

**Prison Reform and the
California Correctional Peace Officers Association**

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“This is an agency in which there has been too much political influence, too much union control and too little management courage and accountability... California was once the national leader, a pioneer, in corrections integrity, innovation and efficiency. We can make it so once again.”¹

Governor Schwarzenegger made this commitment to reform the California Correctional System on January 1st 2005 in his State of the State Address. His explicit reference to the overreaching influence of the California Correctional Peace Officers Association (CCPOA), and his own refusal to accept campaign donations from the union, may reflect a shift in California gubernatorial politics. Until now, the CCPOA has been among the most powerful political forces in the state, contributing millions of dollars each year to political campaigns. Despite Schwarzenegger’s public pronouncement, though, reform may be difficult. The contract between the State of California and the CCPOA gives union members broad powers, some beyond the traditional sphere of labor contracts. The CCPOA contends that these rights promote a professionalized workforce, with better employees, lower turnover, and fewer violent outbreaks than most states.² Many believe instead that the contract imposes unbearable budget costs, reduces managerial discretion, threatens inmate safety, and may impinge upon the state’s ability to implement reform.

1. BACKGROUND

California’s penal system has grown dramatically in the last twenty five years. With increasingly harsh sentencing policies, prison populations have swelled, and twenty-one new prisons have been added, reflecting an unprecedented boom in prison

¹ Governor Arnold Schwarzenegger, State of the State Address (Jan. 5, 2005).

² Mark Martin, *Prison guards lock arms: Formidable union is fighting to keep its July pay raise*, San Francisco Chronicle, June 14 2004, at A-1.

construction. With this growth has come a burgeoning of the prison guard ranks. Between 1980 and 2002, membership in the CCPOA rose from 5,000 to 31,000,³ and with this foundation, the union stepped up its political activities. As a result, the CCPOA is currently the top-spending law enforcement lobby in the state.⁴ In 1994, the union made history when it donated \$425,000 to Pete Wilson's gubernatorial campaign—the largest single donation to a California candidate up to that time. Governor Grey Davis received more than \$3 million in campaign contributions from the CCPOA.⁵ Now, approximately 35 percent of the CCPOA's nearly \$8 million yearly budget is dedicated to political activities.⁶

One of the trends of CCPOA lobbying has been to support legislation that promotes harsher sentences for prisoners. More prisoners means more job security for prison employees. In 1994, the CCPOA joined with the National Rifle Association to fund the “Three Strikes” initiative, the harshest sentencing law in recent history. The initiative passed with 72 percent of voter support. Throughout the late 1980's and 1990's, CCPOA-sponsored legislation was successful more than 80 percent of the time.⁷ Overall, the CCPOA's increasing influence is reflected in the fact that the CDC budget grew from \$923 million in 1985 to \$5.7 billion in 2004, and prison guard salaries swelled from \$14,440 in 1980 to \$54,000 in 2002.⁸

³ The CCPOA was collecting over \$22 million in yearly dues in 2004.

⁴ *Out in the Cold on the Governor's Hit List*, Contra Costa Times, Jun. 22, 2004, at A01.

⁵ Mark Martin, *Guards Union Corrupts Prisons, Report Finds*, San Francisco Chronicle, Jun. 25, 2004, at A-1.

⁶ Daniel Macallair, *Prisons: Power Nobody Dares Mess With*, Sacramento Bee, Feb. 29, 2004.

⁷ *Id.*

⁸ University of California Berkeley, Institute of Governmental Studies Website, California Correctional Peace Officers Association, at <http://www.igs.berkeley.edu/library/htCaliforniaPrisonUnion.htm>, (last modified July 2005).

2. CCPOA LABOR AGREEMENT

The CCPOA labor agreement has received significant bad press for being a budgetary gauging of California tax payers. The average California correctional officer earns \$59,000, which is 58% more than correctional officers nationally.⁹ Union members also receive retirement benefits beginning at 50 years of age of up to 90% of their annual salary for the rest of their lives.¹⁰ The primary contract provision that critics of the contract point to, however, is a 37 percent cumulative salary increase that was adopted in the 2001 agreement. This was adopted under Governor Grey Davis, and has been decried by many as a symbol of special-interest excess and influence over the former governor. In the current budget crisis, Governor Schwarzenegger has felt the impact of the scheduled salary increase. In attempting to balance the budget in 2004, he was forced to ask the union to return to the bargaining table before the contract was up, and before these increases took effect, and request that they give up the scheduled pay raise. As we will see below, this was a costly move. While the union acquiesced on the timing of their pay increases, they expanded their power and job security in other ways.

There is, however, another side to the story. Notably, California's prison guard staffing ratio was 47th-worst in the nation in 2004,¹¹ and the system has been plagued by insufficient recruitment and retention of officers. There are 6.46 inmates per California correctional officer, compared to a national average of 4.47. California correctional officers are assigned twice as many inmates as those in New York.¹² The president of a Chino-area CCPOA chapter was quoted as saying that the overtime situation is so bad

⁹ Petersilia paper, cite pending.

¹⁰ *Id.*

¹¹ Don Thompson, *Prison Guard Costs Skyrocketing*, Long Beach Press-Telegram, Mar. 5, 2004, at A1.

¹² Census of State and Federal Correctional Facilities, 2000, *quoted in* Petersilia paper, cite pending.

“that frequently throughout the months of August and September we weren’t able to fill all the positions on all the shifts, even by forcing every available officer to work a second shift. We’re using fatigued staff in a high-stress environment to provide essential safety and security.”¹³

California Government Code Section 19827.1 specifically acknowledges a historic problem recruiting and retaining correctional officers, and creates a policy that salary for these officers “must be improved and maintained” by taking into consideration “the salary and benefits of other large employers of peace officers in California.”¹⁴ The CCPOA has argued that their salaries should be commensurate with Highway Patrol officers, and that the 37 percent pay hike does not yet achieve this goal. However, while it appears true that their base salaries are lower than the CHP,¹⁵ other provisions in their contract make it more difficult to definitively assess who takes home the better package.¹⁶ Most significantly, corrections officers have access to significant overtime pay. For example, of the one hundred California state employees receiving the most overtime pay in 2004, thirty two were correctional staff.¹⁷ In contrast, California Highway Patrol officers only

¹³ Mason Stockstill, *Riot at CIM Draws Eyes to Staffing Levels*, Inland Valley Daily Bulletin, Sept. 23, 2005.

¹⁴ *California Department of Corrections*, California Bureau of State Audits, July 2002, available at <http://www.bsa.ca.gov/pdfs/reports/2002-101.pdf>.

¹⁵ CHP officer base salary is approximately \$50,952. Officers receive a five percent base salary increase each year for five years until they reach top step salary of \$61,944. California Highway Patrol Website, *Salary, Benefits and Retirement*, available at <http://www.chp.ca.gov/recruiting/html/osalary.html>. Correctional officers receive from \$37,800 to \$64,620. The rate paid beyond \$37,800 is dependent upon time-in-grade, completion of the apprenticeship program and job performance. California Statewide Correctional Officer Examination Bulletin, Department of Corrections and Rehabilitation, available at <http://www.corr.ca.gov/SelectionsStandards/PDFFiles/COBulletin.pdf>.

¹⁶ Senator Scott made this point clear when he cautioned, “If you’re able to cherry pick and say, *We want the retirement benefits involved with this group; we want the health benefits involved with this group...* you can put it all together and you can come up with a composite that shows you’re underfunding in all of these areas. But we could put together a composite that points out, compared to other state employees, how much better your contract is.” *Ad Hoc Committee Informational Hearing: State Bargaining Unit 6 Memorandum of Understanding Before California Senate Appropriations Committee*, Jul. 26 2004, at 48.

¹⁷ This figure consists of eight correctional officers, twelve correctional lieutenants, and twelve correctional sergeants. Plus, it does not include an additional twenty three medical employees of the CDC. Todd Wallack, *Overtime Pay Soars for Hard-To-Fill Jobs*, San Francisco Chronicle, Jun. 21 2005 at A-8. For the list of the

represented ten members of this list.¹⁸ Overtime has proven to be a critical budgetary concern. Overtime costs were \$929 million from 2000-2004, 72 percent, or \$388 million more than the state had planned.¹⁹ In 2003, officers earned \$152 million in overtime, compared to \$21 million in Texas.²⁰

More importantly than “how do we compare,” however, is the question of, “is it working?” The union has a fairly strong argument that, at least in some ways, these salaries yield positive results for the California prison system. “The union has worked diligently to improve wages and working conditions of its members. It has also established reasonable inmate to correctional officer ratios, improved CDC training, and taken steps to protect the rights of victims of crime.”²¹ In 2004, 1000 of California’s 36,000 sworn peace officers left their jobs, a turnover rate for that year of only 3.6%.²² This is one of the lowest if not the lowest turnover rate of any state. Officer turnover means significant administrative, training, and transactional costs. “Thus, California may recoup some of the money spent on lucrative contracts for officers by avoiding these wasted personnel expenses. Better staff retention and greater professionalization should also affect the conditions within the prisons, such as escapes, suicide attempts, and assaults.”²³

In addition to the budget concerns surrounding the MOU, the contract has been criticized for limiting managerial discretion and negatively impacting prisoner security

employees receiving the most overtime *see* <http://www.sfgate.com/cgi-bin/news/casalary/employee?Submit=Page&otmax=&o=50&term=&sort=overtime&ord=DESC>.

¹⁸ Nine officers and one sergeant made the list. *Id.*

¹⁹ *Prison-Guard Overtime Pay Bleeds Budget*, Contra Costa Times, Feb. 27, 2004.

²⁰ *Id.*

²¹ Special Master’s Final Report Re: Department of Corrections Post Powers Investigations and Employee Discipline at 26, *Madrid v. Woodford*, (No. C90-3094-T.E.H.).

²² *Petersilia*, cite pending.

²³ *Id.*

from uses of force by correctional officers. This paper attempts to assess what implications, if any, the current CCPOA MOU, side agreements, and 2004 addendum have in the areas of budget, managerial discretion, and inmate safety, and how these provisions may affect attempted reform of the California penal system.

a. BUDGET

The following are several provisions of the contract that should be explored in any attempt to reduce the cost of the CCPOA contract:

i. Sick Leave Policies

1. Extraordinary Use of Sick Leave (EUSL) Program.

The 2001 labor agreement eliminated the Extraordinary Use of Sick Leave (EUSL) Program. This program was designed to monitor and discourage use of excessive sick leave. The union's concern with EUSL was that it punished members who were legitimately sick based on pre-prescribed limits on leave.²⁴ However, the elimination of the program, in conjunction with an additional new provision prohibiting management from challenging an employee's use of sick leave based solely on the amount or frequency of use,²⁵ has allowed for a dramatic increase in correctional officers' use of sick leave. Whereas it is budgeted for officers to use 7.5 sick days per year, as of 2004 they were taking 13 days per year.²⁶ Correctional officers used about 188,000 hours of sick leave in March 2002, compared to 144,000 hours in March 2001, an increase of around 30

²⁴ Specifically, it defined extraordinary use as calling in sick more than five times per year with nine or more total absences, using sick leave in conjunction with a regular day off three or more times a year, having a bona fide pattern of sick leave use during the year, or using sick leave on a day for which the department had already denied the use of another type of leave.

²⁵ Agreement between State of California and California Correctional Peace Officers Association, July 1, 2001 through July 2, 2006, at §10.02(D). Available at <http://www.dpa.ca.gov/collbarg/contract/bumenu.shtm>.

²⁶ *California Senate Appropriations Committee Hearing*, *supra* note 16 at 4.

percent.²⁷ This increase took place despite the fact that the new agreement still permits management to discipline abusers of sick leave.

2. Intermittent Guard Sick Policy

The policies concerning intermittent guards also have significant budgetary implications. An intermittent guard is an employee who works periodically or for a fluctuating portion of the full-time work schedule. Hours worked are based upon the operational needs of each department. As such, intermittent guards function as a lower-cost alternative to paying overtime to a full-time employee. However, the state may be spending funds unnecessarily with respect to intermittent guards. This is because they are now eligible under the 2001 contract to receive sick leave benefits. If management phones an intermittent who uses sick leave to refuse the assignment,²⁸ the intermittent is paid as if he or she *did* work, up to three times per twelve month period.²⁹ Plus, the department must then pay the employee who actually works the shift. This clause should be revisited in the next contract negotiation.

Excluding this provision, intermittent officers can potentially serve to lower costs. Intermittent guards are available to fill posts that would otherwise be filled by prison guards working overtime. They therefore serve as a lower-cost alternative to overtime expenses. Prisons with low intermittent use could lower their costs by paying for more intermittent officers' time as opposed to the higher prison guard overtime rate. As an example, in 2001, five of the department's thirty three prisons had unused intermittent time equivalent to the efforts of between 11 to 19 full-time officers. Had these prisons

²⁷ CDC State Audit Report, *supra* note 14.

²⁸ The new clause allows intermittent guards to refuse assignment due to illness and still be paid "sick time" pay.

²⁹ CCPOA Agreement, *supra* note 25, at 26.01(C)(8) and 26.02(B). See also Jill Stewart, *Why the Prison Guard Union Instills Fear and Loathing in the Legislature*, Long Beach Press-Telegram, Apr. 18, 2004, at A19.

fully used their intermittent officers, they could have avoided more than \$1.2 million in overtime costs from July through December 2001.³⁰

3. Counting sick leave as time worked when determining overtime.

According to the CCPOA MOU, officers' use of sick time counts as time worked when determining their overtime pay.³¹ This provision is not new to the 2001 CCPOA contract, but the California Bureau of State Audits estimates that it could be adding as much as \$9.5 million to the department's annual costs.³² It should be noted, however, that this manner of computing time worked for purposes of overtime is consistent with the CHP. Their contract states that "time when an employee is excused from work because of holidays, sick leave, vacation, annual leave, personal leave, or compensating time off, shall be considered as time worked by the employee."³³

ii. **Awarding overtime on a seniority basis.**

The CCPOA MOU provides that voluntary overtime will be assigned based on seniority.³⁴ The California Bureau of State Audits estimates that if overtime hours were spread evenly among officers throughout the salary ranges, the department would save about \$4.8 million annually.³⁵ For the six month period between July and December 2001, of 2.3 million total overtime hours worked at the department's 33 prisons, the highest-paid staff worked 69 percent of the hours (1.6 million) yet were only 56 percent of the total correctional officers working overtime. In contrast, the lowest-paid correctional officers

³⁰ CDC State Audit Report, *supra* note 14.

³¹ CCPOA Agreement, *supra* note 25, at 11.08(B).

³² CDC State Audit Report, *supra* note 14.

³³ Agreement between the State of California and California Association of Highway Patrolmen Covering Bargaining Unit 5, Jul. 3, 2001 through Jul. 2, 2006, at 27. "Time worked" applies both to their benefits such as retirement, and to their pay.

³⁴ CCPOA Agreement, *supra* note 25, at 12.05(A).

³⁵ CDC State Audit Report, *supra* note 14.

worked only 7 percent of the total hours (163,000) yet were 12 percent of those who worked overtime.³⁶

The CCPOA MOU states that officers “shall be assigned voluntary overtime by seniority except where precluded by operational needs of the departments or in emergency situations.”³⁷ The CHP has a similar provision for voluntary overtime, but it allows for flexibility in this process: “The employer shall make reasonable efforts to offer special program overtime on an equitable basis taking into consideration employee skills, abilities and past performance for the given assignment. Voluntary overtime shall be offered on a continual rotational basis utilizing the most senior available employee.”³⁸ In practice, each CHP area office has the ability to establish their own policies for handling voluntary overtime assignments, as long as it is fair and equitable.³⁹

Moreover, the CHP may not be a very good comparison here. The nature of overtime assignments in each agency represent a key difference between the prison guards and the CHP. In the prisons, if an officer calls in sick, his or her position must be filled through overtime. This means that every day, every shift, there is significant overtime being paid to prison guards. The Highway Patrol, on the other hand, does not call in overtime officers to fill sick positions. They staff with the people that are on duty, unless extraordinary circumstances arise.⁴⁰ Voluntary overtime is therefore limited to special posts, such as movie details (regulating traffic for a movie shoot) or CalTrans construction sites. These are discrete jobs that are planned in advance for which CHP officers can

³⁶ *Id.*

³⁷ CCPOA Agreement, *supra* note 25, at 12.05(A).

³⁸ CHP Agreement, *supra* note 33, at 30.

³⁹ Interview with Sergeant Andy Menard, CHP, Office of Employee Relations, Dec. 29 2005 (providing examples of rotating through a seniority list or giving the assignment to the employee with less overtime hours in a particular year).

⁴⁰ *Id.* (Menard noted that “Sick leave is not a huge issue for us”)

apply. The prevalence of overtime shifts is therefore much lower at the CHP.⁴¹ The budgetary implications of seniority-based assignments are clearly more severe in the prison system.

iii. **Contribution of funds to a supplemental retirement account.**

As of fifty years of age and thirty years of service, CCPOA members are eligible for retirement benefits of up to 90% of their salary for the rest of their lives.⁴² State legislators have claimed that this is a different type of retirement system than the rest of state employees.⁴³ However, employees of the California Highway Patrol receive the same benefit.⁴⁴ If we compare this retirement system to California teachers, on the other hand, we discover a large disparity. Teachers receive only 2.5 percent at age sixty three.⁴⁵ This means that after thirty years on the job, a correctional officer receives 90% of his salary for life, but a teacher receives only 75%, and these benefits begin twelve years later. The following is a comparison of several state employee benefit systems:⁴⁶

⁴¹ See List of state employees receiving the most overtime, discussed *supra* at 17. Note that CHP officers may also receive pay for mandatory overtime. This is overtime generated during their shift that causes them to work beyond the shift (i.e., DUI arrest, court time).

⁴² As of January 1st, 2006 members who work 30 years prior to retirement receive 90% of their salary. This is calculated by multiplying 3.0 times the number of years worked. Therefore, retiring after twenty years on the job yields sixty percent of salary during retirement (20 times 3.0). There is a 90% ceiling that makes working longer than thirty years irrational.

⁴³ *California Senate Appropriations Committee Hearing, supra* note 16 at 48.

⁴⁴ Specifically, the contract provides that, “Sworn members will accrue retirement benefits under the State Patrol Formula in CalPERS at a rate of 3% of final compensation per year of service at age 50 and above.” CHP Agreement, *supra* note 33, at 33.

⁴⁵ Agreement between the State of California and Bargaining Unit 3, Professional Educators and Librarians, Jan. 31 2002 – Jul. 2, 2003, at 101.

⁴⁶ See Memorandum of Understanding for Bargaining Units 3, 5, 6, 8, 17, available at <http://www.dpa.ca.gov/collbarg/contract/bumenu.shtm>.

| Age at retirement | Retirement Factor | | | | |
|--|-------------------|-------------------|--------------|-------------|-------------|
| | Teachers | Registered Nurses | Firefighters | CHP | CCPOA |
| 50 | 1.10 | 1.10 | 2.40 | 3.00 | 3.00 |
| 51 | 1.28 | 1.28 | 2.52 | 3.00 | 3.00 |
| 52 | 1.46 | 1.46 | 2.64 | 3.00 | 3.00 |
| 53 | 1.64 | 1.64 | 2.76 | 3.00 | 3.00 |
| 54 | 1.82 | 1.82 | 2.88 | 3.00 | 3.00 |
| 55 | 2.00 | 2.00 | 3.00 | 3.00 | 3.00 |
| 56 | 2.06 | 2.06 | 3.00 | 3.00 | 3.00 |
| 57 | 2.13 | 2.13 | 3.00 | 3.00 | 3.00 |
| 58 | 2.19 | 2.19 | 3.00 | 3.00 | 3.00 |
| 59 | 2.25 | 2.25 | 3.00 | 3.00 | 3.00 |
| 60 | 2.31 | 2.31 | 3.00 | 3.00 | 3.00 |
| 61 | 2.38 | 2.38 | 3.00 | 3.00 | 3.00 |
| 62 | 2.44 | 2.44 | 3.00 | 3.00 | 3.00 |
| 63 and over | 2.50 | 2.50 | 3.00 | 3.00 | 3.00 |
| Maximum percentage of salary received upon retirement: | 75% | 75% | 90% | 90% | 90% |

iv. Bonus pay

CCPOA members receive bonuses for fulfilling certain “extra” conditions. For example, correctional officers are entitled to additional income for physical fitness pay, educational incentive pay, bilingual pay, and rural pay. Though these types of bonuses are used in other California law enforcement agencies,⁴⁷ several of them stand out in the corrections system.

First, correctional officers get a bonus of \$65 to \$100 per pay period for simply *completing* a physical fitness exam, regardless of their physical shape.⁴⁸ The CHP, on the other hand, requires that employees meet certain physical requirements for passage of

⁴⁷ The California Highway Patrol offers Physical Performance Pay, Bilingual Pay, Educational Incentive Pay.

⁴⁸ CCPOA Agreement, *supra* note 25, at 15.07(A).

work tasks.⁴⁹ The result is that *every* one of the CCPOA’s 31,000 members are receiving fitness pay,⁵⁰ in essence making it part of their income, as opposed to a performance-based bonus.

Next, the CCPOA MOU has a provision entitled “recruitment incentive” that provides for bonuses to employees in the San Quentin and Salinas facilities. In reality, this is a housing stipend due to higher housing costs in these areas. Officers receive \$175 per month of additional income. According to Senator Speier, other state employees that work in the San Francisco Bay Area receive no such subsidy.⁵¹

Finally, the Rural Health Program appropriates \$1500 per year to employees living in eligible rural areas, a program that also exists in other law enforcement agencies.⁵² These programs generally allocate a certain amount per month to each rural employee that they are permitted to receive as a reimbursement for incurred health costs. The rationale is that health care costs are higher in rural areas.⁵³ The 2001 CCPOA MOU provided for a typical reimbursement program in which employees were required to claim reimbursements and provide proof of their health care expenses. Money that was not claimed was placed into a bank account available to rural employees with catastrophic healthcare conditions. The addendum negotiated in July of 2004 changed this reimbursement system to an out-of-pocket expenditure. Employees are now paid the rural bonus without proving reimbursable costs. The union contends that healthcare costs are

⁴⁹ CHP Agreement, *supra* note 33, at 25.

⁵⁰ *California Senate Appropriations Committee Hearing*, *supra* note 16 at 4.

⁵¹ *Id.*, 47

⁵² *See, e.g.* CHP Agreement, *supra* note 33, at 48.

⁵³ This appears to be a valid concern. HMOs have been withdrawing operations from rural areas due to unprofitability. Profit concerns stem from the fact that rural residents on average have demographic characteristics that make them expensive to insure. Declining availability of healthcare increases its cost in these areas. *HMOs and Rural California*, Legislative Analyst’s Office, August 8, 2002, *available at* http://www.lao.ca.gov/2002/hmos_rural_ca/8-02_hmos_rural_ca.pdf.

simply so high in these areas that all employees would be reimbursed the full amount anyway, making this a stipend that directly offsets higher healthcare costs. Senator Speier has expressed concern that regardless “we are creating a different status for rural employees who are CDC members than rural employees who are not CDC members.”⁵⁴

b. MANAGERIAL DISCRETION

An equally significant concern that many express about the California Correctional Peace Officers Association’s MOU with the State of California is that it covers topics outside the scope of employment conditions and salary,⁵⁵ imposing limitations on managerial discretion. Judge Henderson has stated that the MOU “clearly has resulted in an unfair and unworkable tilt toward union influence ... The agreement contains numerous provisions that seriously undermine the ability of management to direct and control the activities of existing correctional departments and the new Department of Correctional Services.”⁵⁶ Jeanne Woodford, Undersecretary of the California Department of Corrections and Rehabilitation, echoed this sentiment, stating that she “would like to be able to take back some of [her] authority as a manager.”⁵⁷ In reviewing the MOU, it appears that two provisions have the most impact on management’s ability to run their prison facilities: the post and bid system and performance reviews.

⁵⁴ *California Senate Appropriations Committee Hearing*, *supra* note 16 at 44 (Statement of Senator Speier).

⁵⁵ *Id.*, at 67 (Statement of Senator Speier).

⁵⁶ Letter to Governor Schwarzenegger from Judge Thelton Henderson, Jul. 21 2004, *available at* <http://www.prisontalk.com/forums/archive/index.php/t-69764.html>.

⁵⁷ Jeanne Woodford, Talk at Stanford Law School (Nov. 9, 2005).

i. Post and bid provisions limit managerial staffing discretion.

The CCPOA MOU stipulates that seventy percent of a prison's posts are available for correctional officers to fill on a seniority basis,⁵⁸ leaving only thirty percent for management to staff as they deem appropriate. The process for assignments begins with an agreement between the local union chapter and prison management on the number and makeup of posts. Next, correctional officers bid for seventy percent of the posts, and are assigned to them based on seniority. Management makes assignments at its discretion for the remaining thirty percent of the posted positions.

Although the post and bid provision has existed in previous agreements, the current MOU increased the percentage from 60/40 to 70/30. It also augmented the overall number of qualifying positions subject to the provision.⁵⁹ In addition, the 2004 addendum extended post and bid to more supervisory positions. It is unclear, though, whether this change was actually implemented.⁶⁰ None of the other five local law enforcement agencies in California have post and bid provisions.⁶¹

The CCPOA contends that this system assures fairness in assignments and safeguards officers from managers who would use the assignment process inappropriately, such as for retribution or favoritism.⁶² However, management feels that the post and bid

⁵⁸ CCPOA Agreement, *supra* note 25, at 12.07(A)(3)(d).

⁵⁹ For example, medical technical assistants were added as qualifying posts.

⁶⁰ CCPOA asserts that it was promised 70 percent post and bid for supervisors, and claims that the administration renege on the agreement. The state maintains it never went along with a specific percentage. The matter is now the subject of a lawsuit filed by the CCPOA. Andy Furillo, *Contract Pits Guards v. Governor*, Sacramento Bee, Jun. 12 2005. It should be noted here that in reviewing the addendum, I found no reference to including additional post and bid positions.

⁶¹ *California Senate Appropriations Committee Hearing*, *supra* note 16 at 92. California Government Code §19827 identifies the five law enforcement agencies used for salary comparison purposes as the Los Angeles Police Department, the Los Angeles County Sheriff's Office, the San Diego Police Department, the Oakland Police Department, and the San Francisco Police Department.

⁶² *Id.*, at 91.

system prevents them from selecting the most appropriate employees for sensitive or critical posts and limits their ability to reward or discipline staff in seniority-bid posted positions. For example, if management determines that an employee with high seniority is not performing up to standards in a seniority-based post, they may remove that employee. However, they must place the employee in one of their 30 percent posts, preventing them from making merit-based assignments. Similarly, if an employee with low seniority is performing above standards, management's ability to reward that employee with a desirable assignment is limited. Jeanne Woodford has stated that she does not care for the post and bid system and that she would like the next contract negotiation to return some positions to management. She explained that "some people don't have the right kind of personality for particular postings."⁶³

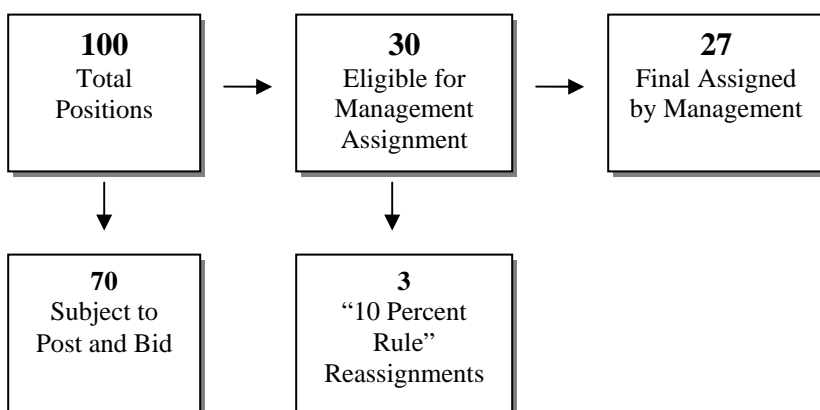
Management has some limited ability to exclude officers from assignments for which they have bid. Inattentiveness on the job, insubordination, or excessive force are permissible reasons, but sick leave abuse, off-duty conduct, or adverse personnel action occurring more than twelve months prior to the requested assignment do not qualify as allowable justifications.⁶⁴ It should be noted, however, that there is a provision entitled the "Ten Percent Rule" that is intended to alleviate the problem detailed above. It states that "in those instances when it becomes apparent an employee does not possess the knowledge, skills, aptitude, or ability to perform at an acceptable standard" in the post position to which the employee has bid, he or she can be reassigned. This reassignment is subject to some hefty procedural requirements, however. The employee's immediate supervisor must prepare a job change memorandum. The memo must then be approved by

⁶³ Woodford Stanford Law School Talk, *supra* note 57.

⁶⁴ CCPOA Agreement, *supra* note 25, at 12.07(3)(e)

the employee’s second line supervisor and section manager prior to being forwarded to the Personnel Assignment Office. The number of these reassignments must not exceed ten percent of the total post seniority-based positions.

As an illustration, the following flow charts details how these rules work together to limit management’s assignment discretion. Beginning with a hypothetical one hundred post and bid eligible positions, management may only be able to assign twenty seven posts:



ii. Performance reviews:

If an officer engages in inappropriate conduct, the MOU states that unless his or her performance was of a continuing nature or the instance was “particularly egregious,” a single event cannot be the basis of a substandard rating on an employee review. An overall rating of satisfactory or higher is considered to constitute successful job performance.⁶⁵ This provision is important because performance reviews should be a mechanism for managers to assess employee suitability for job posts. Preventing supervisors’ reviews from accurately representing an officer’s performance means that

⁶⁵ *Id.*, at 9.01(A), 9.01(B), 9.01(D).

assignments even to those thirty percent of posts without seniority limitations are made without full information.

Successful job performance is also tied to officer salary. According to the contract, all employees who are certified as successful job performers shall receive an annual Merit Salary Adjustment (MSA).⁶⁶ This means that even if an employee engages in conduct of which management does not approve, but is not “particularly egregious” or continual, the state is nonetheless required to pay a merit bonus.

c. SAFETY AND DISCIPLINE

While it is clearly appropriate for a labor contract to regulate employment conditions, including the disciplinary process, these provisions in the CCPOA MOU may adversely impact inmate safety and serve to intimidate potential whistleblowers in use of force incidents. Judge Henderson’s Special Master has stated:

The CDC and Department of Personnel Administration, with the approval of the California Legislature, have entered into a series of MOU modifications whereby the delicate balance struck by California statutes between holding a peace officer to the high standards expected by the public and safeguarding that peace officer’s due process rights, has been prejudiced to a degree where timely, fair, and effective investigations of inmate abuse may well be impossible.⁶⁷

The union, on the other hand, defends the provisions as necessary to protect the rights of officers accused of using excessive force.

⁶⁶ *Id.*, at 15.03(E). The clause additionally states: “Successful job performance shall be based on the latest performance evaluation on file as of the date of the pay increase. If no performance report is on file, the employee shall be deemed to have been performing successfully and shall receive his/her MSA.”

⁶⁷ Special Master’s Final Report, *supra* note 21, at 104, *Madrid* (No. C90-3094-T.E.H.).

i. Investigation of guard misconduct:

The contract requires investigators to turn over grievances that could result in adverse action to the accused CCPOA officer before the officer is interviewed by internal affairs.⁶⁸ MOU Side Letter Number 12 requires the CDC to give written notice to any employee ordered to attend an investigative interview, whether the employee is the subject of the investigation or simply a witness. It also mandates that the CDC allow reasonable time for a CCPOA representative to travel to and attend the interview.⁶⁹ These provisions taken together may deter reporting, compromise investigations, lead to reprisals, and perpetuate the code of silence.

First, an inmate who wants to report an abuse of force may reconsider this decision since he knows that the officer who abused him will immediately receive a copy of the complaint. In addition, there are no rules preventing this officer from telling others at the prison about the allegations, making the complainant potentially vulnerable to retaliation. Next, in the event of an internal affairs investigation, the investigation may be compromised because the subject officer and his CCPOA representative already have the details of the claims against him. The same CCPOA representative is allowed to attend each witness interview and subsequently attend the subject officer's interview. Thus, by the time the subject is interviewed, he has both the original complaint by the inmate and is aware of what each of the witnesses have said. The officer and his coworkers can easily develop consistent alibis to frustrate the investigation.⁷⁰ Finally, Judge Henderson's Special Master expressed concern that Side Letter 12 ensures a strict code of silence

⁶⁸ CCPOA Agreement, *supra* note 25, at 9.09(C).

⁶⁹ Special Master's Final Report, *supra* note 21, at 113, *Madrid* (No. C90-3094-T.E.H.).

⁷⁰ *Id.*

concerning inmate abuse cases. “Correctional officers who meet with investigators do so under the watchful eye of their CCPOA representatives. Correctional Officers who meet with an investigator without their CCPOA representation are readily identified by the CCPOA, and can be subjected to shunning and other misconduct by the correctional officers under investigation.” Moreover, neither the CDC nor the CCPOA has issued policies that govern the behavior of CCPOA representatives who serve as representatives to witness and subject officer interviews.⁷¹

The union offered the Special Master several justifications for these provisions, none of which satisfied him as convincing “given the section’s application in day-to-day life in the prisons.”⁷² First, the CCPOA explained that correctional officers should receive complainant information because they need to be informed of inmate threats. While the Special Master was in agreement with this concept, his review of grievances indicated that prisoners do not use the grievance process to communicate threats. Second, the CCPOA contends the provisions are needed to “enhance correctional officer memories.” Again, the Special Master disagreed with this argument because current policy dictates that the correctional officers prepare a report about any incident that an inmate would report as forceful. Third, the CCPOA cites section 909(e) which allows the CDC to decline to provide a report to the alleged perpetrator in the event of a surveillance, undercover operation, or sting. According to them, this means that legitimate investigations may proceed without turning over sensitive information to the accused officer. However, as the Special Master pointed out, correctional officers know when they are being investigated. Thus, if someone is under surveillance, when he requests a copy of the grievance and is

⁷¹ *Id.*, at 114.

⁷² *Id.*

told that 909(e) prevents him from viewing it, he will know immediately that an undercover action is underway, compromising the surveillance and the investigation.⁷³

A final concern with the mechanism for addressing use of force incidents is the Executive Review Committee (ERC). Currently, CCPOA representatives are invited to observe the weekly meeting of the ERC, which is a forum for candid discussions of reports of force. These same CCPOA representatives may later represent officers whose cases were discussed at the ERC meeting. The Special Master believes that this system is inappropriate and unnecessary to protect the rights of officers given the existence of well-established polices and procedures to assure their fair treatment, such as Skelly hearings.⁷⁴

ii. One year limit on bad conduct affecting officer assignments.

Bad employee conduct ceases to affect an officer's assignment one year after the incident occurs. An employee may not be precluded from participating in the post and bid program based upon an adverse personnel action if this action occurred more than twelve months prior to the bid process. Prison managers can therefore not deny an officer's requested job assignment based on earlier bad conduct if they are entitled according to seniority.⁷⁵ This could jeopardize inmate safety because managers are precluded from following their own instincts that an officer with previous disciplinary problems may not be ready or have the right personality for a particular posting.

⁷³ *Id.*, at 113.

⁷⁴ *Id.*, at 33. Public employees are entitled to a pre-disciplinary Skelly hearing. This includes written notice of the proposed disciplinary action, including: (1) a statement of the nature of the proposed discipline, (2) the effective date of the proposed discipline, (3) the reasons for the discipline, (4) the specific policy or rule violated, (5) a statement advising the employee of the right to respond orally or in writing. The Skelly rule allows employees an opportunity to respond to the charges and to request a reduction or elimination of the discipline.

⁷⁵ CCPOA Agreement, *supra* note 25, at 12.07(B)(1)(e)

iii. Purging of files:

Most files relating to disciplinary or work quality problems are regularly purged from employees' files. Specifically, the MOU requires that Letters of Instruction and Work Improvement Discussion records be removed from employee files one year after the date which management should have reasonably known of the incident.⁷⁶ Notices of adverse action are purged after three years;⁷⁷ citizens' complaints after five years.⁷⁸ On the one hand, this impinges upon management's ability to fully assess correctional officers' suitability for different posts. On the other hand, it enables employees who improve their conduct to move past previous bad acts and become successful employees. In determining which of these arguments weighs heavier in the context of the California correctional system, it is helpful to look to the Highway Patrol as a comparison. Though no similar provision exists in the Highway Patrol contract, departmental policy dictates the same result—that citizen complaints be purged after five years and negative documentation after three.⁷⁹ The CCPOA provision is therefore consistent with other public safety agency contracts.

3. 2004 CHANGES TO THE CCPOA CONTRACT

On July 1 2004, the Schwarzenegger administration reached a deal with the CCPOA to delay the scheduled union pay raise with the purpose of saving the state \$108 million in fiscal year '04-05. Judge Henderson harshly condemned the agreement as giving up “numerous and important management prerogatives to the CCPOA.”⁸⁰ In

⁷⁶ CCPOA Agreement, *supra* note 25, at 9.05(A).

⁷⁷ *Id.*, at 9.06(A).

⁷⁸ *Id.*, at 9.06(B).

⁷⁹ Andy Menard Interview, *supra* note 39.

⁸⁰ Henderson letter, *supra* note 56.

Henderson’s view, “many of these modifications subtly — and some not so subtly — undermine the ability of the Court to achieve compliance with its remedial orders.” Jeanne Woodford has taken a more pragmatic view of this most recent negotiation. “The Governor needed money. The only way you can get money back from the unions is to give something. That’s what it was.”⁸¹

The agreement provided for a 5 percent raise on July 1st 2004, 5 percent on January 1, 2005, and 0.9 percent on July 1, 2005.⁸² This was instead of the original 10.9 percent raise that had been scheduled for July 2004.⁸³ This scheduling change created about \$20 million in savings out of salary. To achieve the full \$108 million savings, the state deferred payments into the correctional retirement fund, the POFF II.⁸⁴ In exchange for this agreement, the CCPOA achieved the following significant gains:

- Guaranteed no layoffs through 2006 unless the inmate population dropped by more than six percent. This essentially ensures no layoffs because the average yearly

⁸¹ Woodford Stanford Law School Talk, *supra* note 57.

⁸² Note that the CHP received the following pay increases: 7.7% on July 1, 2003; 6.8% on July 1, 2004; and 5.6% on July 1, 2005. Andy Menard Interview, *supra* note 39.

⁸³ Agreement Between the California Correctional Peace Officer Association and the State of California Regarding the Amendment of the Bargaining Units 6 Memorandum of Understanding, Jul. 1 2001 through Jul. 2 2006.

⁸⁴ The POFF II is a program whereby the state contributes percentage of employees’ salaries into a defined contribution plan for their eventual retirement.

change in the California prison population since 1997 is 1.0%.⁸⁵ It appears that this provision was well-timed from the union’s perspective because three CYA facilities were scheduled for closure, and this clause, along with a new transfer provision, ensured absorption of employees of those facilities into the greater correctional system, as opposed to lay offs.⁸⁶ While this clearly affects the state budget, given that the Department of Corrections and Rehabilitation (“CDCR”) has difficulty recruiting correctional officers, it also seems to yield a benefit to the state of increasing correctional officer ranks. It should be noted, though, that tying job security to the prison population could potentially impact parole revocations. Though union representatives deny the charge, policy makers express concern that parole officers may violate parolees intentionally to keep prison populations high. If this is true, provisions that link jobs to prison population would enhance these perverse incentives.

- The Department of Corrections and Rehabilitation agreed to hand over prison videotape of riots or other incidents to the CCPOA no later than twelve months

⁸⁵ California Prisoners and Parolees, Summary and Statistics, 2005, at 6, *available at* [http://www.corr.ca.gov/Offender InfoServices/Reports/Annual/CalPris/CALPRISd2004.pdf](http://www.corr.ca.gov/Offender%20InfoServices/Reports/Annual/CalPris/CALPRISd2004.pdf). The following chart provides more detail of prison population growth:

| Year | CA Prison Population | % change |
|------|----------------------|-------------|
| 1997 | 152,506 | |
| 1998 | 158,207 | 3.7% |
| 1999 | 162,064 | 2.4% |
| 2000 | 162,000 | 0.0% |
| 2001 | 161,497 | -0.3% |
| 2002 | 157,979 | -2.2% |
| 2003 | 160,931 | 1.9% |
| 2004 | 163,500 | 1.6% |
| | Average | 1.0% |

⁸⁶ *California Senate Appropriations Committee Hearing*, *supra* note 16 at 50.

after the occurrence. The union exacted this provision in order to resolve their concerns about Department reluctance to turn over the footage. The union has traditionally used these tapes in their lobbying and public relations efforts to publicize and provide support for their claim that correctional officers “walk the toughest beat.”

- Employees working in rural areas were given an extra \$125 per month for health care costs. This provision changed the program from a health care reimbursement system to a flat income increase. See discussion *supra* at page 10.
- The post and bid system was extended to include prison supervisors.⁸⁷ Again, it is unclear where this is written or how many supervisors were actually given this benefit in practice. See *supra* note 60. In one sense, this further reduces the ability of wardens and top managers to staff the prison as they deem appropriate. From an operational perspective, however, this encourages union officers to work diligently in the hope of securing a promotion. Currently, prisons suffer from the phenomenon that officers do not *want* to promote because officer benefits are better than supervisor benefits. Including supervisors in the post and bid system is one way to address this problem.
- The addendum provides that funding be distributed as a continuous appropriation. In most MOUs passed by the legislature, even with the contract in force, if the legislature elects not to appropriate funds in a fiscal year, the parties must return to

⁸⁷ Furillo, *supra* at note 60.

the bargaining table to renegotiate. Continuous appropriation removes legislative authority to withhold appropriation of funds in this way.⁸⁸

- The CCPOA is to have a say in a two-year study to determine whether a college program at San Quentin State Prison reduces recidivism.⁸⁹ It is unclear why the CCPOA wanted this provision.

4. RECOMMENDATIONS

Despite significant bad press directed at the CCPOA and their contract with the state, this paper has attempted to present an even-handed analysis of the agreement in order to identify which provisions, if any, should be revisited in the next negotiation. Surprisingly, the salary increases, though they present tremendous budgetary problems for California, are perhaps not as worthy of renegotiation as portrayed by the press. California prison guards are highly paid compared to other states, but they are still not commensurate with the CHP. Moreover, recruitment remains difficult despite their relatively high salary, and the low turnover in prison guard ranks once they are hired may provide some cost savings to the state.

There are, however, several areas of the contract that demand attention. Most notably, the post and bid program and the system for investigating guard misconduct are problematic and should be given priority. From a budgetary perspective, several provisions in the contract appear to be imposing unintended costs. The Extraordinary Use of Sick Leave program should be revisited and potentially reinstated in some capacity.

⁸⁸ MOU Amendment, *supra* note 83.

⁸⁹ Mark Martin, *Judge Condemns Deal with Prison Guards*, San Francisco Chronicle, Jul. 21, 2004, at A1.

Higher standards should be imposed for physical fitness pay such that the bonus actually rewards physical health. Finally, sick leave for intermittent guards should be reassessed.

This year, the CCPOA and the State of California will undertake negotiations for the next agreement. In this process, it will be critical for the State to focus on the clauses prioritized above. If successful, this represents a tremendous opportunity for Governor Schwarzenegger to work with the union to advance his effort to reform the California correctional system.