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In the Matter of Arbitration

Between

District 1199, SEIU

and

The State of Ohio, Department  
of Mental Health

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Case Number:

23-06-(92-04-16)-0247-02-12

Before: Harry Graham

Appearances: For District 1199:

Tom Woodruff, President  
District 1199  
475 East Mound St.  
Columbus, OH. 43215

For Department of Mental Health:

George R. Nash  
Department of Mental Health  
30 East Broad St.  
Columbus, OH. 43266-0414

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on February 24, 1993 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the State violate the Collective Bargaining Agreement when it changed the rate of compensation for "on duty pay" at Central Ohio Psychiatric Hospital? If so, what shall the remedy be?

Background: The parties agree upon the events that prompt this proceeding. The Employer operates a facility in Columbus, OH., the Central Ohio Psychiatric Hospital (COPH). Among the employees at COPH are psychiatrists. In order to provide complete coverage of the medical needs of residents at COPH the employer instituted a system of "on-duty" staffing. This system calls for psychiatrists to receive premium pay for hours worked beyond the normal work schedule. First instituted in 1981, the on-duty pay plan historically provided for pay at the rate of time and one-eighth (1 1/8T). That pay was divided 75% in cash and 25% in compensatory time.

When the parties came to negotiate the initial agreement between them in 1986 the on-duty pay at COPH remained unchanged. Similarly, when the second agreement was reached in 1989 no change was made in on-duty pay. In April, 1992 the administration of COPH unilaterally altered the method of payment for on-duty time. It reduced the payment to straight time. The premium historically associated with on-duty pay was eliminated.

In order to protest the change in on-duty pay a grievance was promptly filed. It was processed through the procedures of the parties without resolution and they agree that it is now properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to Section 41.03 of the Agreement and insists that it has been violated in this instance. In relevant part the language provides that when on-duty pay is made at various institutions that exceeds the contractually mandated level (initially \$23.00 per hour) "contracts will be offered at the current rate." The phrase "current rate" requires that the State make payment according to the well established formula calling for 1 1/8 time payment divided between cash and compensatory time according to established practice the Union insists. It was precisely to prevent the sort of occurrence that took place in this instance that the parties negotiated the language of 41.03. That language guarantees to doctors that the long established system of premium pay for on-duty time will continue. That the employer unilaterally altered it represents a clear-cut violation of the Agreement according to the Union.

When the Employer came to reduce the on-duty pay rate it did so for a number of reasons. It claimed that the rate was the result of an error which had initially occurred in 1981. This is simply not the case according to the Union. The State knew what it was doing during the 1980's. This is shown by Union Exhibit 2 in this proceeding. That Exhibit is a memo from the payroll department of COPH to the Audit and Reimbursement section of the Department of Mental Health. Dated October 26, 1990 it outlines the method of payment for

on-duty time at the facility. It indicates the rate was established "around 8-10 years ago." It also indicates that while "questions" about the pay method had arisen, "nothing has ever changed." There can be no question but that the State was aware of the pay premium for on-duty time at Copenhag for many years prior to April 1992. It agreed to perpetuate the method of compensation for such time in the 1986 and 1989 Agreements. It cannot act as it did in this instance according to the Union.

During the processing of this grievance the Union asserts that there occurred a substantial irregularity. According to testimony from a Union witness a management representative told doctors at Copenhag to drop the grievance in exchange for the State abandoning its efforts to collect back pay it believed to be due. That offer represents a highly improper method of dealing with employees the Union insists. Moreover, the Union owns the Grievance. Even if employees were willing to resolve this or any other issue they may not do so unless the Union approves. The Union would never approve such a resolution in a case such as this. It seeks an award of back pay and a directive to the State to halt such offers to employees.

Position of the Employer: According to the State the method of payment for on-duty time at Copenhag represents an error. When it was detected in 1992 it was corrected. The Employer is

permitted to act as it did in this instance it asserts. the phrase "current rate" in Section 41.03 refers to the hourly rate earned by physicians. As that is so and an error of long standing was discovered, the State may act as it did in this instance it asserts. When the parties bargained the 1986 and 1989 Agreements the State never understood Section 41.03 to mean that the premium payment for on-duty pay was required to continue unaltered.

When the labor relations officer of CPH met with doctors to discuss this issue he made no threats. He did not promise they could keep payment made in error. As that is the case, the State asserts it acted properly in this instance. As the term "current rate" refers to the hourly rate earned by doctors the State urges the grievance be denied.

Discussion: Testimony from a Union witness, Dr. Yakhmi, is credited to the effect that the State offered to abandon any effort to collect payments it regarded as having been made in error in exchange for the Union dropping the grievance. This practice is highly improper. It is absolutely impermissible in labor relations. The contract provides a forum for dispute resolution over questions regarding contract interpretation. In essence the State attempted coerce employees to suspend exercise of their contractual rights. That sort of activity must not occur.

In this situation even if the payment for on-duty time at

COPH was an error it was an error well accepted by the parties. This is shown by Union Exhibit 2 which reflects payment in the manner in which doctors have been paid at COPH for many years. That Exhibit reflects the knowledge of the Payroll Department at COPH that the on-call premium pay at time and one-eighth was of longstanding. The rationale proffered by the State, that an error was discovered in 1992, is an ex-post-facto rationale for its action. A more accurate explanation for the State's action in this instance is found in the testimony and documentation provided by the Employer at the arbitration hearing. The State made continuous reference to its financial inability to pay on-duty time at the premium rate. That is not justification for altering the term of a collective bargaining agreement. If one party or the other finds it impossible to comply with the terms of a negotiated agreement it has recourse readily available. It may seek to reopen the contract and secure modification. Terms of an agreement may not be altered to suit the convenience of one party without agreement by the other. In this case, that agreement was not sought and did not occur.

In this case the language of the Contract is clear. The Employer must continue to pay at the "current rate." The "current rate" in this case is time and one eighth. That is the rate that must be paid by the clear language of the

Agreement. The term "current rate" encompasses not only the dollar amount to be paid, but the form in which payment is to occur. In this instance that includes both cash and compensatory time.

Award: The grievance is SUSTAINED. The State is to reimburse physicians at Central Ohio Psychiatric Hospital for all monies and compensatory time lost as a result of this violation of the Labor Agreement. The State is to cease and desist from offering improper inducements to employees to abandon grievances.

Signed and dated this 9<sup>th</sup> day of March, 1993 at South Russell, OH.

Harry Graham  
Harry Graham  
Arbitrator