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OFFICE OF THE ARBITRATOR

August 9, 1989

In the Matter of the Arbitration between:

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| THE STATE OF OHIO |) | |
| OFFICE OF COLLECTIVE BARGAINING |) | |
| Columbus, Ohio |) | |
| |) | |
| and |) | Grievance Nos. |
| |) | 27-20-(2/4/88)-002-02-11 |
| OHIO HEALTH CARE EMPLOYEES UNION) |) | 27-20-(2/4/88)-003-02-11 |
| DISTRICT 1199, WV/KY/OH |) | |
| NATIONAL UNION OF HOSPITAL AND |) | |
| HEALTH CARE EMPLOYEES, AFL-CIO |) | |

APPEARANCES

For the State

Thomas E. Durkee
Meril J. Price
Robert D. Merkee
Fr. David K. Foxen
Brian K. Cain

Labor Relations Officer, DRC
Office of Collective Bargaining
Chief of Personnel Services
Deputy Warden/TIE
Nurse Supervisor III/Clinic
Administrator

For the Union:

| | |
|-----------------------------|--------------------------|
| Thomas Woodruff | President, District 1199 |
| Ted J. Morrison C.D.T. | Witness |
| Charles J. Thomason, D.D.S. | Grievant |

Arbitrator:

Earl M. Curry, Jr.

BACKGROUND

The instant arbitration arose as the result of two grievances filed on February 3, 1988, by the Ohio Health Care Employees Union District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL-CIO, (the "Union") protesting, on behalf of Dr. Charles J. Thomason, D.D.S. (the "Grievant"), an alleged violation of Article 23 of the Agreement by the Ohio Department of Rehabilitation and Correction, Ohio State Reformatory (the "State"). When the parties were unable to resolve this matter through their negotiated grievance procedure it was submitted to arbitration pursuant to Article 7, Section 7.06, Step 5 of their Agreement.

The parties have stipulated the following:

1. Ward K. Hostetler retired from the position as Dental Director on October 31, 1987.
2. Ohio State Reformatory initiated a personnel action on Charles J. Thomason, D.D.S. for a 10 week temporary working level (TWL) supplement from November 1, 1987 through January 18, 1988.
3. The personnel action was approved by the Department of Administrative Services from December 7, 1988 through February 13, 1988.
4. On pay period ending February 13, 1988, salary adjustments were made as follows:

Less 302.17 hours at 24.56 = \$7,421.30

Plus 302.17 hours at 25.33 = \$7,653.97

5. The position of Dental Director was posted as a full-time vacancy at Ohio State Reformatory on October 2 - 12, 1987; February 29 - March 9, 1988; July 14 - 25, 1988.

6. Dental Director, #65118, is an exempt position.

STATEMENT OF FACTS

The facts of the instant matter are not in dispute. The Grievant is employed as a part-time (30 hours per week) Dentist 2 at the Ohio State Reformatory in Mansfield, Ohio. The Ohio State Reformatory is a maximum security institution with an inmate population of 2,352. It is one of two reception centers of the Ohio Department of Rehabilitation and Correction for new felony commitments. The institution has a hospital and dental clinic to provide medical screenings and care for the inmate population. The dental clinic has an average monthly patient visits of 673. The clinic provides a full range of dental services utilizing a part-time Dentist 2 (the Grievant) and a full-time Dental Technologist 2, both on the state payroll and two part-time Contract Dentists. Additionally, there are three inmates who work in the clinic. Prior to October 31, 1987, the clinic also had a full-time Dental Director, who, in addition to administrative and supervisory duties, treated inmate patients.

On October 31, 1987, Dr. Ward K. Hostetler, the Dental Director, retired from state service and the institution posted the vacancy. The Grievant was offered the position by management but refused it when he discovered that his total pay would be cut

from 8-10% if he took the job because he would lose his professional achievement incentive supplement. On November 2, 1987, the Hospital Administrator, Eleanor Kalfs, informed the Grievant that he was acting Dental Director and on November 9, 1987, a personnel action form was initiated to compensate the Grievant for working as Acting Dental Director, pursuant to Article 23 of the Agreement. This compensation took the form of a temporary working level supplement for a 10-week period. Prior to receiving the temporary working level supplement the Grievant's base salary was \$24.56 per hour. While receiving the temporary supplement the Grievant's base salary was adjusted to \$25.33 per hour. The net result of the pay supplement was an increase of 3.1%.

On January 21, 1988, the Grievant met with management officials to discuss his compensation rate. The Grievant was told that the institution would try to have his pay supplement include the professional achievement incentive level (PAIL). After discussions with the Department of Administrative Services it was determined that since the Grievant was temporarily occupying an exempt position as Dental Director he could not be compensated at the PAIL rate, but would, instead, receive longevity pay commensurate with his state service. The Grievant was informed of this on January 29, 1988, and, as stated above, the instant grievances were filed on February 3, 1988.

The first grievance sought retroactive approval beginning November 9, 1987, and the second sought compensation of 5% above

his total current compensation including supplements. Several meetings were held with the Grievant over this issue in late January and early February, 1988. During these meetings the Grievant was advised: that the temporary working level supplement was 5% of his base rate of pay; that the temporary working level supplement would not be requested past the first 10 weeks; that the temporary working level supplement had been erroneously paid as the duties were part of his position description; and that he was to perform only those duties covered by a Dentist 2 position description.

ISSUE

What is the proper rate of pay for the Grievant during the time he was assigned to the position of and/or performed the duties of Dental Director?

PERTINENT CONTRACT PROVISIONS

ARTICLE 23 - TEMPORARY WORKING LEVEL

The agency may temporarily assign an employee to duties of a position with a higher pay range. If the temporary assignment is for a continuous period in excess of seven (7) days, the affected employee shall receive a pay adjustment which increases the employee's base rate of pay to the greater of a) classification salary base of the higher level position, or b) a rate of pay at least five percent (5%) above his/her current rate of compensation. The employee shall receive the pay adjustment for the duration of the temporary assignment.

The agency may place an employee in a temporary assignment more than once in any one (1) year period with prior approval of the Office of Collective Bargaining.

The agency shall not extend a temporary assignment beyond a ten (10) week period unless the Office of Collective Bargaining has given prior approval and the temporary assignment is being utilized to fill a position which is vacant as a result of an approved leave. The temporary assignment in such instance may be extended for the entire period of the vacancy which was the result of an approved leave.

Employees who are receiving temporary working level pay adjustments for positions excluded from these bargaining units shall be considered employees of the bargaining unit; however, they shall not answer grievances nor serve as delegates while temporarily working as supervisors.

CONTENTIONS OF THE PARTIES

Union's Contentions

The Union contends that the State has violated the provisions of Article 23 of the Agreement by the method it used in determining the Grievant's pay rate. It argues that the Grievant should have been placed in pay range 16 (\$23.53) and his pay supplemented with PAIL (\$3.20) for a total of \$26.73 per hour, instead of the \$25.33 he was actually paid. It argues that he should receive this amount (\$26.73) for the entire time he has performed the duties of Dental Director. In this regard, it argues, that the Grievant has, in fact, been performing all of the duties performed by the prior Dental Director. In fact, management witness Brian K. Cain testified that the Grievant was now performing the duties performed by the prior Dental Director and had he bid on the job and received it he would be performing the same duties he now performs. The fact that the Grievant performed no statutory supervisory duties is irrelevant, it

argues, since these statutory supervisor duties are only carried out at the deputy warden level.

It further argues that the Grievant's job changed radically after the prior Dental Director left the position and he assumed the administrative duties of running the department. The Grievant was in full charge of the dental clinic and made all work assignments. It argues that the dental clinic in question is the largest one in the Department of Rehabilitation and Correction and that smaller dental clinics in the Department have filled the position of Dental Director. It also argues that if the institution wants to do away with the position, the time to do so is when they move to the new facility. It contends that it is inequitable for the Grievant to be performing the duties of Dental Director and not be paid for these additional duties. It argues further that the Grievant should be paid \$26.73 per hour from November 9, 1987, to the present time and for so long in the future as he continues to perform these duties. It asks, accordingly, that the grievance be sustained.

State's Contentions

The State concedes that the correct rate of pay for the ten weeks the Grievant was on an approved TWL is \$26.73. It argues, however, that the duties performed by the Grievant during the ten-week period as Acting Dental Director were no different than his duties as a Dentist 2. The duties that the Grievant does not perform and distinguishes him from a Dental Director are the duties of hiring, transferring, suspending, laying off,

recalling, promoting, terminating or assigning other public employees, as well as approving leaves and overtime, adjusting grievances, maintaining orientation programs, and preparing an estimated budget. These duties the Grievant does not have nor have they been assigned to him by management. Further, if there was any question as to the Grievant's duties, he was specifically told by his supervisor to only perform those duties as outlined in his position description as a Dentist 2.

It argues that since the Grievant did not perform duties beyond the scope of his current classification he was not entitled to the TWL supplement and was paid erroneously. However, since this TWL was approved by the appropriate authorities, it is willing to recalculate his rate of pay and pay him the correct amount of \$26.73 per hour for the ten weeks of TWL approved. This, however, does not mean that the Grievant is entitled to a TWL supplement for any time other than the ten weeks already approved since the Grievant was not performing duties beyond the scope of his current classification and the TWL supplement was paid erroneously. It admits that the prior Dental Director may not have been appropriately classified as Dental Director. However, it argues, this fact or the fact that another dentist at another Department dental clinic is inappropriately classified does not mean that the Grievant should receive any additional TWL supplement. It suggests that the appropriate remedy in this case is to recalculate the ten-weeks of TWL supplement approved to the correct rate of \$26.73 per hour. With

this modification it asks, accordingly, that the grievance be denied.

DISCUSSION

In the opinion of the Arbitrator, the grievance should be denied, except for the modification of pay suggested above by the State. It is apparent to the Arbitrator, upon a review of the classification specifications and position descriptions for Dentist 2 and Dental Director (Joint Exhibits 3-6), that, given the professional staffing of the dental clinic in question, the clinic does not qualify by size to have a Dental Director. In other words, Dr. Hostetler was not appropriately classified as Dental Director. The fact that this clinic was the largest in the prison system does not mean that it is entitled to the position of Dental Director. It is rather, the classification specifications and position descriptions that regulate which State institution dental clinics are entitled to the position of Dental Director, based on the size of the professional staff at that clinic. Clearly, at no time referred to at the arbitration hearing was the staff at the clinic in question large enough to be entitled to the position of Dental Director. While this situation may appear unequitable to the Union and Grievant the true inequity was to the State by misclassifying Dr. Hostetler and having a Dental Director in the first place. In any case, "two wrongs do not make a right" and the appropriate remedy is

not to reclassify the Grievant or to pay him the TWL supplement beyond the ten weeks already approved.

Article 23, set forth above, clearly states that:

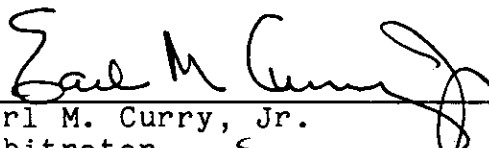
[t]he agency shall not extend a temporary assignment beyond a ten (10) week period unless the Office of Collective Bargaining has given prior approval and the temporary assignment is being utilized to fill a position which is vacant as a result of an approved leave. (emphasis added)

In the instant case, the Office of Collective Bargaining did not give prior approval, nor was the vacancy a result of an approved leave. Therefore, the conditions necessary for an extension of Grievant's TWL supplement have not been met and the Arbitrator has no authority to require the State to extend it. In any case, as stated above, the Arbitrator does not believe that the dental clinic in question qualifies to have a Dental Director in any case because of the size of the professional staff.

This is not to say that the Arbitrator is not sympathetic with the Grievant's position. He is. He believes his duties did change after Dr. Hostetler's retirement and that he performs the same duties Dr. Hostetler performed. This fact, however, as discussed above, does not entitle the Grievant to the remedies the Union is asking for. He also believes that the State is fortunate to have such a dedicated professional employee as the Grievant on its staff. However, the Arbitrator is limited in his authority to the determination of whether the Collective Bargaining Agreement has been violated and, in this case, he does not believe that it has.

AWARD

The grievance is sustained in part and denied in part. The State is to recalculate the ten weeks of approved TWL supplement discussed above and pay the Grievant for those ten weeks the difference between what he was paid and the rate of \$26.73 per hour.



Earl M. Curry, Jr.
Arbitrator

Shaker Heights, Ohio
August 9, 1989