is undisputed that between April and October, 2020, Local 839 business agent Jesus Alvarez had access to bargaining unit members in the specific places where they perform their duties for the Employer, for the purposes of investigating grievances and unquestionably limited to matters related to the CBA. The Union notes, Alvarez's visits foreclosed unmeritorious grievances from being filed and were therefore mutually beneficial to both the Employer and the Employees.

The Union argues the Employer unilaterally issued new restrictions to Alvarez, in an effort to frustrate the Union's efficacy in representing its members' contractual and collective bargaining rights. While establishing a motive for the Sheriff's decision is not necessary to establish a breach

of contract, the Sheriff's angst toward the corrections officers communicating with their bargaining representative that preceded his decision to restrict Alvarez's visitation rights is behavior that must not be sanctioned.

The Union argues the employer has no right to unilaterally change its interpretation of the access provision and has a duty to bargain the change. The Union argues, a change of interpretation is no different from a change in the hours, wages, working conditions or rules set forth in the agreement and both parties must agree to it before both can be bound by it. The Union argues, in light of the parties' practice, such as allowing Alvarez in outside business hours, with only a member accompanying him (i.e., not a designated escort per the new rules) and without notice to the Sheriff's office, an employer cannot remain silent about a provision and then expect to unilaterally discontinue the practice. It has a duty to bargain the change.

The Union argues the Employer's safety and security defense is not supported by the record. The union notes the Employer failed to bring forth a witness who could articulate what caused these new safety and security concerns between April 2020, when Alvarez took over as business agent for the unit, and October 2020, when his access was limited and the Employer did not allege any qualifying emergency only that there are security and safety issues inherent in letting anyone in the jail facility, which was just as true in September of 2020 (before the new restrictions) as it was in October 2020.

The Union argues the change is a result of the anti-union animus of Sheriff Raymond. Raymond's letter of October 6 reflects his anti-union animus characterizing his employees' calls to Alvarez as "squealing," and telling Alvarez that he was not staying "in his lane." Raymond added, "This is not happening anymore. My command staff have been instructed to not respond to you any longer." The Union argues the language reflects the Employer's thoughts on the employees' collective bargaining and contractual rights—and thus it is no surprise that he would take extraordinary steps to undermine the efficacy of the Union by limiting its ability to visit with the employees.

The Union refutes any argument by the Employer that because Local 839 did not bargain the language of Article 25.2, the County is somehow free to disregard the contractual provision and change it unilaterally. The Union argues when the change in representation occurred, no aspect

of the County's contractual commitments were altered and any argument that the County's decision to implement new rules regarding the Union's access because Local 839 did not bargain the language is without merit.

POSITION OF THE EMPLOYER

The Employer argues the Union has the burden of proof and failed to present any evidence of the mutual intent of the parties on the interpretation of Article 25.2. The Employer argues the contract is interpreted by the parties' intent. The Employer cites the lack of any participation in the bargaining of the contract by the Union.

The Employer points to the testimony of Carlee Nave, and her understanding of the meaning of the contract provision 25.2 and the words "work location" as meaning the entire courthouse, and "any reasonable time" as business hours. The Employer argues the Union failed to offer any evidence otherwise.

The Employer argues the arbitrator is prohibited sua sponte from creating and implementing new terms to this agreement that add, subtract, alter change or modify Section 25.2. The Employer argues the Union "…failed to adduce any evidence from which this Court may determine the meaning of the agreed terms. Accordingly, the uncontroverted evidence at hearing showed that "work location of employees" meant, "behind the black fence" and "at any reasonable time" meant "Business hours."

The Employer argues it did not make a unilateral change to the Union's access to the Jail but that the response provided a process for meeting membership that is consistent with Section 25.2.

The Employer argues the Union did not prove a unilateral change as the Union must establish both the existence of a relevant status quo or past practice and a meaningful change to a mandatory subject of bargaining, citing WAC 391- 45-270(1)(a). The Employer argues a past practice is a course of dealing acknowledged by the parties over an extended period, becoming so well understood that the party deems its inclusion in a collective bargain agreement superfluous and must have a material and substantial impact on the terms and conditions of employment.

The Employer argues there must be a determination of whether the issue is a mandatory subject of

bargaining. The Employer argues it is not a mandatory subject of bargaining because the Employer's concern for safety which is its management prerogative, outweighs the Union's interests.

The Employer argues there is a safety concern as escorting visitors through secure areas poses a risk to the safety and security of the Jail, it reduces staffing levels by one or two officers needed for the escort which could affect the ability to respond to other emergency situations within the jail and it leaves the possibility of illicit contraband entering the facility or furthering criminal activity outside the jail (i.e., passing of information to gang members outside).

The Employer argues the Union failed to show how the restriction on the Union's ability to meet with correctional officers working late night hours was restricted. The Employer argues the union can simply speak with the member in-person and if he needs to inspect the jail, he can be escorted. The Employer argues the impact of the change, if any, to employee wages, hours and working conditions is slight when compared with the security risks.

OPINION

This is a case of contract interpretation. To determine whether a violation exists, the meaning of the contract provision at issue must be interpreted. Historically, when interpreting contract language, arbitrators have used the "Plain Meaning Rule" as a guide. When the language is clear and unambiguous, the words are given their plain meaning.[7]

When a provision is subject to one or more interpretations, it is considered ambiguous and an arbitrator may consider evidence of past practice, as well as the bargaining history to interpret the language.[8] These tools help the arbitrator in determining the parties' intent in drafting the contract language and their agreement on the meaning and application of the provision.[9]

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[7] *Anchor Glass Container Corp.,* 136 LA 823 (Miles, 2016)
[8] *International Paper,* 137 LA 373 (Van Kalker, 2017)
[9] *How Arbitration Works,* Elkouri and Elkouri, 8th Edition, 2016, 9-9

The use of the Plain Meaning Rule by arbitrators has received numerous criticisms and recent arbitration decisions reveal a trend of rejecting the rule in favor of considering any and all evidence pertinent to contract interpretation.[10] To determine the parties' intent, the overall provision may be considered or the contract as a whole.[11]

The parties custom and past practice is the most widely used standard to interpret ambiguous and unclear language. The parties' intent is most often evidenced by their actions. Most arbitrators rely exclusively on the parties' manifestation of intent as shown through past practice and custom. Indeed, it is so common, citation of arbitral authority is unnecessary.[12] One arbitrator commented, it would have to be a very strong and compelling reason to change the practice by which a contract has been interpreted. Any past practice of parties other than the parties at issue is irrelevant.[13]

The parties here dispute the meaning of the words "work location" and "any reasonable time." The Union defines work location as the jail house and the Employer interprets the work location as any place in the Franklin County Justice Center. The Union defines "any reasonable time" as the work hours of the members and the Employer now defines it as the business hours of 8:00 am to 5:00 pm.

Thus, the contract article at issue here is subject to one or more interpretations by the parties and is therefore, ambiguous. The parties custom and past practice is the strongest indication of the parties' intent and the most important evidentiary consideration.

Here, there is an established past practice as to the meaning of the words in Article 25.2 "work location" and "any reasonable time." The parties have accepted the "work location" as the Jail and " any reasonable time" as the work hours of the members. From April 2020 to November 2020, Alvarez visited the Jail numerous times, on at least ten (10) or eleven (11)

[10] *Bonner General Hospital,* 139 LA 743 (Romeo, 2018)
[11] *Wells Badger Index, Inc,* 83 LA 517 (Hales, 1984)
[12] *How Arbitration Works,* Elkouri and Elkouri, 8th Edition cumulative supplement 2021, 12-10
[13] *How Arbitration Works,* Elkouri and Elkouri, 8th Edition cumulative supplement 2021, 12-11

occasions. Alvarez visited the Jail during the day and at night. Alvarez visited the Jail for the purpose of investigating grievances and representing employees during investigative interviews. Alvarez met with members inside the Jail and not in outside offices. Each visit was accompanied by a communication to the Commander. No evidence was presented to the contrary. There was no practice to the contrary.

This past practice of Alvarez visiting the work location and at any hour from April to November was open, notorious, and known to the Employer. Alvarez would call the Commander prior to his visit. The Employer did not object to his access to the Jail or to a time outside of business hours until the alleged violation.

Examining the contract language in the context of the entire CBA provides an interpretation consistent with past practice. Sec. 4.2(d), the contract memorializes management's right to assign employees to work locations and shifts. There is only the one jail facility. The clause can only be read as defining the work location as the physical place where members actually perform their duties. Section 9.1 defines the work day as a 24-hour period with the work week beginning on Sunday and ending on Saturday. Employees work round the clock.

It is reasonable to interpret work location as the Jail itself, where the employees actually work. The employees do not work in the offices outside the Jail. There is no connection to the offices outside the Jail except for a physical proximity. Meeting in those offices remove the employees from their actual work location and the area where they perform their work.

It is reasonable to interpret "any reasonable time" as the work hours of the employees, which is 24 hours a day, seven days a week. The purpose of the contract language is to give the Union representative access to employees. To access employees on all shifts, all hours of the day is a necessary parameter.

The changes on October 22, 2020, and October 29, 2020, in the location where the Union can visit employees and investigate grievances from the Jail to the Sheriff's office in the courthouse, changing access from work hours to business hours, and changing the escort to individuals whose offices are not in the Jail is a unilateral change in past practice.

The October 29, 2020, changes make it more difficult for the Union to meet with its members. The reduction in hours and the failure to access the work location without a specific person as the Union Representative's escort, either the Sheriff or Human Resources, narrow the circumstances where, when and how the Union Representative may meet with Employees.

Even though the Employer introduced testimony on the intent in bargaining to include the entire Campus as the work location, that intent was never communicated to the Union that negotiated the contract. There is no logical reason to expand the definition of the work location to a larger physical area than the location where the employees actually work. The employer's subjective understanding in bargaining is insufficient to overcome the established past practice in interpreting the language.

While the Employer cites security concerns, and while security is of utmost importance in a Jail, those concerns are unsubstantiated when it comes to the Union Representative. There were no specific instances of any security risks being posed or any instances where security was threatened. The testimony presented was hypothetical and speculative. Previously the Union was never informed of any security issue with Alvarez's presence in the Jail. In fact, the Employer allowed a change in the way Alvarez entered the Jail from the same manner as members of the public to later only needing to appear at a door to be given entry. This shows how the Employer trusted Alvarez and how his presence did not pose a safety threat.[14]

The Union does not need to prove the issue is a mandatory subject of bargaining. WAC 391-45-270 is inapplicable here and concerns the burden of proof in an administrative hearing on an unfair labor practice charge. The ULP was placed on hold pending a determination of the arbitrator in case the underlying issue was resolved, rendering a hearing on the ULP unnecessary.[15] By deferring the matter, PERC did not give the arbitrator the authority to decide the merits of the ULP, it merely placed it on hold

[14] The testimony on safety concerns was presented by Commander Sultemeier. The Sheriff, the individual who changed the rules, did not testify.

[15] The deferment letter specifically states: "…a substantial question of contract interpretation exists which could influence or control the outcome of the unfair labor practice case …The Commission reviews the arbitration award to determine its effect, if any, on the unfair labor practice case…If the arbitrator finds the employer conduct was prohibited by the collective

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CONCLUSION

The Union has satisfied the burden of proof that the Employer violated Article 25.2 of the collective bargaining agreement. The past practice and custom of interpreting the words "work location" means the area in the jail where the employees actually work. The area in the Sheriff's is not the work location. The past practice and custom of interpreting the words "any reasonable time" means the work hours of the employees which is 24 hours a day. A limitation to business hours is not a "reasonable time." The past practice and custom are consistent with the overall collective bargaining agreement and is reasonable. There are no security concerns to justify the unilateral change.

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bargaining agreement, the arbitrator will need to remedy the contract violation…the union should anticipate dismissal of the unfair labor practice allegation on a subject that was bargained by the parties and was merely a contract dispute."

AWARD

Franklin County Corrections violated Article 25.2 on October 22, 2020, and October 29, 2020, when it changed the Union's access to employees by prohibiting the Labor Representative from entering theJail and unilaterally changing the hours, location and escort for access to employees.

The remedy is an order requiring Franklin County to rescind the rules issued on October 22, 2020, and October 29, 2020, altering the Union's ability to access employees.

Dated this 18th day of February 2022.

/s/ _____

Robin A. Romeo

Arbitrator