

BARRY WINOGRAD
Arbitrator and Mediator
1999 Harrison Street, Suite 1400
Oakland, CA 94612
(510) 465-5000

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy Between:)
)
)
UNIVERSITY PROFESSIONAL AND TECHNICAL)
EMPLOYEES-CWA LOCAL 9119) Arbitrator's
) File No. 18-206-LA
)
and,)
)
)
UNIVERSITY OF CALIFORNIA, DAVIS) ARBITRATION
) OPINION AND AWARD
) (August 14, 2019)
[Re: Senior Pharmacist On-Call Pay,)
No. DV HX-1523-18])
)
_____)

Appearances: Greg Wine, for University Professional and Technical
Employees-CWA LOCAL 9119; Shelbi Rodriguez (Labor Relations
Consultant), for University of California, Davis.

INTRODUCTION

This dispute arises under a labor agreement for healthcare employees between the University Professional and Technical Employees an affiliate of the communications Workers of America, and the University of California. At issue is a pay dispute affecting senior pharmacists at the University of California, Davis Medical Center. The Union contends that the University violated the labor agreement by denying senior pharmacists in the information technology (IT) unit on-call pay for assigned time outside of working hours. The University urges that on-call pay is not owed, asserting that previous practice is controlling for IT senior pharmacists.

The undersigned was selected by the parties to conduct a hearing, and to render a final and binding award. The hearing was held on June 26 and July 1, 2019 in Sacramento, California. At the hearing, the parties were afforded an opportunity to examine and cross-examine witnesses, and to introduce relevant documentary evidence. The dispute was deemed submitted for decision on July 15, 2019 upon receipt of posthearing briefs.

ISSUES

Based on discussion with the parties at the outset of the proceeding, the following issues were submitted for resolution: Did the University violate Article 11 and Appendix A of the labor agreement by failing to pay on-call and restricted on-call pay to senior pharmacists in classification code 7932; if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISION

ARTICLE 3 ARBITRATION PROCEDURE

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H. ARBITRATION REMEDIES

1. No remedy by an arbitrator with respect to any grievance which shall be submitted to her/him shall in any case be made retroactive to a date earlier than thirty (30) calendar days prior to the filing of the Step 1 grievance, except for the correction of mathematical, calculation, recording or accounting errors relating to the payment of wages. For grievances involving the correction of mathematical, calculation, recording or accounting errors relating to the payment of wages, an award of an arbitrator shall not in any case be made retroactive to a date earlier than three (3) years prior to the initiation of the written grievance in Step 1 of the Grievance Procedure....

ARTICLE 11 HOURS OF WORK

A. EXEMPT EMPLOYEES

1. The normal workweek for a full-time exempt employee is considered to be 40 hours, and for part-time exempt employees the proportion of 40 hours equivalent to the appointment percentage. However, greater emphasis is placed on meeting the responsibilities assigned to the position rather than on working a specified number of hours. Exempt employees do not receive overtime compensation or compensatory time off, or additional compensation beyond the established salary for the position. After extended periods of additional time worked or unusually heavy workload, supervisors may approve an employee's request for a temporary reduction in work schedule with no loss of pay.

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12. On-Call

- a. On-call is time during which an employee is required to be available for return to work as a result of a call to work. An employee is not considered to be in on-call status unless the employee had previously been scheduled by the University for the assignment. The University retains the right to determine the need for, and the assignment of, on-call time.
- b. On-call will not be considered hours worked when employees are free to engage in activities for their own purposes even though they are required to inform the employer how they can be reached though to carry a beeper or radio.
 - 1) An employee in on-call status who is called in to work shall be guaranteed a minimum of two (2) hours of work or two (2) hours of pay in lieu of work for each occurrence of call-in. An employee

in on-call status is not eligible for minimum call-back.

- 2) Time spent in unrestricted on-call status, but not actually worked is not considered as time worked or time on regular pay status.
 - 3) An employee called in to work from on-call status shall be assigned by the University to perform available work.
 - 4) Employees are eligible for additional pay for unrestricted on-call in accordance with the rates listed in Appendix A-1, A-2 and A-3.
- c. On-call will be considered hours worked when an employee cannot use his or her time effectively for the employee's purposes. Under such circumstances, the employee will be paid at the employee's normal pay rate (or overtime when appropriate).

ARTICLE 43 WAIVER

- A. The University and UPTE acknowledge that:
1. During the negotiations which resulted in this Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining;
 2. This Agreement constitutes the entire contract arrived at by the parties after the exercise of that right and opportunity;
 3. This Agreement supersedes and replaces the specific rights and/or procedures set forth under the various personnel programs and policies, which previously applied to Health Care Professional Unit employees.

B. As a result of the acknowledgments in Section A, above, the University and UPTE agree that, for the term of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered within this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

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APPENDIX A

Davis - Appendix A					PHARMACIST SR EX - 7932				
Step	1/1/2014	Eve Rate	Night Rate	Wknd Rate	On Call Rate	Charge Differential	1/1/2015 (+2%)	1/1/2016 (+2%)	1/1/2017 (+2%)
1	\$71.81	.00	.00	.00	7.00		\$73.25	\$74.72	\$76.21
2	\$73.26	.00	.00	.00	7.00		\$74.73	\$76.22	\$77.74
3	\$74.70	.00	.00	.00	7.00		\$76.19	\$77.71	\$79.26
4	\$76.22	.00	.00	.00	7.00		\$77.74	\$79.29	\$80.88
5	\$77.73	.00	.00	.00	7.00		\$79.28	\$80.87	\$82.49
6	\$79.28	.00	.00	.00	7.00		\$80.87	\$82.49	\$84.14
7	\$80.88	.00	.00	.00	7.00		\$82.50	\$84.15	\$85.83

FACTUAL ANALYSIS AND DISCUSSION

1. Facts Giving Rise to the Dispute

This arbitration followed the filing of an individual grievance in October 2017 on behalf of Stephan Provan, an IT

senior pharmacist. (Un. Exh. 2, p. 1.) The grievance alleged that the University was violating the labor agreement by failing to pay on-call pay to senior pharmacists at the University's Davis Medical Center located in Sacramento. The grievance stated:

Alleged Violation of Agreement

UC Davis Health has a long standing past practice of providing Sr Pharmacists working in the hospital on-call pay in accordance with the Appendix A salary table in the HX contract. This is a recognized exception to article 11 hours of work. UPTe has many job titles which are exempt that also receive on-call pay for intermittent periods of on-call time over several days. The inpatient Sr. Pharmacists are on-call for 7 days overnight for any questions regarding medications and ordering medications. The IT senior pharmacists are also on-call for 7 days overnight for any questions regarding medications and ordering of medications in the electronic medical record. The Senior Pharmacist Exempt salary table in appendix A pg. 142 of the HX contract is for all employees who have this job title campus wide and has been negotiated as such. These salary tables are not department specific and should not be interpreted in this manner since department specific salary tables would be against the intent of the contract. Past practice of not paying for hours worked is not an acceptable defense of this contract violation.

Remedy Requested

All UC Davis Senior Pharmacists Exempt who provide on-call services campus wide will get the on-call pay negotiated in the HX contract. All IT Senior Pharmacist Exempt who have been on-call for the past 3 years are to be made whole. (Un. Exh. 2, p. 3.)

The University denied the grievance in December 2017. (Un. Exh. 2, pp. 5-24.) In the University's view, there is a

longstanding practice of not paying senior pharmacists in the IT unit who are assigned to on-call status. The University's response noted that a previous group grievance for IT senior pharmacists had been filed in November 2016, which also had been denied. (Id., p. 19.) For that grievance, however, extra payments had been provided for some employees, not for on-call status, but for reaching the top of the pay schedule. (Id., p. 11, 19-25.) In mid-2018, in advance of this arbitration, the October 2017 grievance filed on behalf of Mr. Provan was consolidated with the previous 2016 group grievance, as well as with a group grievance from April 2018. (Un. Exh. 2, p. 26.) This arbitration followed.

Testimony and documentary evidence was received at the arbitration regarding the work of IT senior pharmacists, and that of other senior pharmacists and healthcare employees.

IT senior pharmacists are licensed, as are all senior pharmacists working for the University. At the Davis Medical Center, the University employs 38 senior pharmacists in all. Fifteen senior pharmacists are in the IT unit after being added to the classification in 2011. Mr. Provan began working in 2012 as an IT senior pharmacist, but waited until he vested in the retirement system to grieve the failure to receive on-call pay.

The IT senior pharmacists provide indirect clinical support for patient care by using a software system that is available for doctors and nurses who are working with patients in the hospital. In doing so, IT pharmacists are building an electronic medical records system for online patient care. This software interface permits IT pharmacists to track medications, provide drug compositions and warnings, and authorize the use and modification of courses of treatment. Registered nurses working in the IT unit are not on-call, and doctors in the unit work on teams separate from the pharmacists. (See Un. Exhs. 4 (pp. 6-9), 4(c).)

On-call status also is used for senior pharmacists who work in the hospital with practitioners dealing directly with patients. This use of on-call status for senior pharmacists, commencing around 2008, preceded the use of an IT senior pharmacist classification, and has continued since. The on-call status for senior pharmacists, including IT senior pharmacists, is set forth as a working condition in the position description and on the intra-University website. (Un. Exh. 4, pp. 2, 4, 5; Un. Exh. 13.) No distinction is made in these materials regarding on-call pay for senior pharmacists in different health care units, such as IT.

On-call work for senior pharmacists in the IT unit is carried out through five teams of three employees each. They are on-call once every five weeks. Upon occasion, as Mr. Provan acknowledged, shift coverage by another IT senior pharmacist can be arranged as an alternative when an on-call assignment is scheduled. Senior pharmacists in IT who are designated for on-call duty have this status built into their work schedule, although, according to University testimony, IT senior pharmacists are unable to submit timesheets for on-call payments. (Un. Exh. 4, p. 10 et. seq.)

There are no written rules or protocols for on-call duty by senior pharmacists, either in the IT unit or in the hospital. However, the weight of the testimony regarding expectations is that senior pharmacists should be available within 15 minutes or so of a pager contact. Once in contact, the senior pharmacists provide assistance. To facilitate on-call duty, senior pharmacists must have access to a laptop with online availability. In addition, senior pharmacists working on-call must maintain physical alertness and availability, and do not engage in drinking, going to the movies, or other recreational activities.

Other non-IT senior pharmacists at the medical center who receive on-call assignments are paid for that time. (See, e.g., Un. Exh. 7, pp. 5-6 (re: Giannini).) Some bargaining unit employees in exempt status in other classifications, such as social workers and dieticians, also receive on-call pay. (Un. Exh. 5.)

In the background of this dispute are two bargaining agreements. The first, from 2007 to 2011 did not include any language extending on-call pay to senior pharmacists. (UC Exh. 5.) However, a successor agreement for the period 2013 to 2017, specifies on-call pay for senior pharmacists in Appendix A of the labor agreement. (UC Exh. 1.) Appendix A is the pay chart that bargaining unit employees at UC Davis can reference. The parties stipulate that senior pharmacists working in IT have not been paid for on-call status before the current labor agreement, or after. The estimated value of on-call pay is about \$8,000 to \$9,000 annually for IT senior pharmacists.

2. Discussion

The Union contends that the University violated Article 11 and Appendix A of the labor agreement by failing to provide on-call pay to IT senior pharmacists who perform job duties

comparable to those of other senior pharmacists working for the Medical Center. The University maintains that on-call pay is not owed because a longstanding practice for IT senior pharmacists known to the Union constitutes "a modification to the seemingly unambiguous contract language." (UC Br., p. 10.)

For the reasons that follow, the Union's grievance will be sustained.

First, the labor agreement weighs strongly in favor of the Union's position. Article 11 establishes a general principle that exempt employees, as here, will not receive extra pay for extra work. However, Article 11 also provides an exception for matters covered in Appendix A, including on-call pay. In this respect, Appendix A covers all senior pharmacists, without qualification, as there is no exception in the contract for any senior pharmacist on the issue of on-call pay. Nor is there any evidence of contrary negotiating history regarding a decision to include on-call pay in the 2013 bargaining agreement, in contrast to the previous bargaining agreement which was silent on the subject.

Second, some senior pharmacists are paid for on-call service, but others in IT are not. On the facts presented, this

difference in treatment requires an explanation since the essential duties are comparable. Each type of senior pharmacist is engaged in clinical facets of patient care with health care personnel. Each type of pharmacist, when on-call, is subject to comparable restrictions, including the basic requirement of having a professional license, online access, and limitations on personal activity when scheduled to be on-call.

Third, the University's reliance on previous practice is not supported when the evidence is assessed; that is, the University has not demonstrated that the practice has been consistent with the terms of the labor agreement, and based on notice to and acceptance by the Union. While Mr. Provan or other individual IT senior pharmacists may have been aware that on-call service was not being paid, that is not the same as the Union knowing of and accepting the practice. In this proceeding, even if the labor agreement is not deemed to be clear and unequivocal, there is no evidence of the Union's knowledge of the University's position until the University responded in November 2016. The filing of that grievance demonstrates the Union's objection to the University's interpretation of the on-call pay provision.

Last, a related reason to reject the University's position is that, if adopted, it would constitute an additional term establishing an unwritten exception to Appendix A and the labor agreement generally, and, thereby modify text already agreed upon by the parties. In this respect, support for the Union's grievance is found in Article 43's waiver language. To the extent the University relies on previous practice to modify the labor agreement in order to deprive employees of a negotiated benefit, Article 43 strongly suggests that the new contract language specifying on-call pay for senior pharmacists superceded any previous understanding.

In deciding this case, the arbitrator is not resolving an issue raised by the Union at the hearing and in its brief asserting that the University has threatened to retaliate against the Union, should it prevail, by reclassifying IT senior pharmacists as non-unit personnel. (Un. Br., pp. 3-4.)

On the issue of appropriate relief, the arbitrator rejects the Union's request in its grievance for three years of make whole payments for on-call assignments, or, further, to 2008, when on-call duty was implemented, as proposed in the Union's post-hearing brief. (Un. Br., p. 4.) The Union's reliance on contract language in Article 3.H allowing for an extended three-

year period of recovery misconstrues a limitation in that provision. (UC Exh. 2.) Briefly stated, a three-year recovery for pay claims is permitted when there is a clerical or accounting error requiring correction, not payment based on an interpretation of contract language and past practice, as here. Accordingly, the make whole period is retroactive to 30 calendar days prior to filing step one of the November 16, 2016 grievance which has been consolidated in this proceeding with two later claims.

AWARD

Based on the testimony and documentary evidence, and the findings and conclusions set forth above, the undersigned renders the following Award:

1. The Union's grievance is sustained. The University at the Davis Medical Center shall cease-and-desist from failing to pay IT senior pharmacists working on-call in either restricted or unrestricted status.

2. IT senior pharmacists shall be provided make whole relief commencing 30 days prior to filing of the November 16, 2016 grievance.

3. Pursuant to the stipulation of the parties, the undersigned will retain jurisdiction for 120 days from the date of this Award to resolve any disputes regarding implementation of the remedy.

Dated: August 14, 2019

Barry Winograd

BARRY WINOGRAD
Arbitrator