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IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy Between: )

UNIVERSITY PROFESSIONAL AND TECHNICAL ) Arbitrator's
EMPLOYEES-CWA LOCAL 9119 ) File No. 18-206-LA

and,

UNIVERSITY OF CALIFORNIA, DAVIS ) ARBITRATION
[Re: Senior Pharmacist On-Call Pay, ) OPINION AND AWARD
No. DV HX-1523-18] ) RE: REMEDY DISPUTE
(December 13, 2019)

Appearances: Greg Wine, for University Professional and Technical Employees-CWA LOCAL 9119; Danielle Kehler (Employee and Labor Relations Manager), for the 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, and concerns the University’s Davis Medical Center. At issue is implementation of the remedy directed by the Award in a decision dated August 14, 2019. The Award stated:

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. (Opinion and Award, Aug. 14, 2019, pp. 15-16.)

The undersigned was advised by the parties in October 2019 that a dispute had arisen regarding implementation of the remedy. Following a review of documents submitted to support the positions of the parties, a hearing on the remedy dispute was conducted on November 13, 2019 in Sacramento, California.
At the hearing, witnesses were examined and relevant documentary evidence was reviewed. The dispute was deemed submitted on November 22, 2019 upon receipt of the final posthearing briefs.

ISSUES

Based on the record presented, and the positions of the parties, the arbitrator has determined that the following issues are submitted for decision in this phase of the case: Did the University comply with the terms of the Award dated August 14, 2019; if not, what is the appropriate further relief?

RELEVANT CONTRACT PROVISIONS

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

18-206.Decision.UCD-UPTE.Remedy
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.

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
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).

APPENDIX A

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<th>Davis - Appendix A</th>
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FACTUAL ANALYSIS

This remedy decision concerns the subject matter of a 
previous arbitration decision on the merits issued August 14, 
2019. The previous decision dealt with a pay dispute affecting 
senior pharmacists at the University of California, Davis Medical 
Center. The decision followed three grievances filed by the 
Union, beginning in 2016, which were consolidated for hearing.
In the earlier phase of this case, the Union urged that the University violated the labor agreement by denying senior pharmacists in the information technology (IT) unit on-call pay for scheduled time outside of working hours. The University maintained that on-call pay was not owed, relying on previous practice for IT senior pharmacists.

In the August 2019 decision, the undersigned concluded that the University violated the labor agreement by denying on-call pay for scheduled time outside of regular working hours for IT senior pharmacists. This conclusion was based on the language in Article 11.A.12 of the bargaining agreement, and, particularly, on the University’s practice of making on-call payments to senior pharmacists working in a parallel clinical setting for whom the agreement also applied.

Following the decision, the parties met to implement the remedy. As to the first portion of the Award, the cease-and-desist directive, it is undisputed that the University complied, although payment has been delayed by implementation of a new payroll system. Beyond that issue, the Union challenges a new post-decision policy statement as not providing pay to IT senior pharmacists working on-call in restricted status. According to
the new policy, it only applies for situations involving unrestricted status. (UCD Exh. 1, pp. 2, 8.)

The Union argues that the new policy, by not providing for restricted pay, is inconsistent with the August 2019 Award. The Union believes that both types of pay are warranted, and also argues that the University failed to properly meet and negotiate over its new policy.

For its part, the University asserts that it has complied with the Award by providing for unrestricted pay in keeping with the circumstances of the assignments to IT senior pharmacists. For the University, there is no need for further action since only one person on a team is assigned to on-call status. Previously, teams of three to five IT senior pharmacists were scheduled to be on-call outside of regular working hours, which normally are 8:00 a.m. to 5:00 p.m., Monday through Friday.

The University also maintains, in any event, that there is no support in the labor agreement or on the factual record for restricted pay for senior pharmacists who are “called in to work,” under Article 11.A.12.
The second issue in the present remedy phase concerns the amount to be paid as make whole relief commencing 30 days prior to filing of the initial grievance in 2016. On this issue, the parties have assembled a substantial and comprehensive documentary record of work schedules and assignments for the nearly three years prior to the August 2019 decision. In sum, UPTE seeks approximately $377,000 as payment in varying amounts to individual IT senior pharmacists who were scheduled and handled calls as part of rotating teams for on-call assignments throughout that period. (UPTE Exh. 3, pp. 1-2.)

The University, in contrast, urges that $136,000 is owed. (UC Exh. 1, pp. 3-5.) In the University’s view, as only one individual for each assigned team should be deemed to be in on-call status by responding to pages, any make whole amount should be divided proportionately. According to the University, payment should be averaged for those scheduled to be on an on-call team since the duty was shared and rotated depending on pager calls received by those employees.

Aside from payments to team members, UPTE also seeks pay for those IT senior pharmacists it deems to have been working in restricted status, or at least paid a two-hour minimum for calls taken. For the Union, such pay would be consistent with pay at
a regular rate as set forth in Article 11.A.12 of the labor agreement when an employee is limited in personal life activities and then is "called in to work." The University counters that such pay is not warranted by practice for those assigned on-call duty, nor by the terms of the labor agreement.

DISCUSSION

Based on the facts and argument presented, it is concluded that unrestricted pay at the contractual rate of $7.00 per hour is owed for on-call assignments by the University for all individuals on teams scheduled for on-call assignments outside of regular working hours. Each individual so scheduled should be paid the $7.00 per hour on-call rate under Appendix A since they were each assigned to the on-call schedule.

The arbitrator concludes that, in this context, the employees should not bear the burden of dividing hourly pay amongst themselves, which is what the University proposes. Here, the University failed to provide any direction or mandate assuring that on-call pay would be received by only one employee, in contrast to the approach adopted by the University after the August 2019 decision. Instead, internal allocations
to divide or respond to requests within a team were delegated by the University to those employees. Hence, Article 11.A.12 applies for unrestricted payments to those scheduled to be in on-call status outside of regular working hours.

The University’s position also is rejected because, rather than providing hourly pay, the University would average the pay for all of the employees on an on-call team. This approach of dividing pay is not set forth in the bargaining agreement and was not agreed to by the Union. As a result, each member of the team would receive a much lower amount if the University’s calculation method is adopted.

The University also argues for a lesser amount as payment because it believes it would be unreasonable given the modest workload of the individuals affected. Granted, the work required of IT senior pharmacists typically was sporadic and brief when paged to respond during non-work hours. Nevertheless, it was the University that designed this system, and not the Union nor the employees.

On other questions raised in this case, the Union’s objections are rejected. As to the Union’s claim that the University failed to abide by the first portion of the Award,
the contention is misplaced. Indeed, the University complied with the directive that it cease-and-desist from the practice of failing to provide on-call pay. After the decision, the University adopted a policy providing for unrestricted hourly rate pay for a single pharmacist, both IT and clinical, when scheduled to be on-call. However, by the terms of the Award in August 2019, the University was not obliged to pay for both unrestricted and restricted on-call status. Rather, the Award only provided that pay be made for “unrestricted or restricted status,” using the disjunctive and without resolving the further issue now raised by the Union.

On this issue, the Union’s claim for make whole payment for restricted pay for those individuals who were called or paged for assignments during their on-call shift is not well founded, whether payment be for a two-hour minimum or otherwise. Most important, such payment for IT senior pharmacists, who are exempt employees, is not clearly supported in the bargaining agreement, at least on the record presented to this arbitrator, nor is it compelled by the August 2019 Award. Rather, the agreement in Appendix A provides for on-call pay at a rate of $7.00 per hour, and there is no other indication in Appendix A that pay beyond that amount is owed.
To support the Union's contention, it cites the on-call pay provisions for restricted pay in Article 11.A, but, relying on those terms poses the problem that senior pharmacists as exempt employees are not ordinarily entitled to restricted pay. Moreover, on the facts presented in this case, the contract itself is not clear on this question. Unlike the hourly figure in Appendix A for unrestricted pay consistent with Article 11.A.12.b.4, the Union's claim is premised on reading several other terms together to draw support. However, the Union's multi-step argument begs the question of why the parties were not clear in the agreement.

Further, on this record, the Union has not provided a basis to conclude that IT senior pharmacists should be paid at a higher hourly rate for being "called in to work." Even the Union recognizes the difficulty of making such a calculation based on the records of assignments and responses, which are partial and apparently incomplete. (UPTE Exh. 3, p. 1.)

Based on the above, the Union's claims regarding the University's failure to meet-and-confer to adopt an on-call policy and for restricted pay for senior pharmacists in on-call status are denied. This denial is without prejudice to the
disposition of any future grievance pursued by the Union based on those alleged violations.

AWARD

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

1. According to the proof offered in this proceeding, the University will provide make-whole pay at the $7.00 per hour unrestricted rate to each IT senior pharmacist scheduled for on-call teams outside of regular working hours, commencing 30 days prior to filing of the November 16, 2016 grievance, until adoption of a new University policy assigning a single pharmacist to be in on-call status.

2. All other Union claims are denied as stated in this decision.

3. The arbitrator will retain jurisdiction for 90 days to resolve any further dispute over implementation of the remedy.

Dated: December 13, 2019

BARRY WINOGRAD
Arbitrator