Thomas J. Nowel, NAA
Arbitrator and Mediator
Lakewood, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In the Matter of Arbitration Between:	)	Grievance No.
	)	DRC-2018-
Ohio Department of Rehabilitation and	)	02429-12
Correction	)	
	)	ARBITRATION
and	)	OPINION AND
	)	AWARD
SEIU District 1199 WV/KY/OH	)	
	)	DATE:
Re: Paid Administrative Leave Rate of Pay, Hamad	)	March 21, 2019

APPEARANCES:
Amanda M. Schulte, for SEIU District 1199 and Cullen Jackson, for the Ohio Department of Rehabilitation and Correction.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Service Employees International Union, District 1199 WV/KY/OH. The Grievant, Patricia Hamad, was placed on paid administrative leave during an investigation. Ms. Hamad is a Social Service Worker 1 who is employed by the Ohio Department of Rehabilitation and Correction. The parties are in disagreement regarding the appropriate rate of pay, based on supplemental pay increments, while on administrative leave. Grievance was filed on July 25, 2018. The Employer denied the grievance, and the matter was carried forward to arbitration on November 2, 2018. The arbitrator was assigned to hear this matter pursuant to Section 7.07 of the collective bargaining agreement.

By agreement of the parties, there was no evidentiary hearing. Instead, the parties submitted a series of joint factual stipulations and joint exhibits to the arbitrator and filed closing briefs outlining their respective arguments.

JOINT STIPULATIONS

1. The grievance is properly before the arbitrator, and there are no procedural objections.

2. There is no dispute that Grievant was placed on paid administrative leave pursuant to an investigation.

3. Prior to being placed on administrative leave, Grievant's hourly rate of pay was $30.44 per hour, which included an Article 43.10 Risk Supplement of $.77 per hour and an Article 43.11 Retention Supplement of $4.09 per hour.

4. While on administrative leave, Grievant did not receive either supplement, resulting in an hourly rate of $25.58.

5. While on administrative leave DRC paid Grievant her base rate of pay, which Article 43.01 defines as "…the employee's step rate plus longevity adjustments."

6. The Union is unaware of past cases in which an employee received supplements while on administrative leave; however, the Union has not done an audit of past employees on administrative leave.

RELEVANT PROVISIONS OF THE AGREEMENT

The parties have stipulated that Articles 5 and 43 are the relevant provisions of the Agreement to be considered by the arbitrator.

Article 5, Management Rights

The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of the workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees for just cause; 2) determine the number of persons required to be employed or laid off; 3) determine the qualifications of employees covered by this Agreement; 4) determine the starting and quitting time and the number of hours to be worked by its employees; 5) make any and all rules and regulations; 6) determine the work assignments of its employees; 7) determine the basis for selection, retention and promotion of employees to or for positions not within the bargaining unit established by this Agreement; 8) determine the type of equipment used and the sequences or work processes; 9) determine the making of technological alterations by revising the process or equipment or both; 10) determine work standards and the quality and quantity of work to be produced; 11) select and locate buildings and other facilities; 12) transfer or sub-contract work; 13) establish, expand, transfer and/or consolidate, work processes and facilities; 14) consolidate, merge or otherwise transfer any or all of its facilities, property, processes or work with or to any other municipality or entity or effect or change in any respect the legal status, management or responsibility of such property, facilities, processes or work; 15) terminate or eliminate all or any part of its work or facilities.

Article 43, Wages

43.01 Definition of Rates of Pay

Class base is the minimum hourly rate of the pay range for the classification to which the employee is assigned.

Step rate is the specific value within the pay range to which the employee is assigned.

Base rate is the employee's step rate plus longevity adjustments.

Regular rate is the base rate (which includes longevity) plus all applicable supplements.

Total rate is the regular rate plus shift differential, where applicable.

Notwithstanding any other provision of this Agreement, if these definitions lead to any reduction in pay, the previous application shall apply.

43.10 Risk Supplement

A special supplement equal to five percent (5%) of the class base shall be awarded to those parole and probation officers, including those assigned to the Parole Board (within the DRC prisons), who are authorized to carry a firearm and who encounter added risk by being required to do one or more of the following:

A. Arrest or transportation of parolees, probationers, or furloughees;

B. Enter a designated risk zone for the purpose or supervision or conducting of investigations.

A special institutional supplement of three percent (3%) shall be paid to those employees in non-correction specific classifications of the Department of Rehabilitation and Correction who work in institutions and whose classification title does not include the term "correctional" or "corrections."

43.11 Recruitment/Retention

A. Recruitment/Retention Supplement

The Employer may establish a supplement at any amount up to twenty-five percent (25%) of the employee's class base as defined in Section 43.01. Such supplement shall be used solely as an incentive for recruiting or retaining employees in the following classifications: Physician, Physician Specialist, Psychiatrist, Psychologist, Physician Assistant, Social Worker, and Behavioral Healthcare Provider, and any classification that requires licensure as a Registered Nurse. The incentive may be established to compensate for institution/facility or office location, certifications, specialty, education, shift and/or weekend, or any other reason determined by the Employer to warrant consideration under this provision. The following provisions apply to the administration of the Recruitment/Retention Supplement:

1. The Agency shall have the sole authority to designate any positions to which a supplement will apply and to discontinue its use.

2. The Agency shall have the sole authority to designate the percentage amount of any supplement for any particular position or group of positions.

3. The Agency shall provide the Union notice and an opportunity for discussion prior to implementation of a supplement.
4. When the Employer determines to establish a supplement for a particular position, employees of positions which carry the identical certification, specialty, education, institution/facility or office location, shift and/or weekend, or other factor for which there have been recruitment or retention problems will be granted the same percentage supplement.
5. Issues arising out of the application of the supplement may be raised at the Agency Professional Committee (APC). Should the issue not be resolved, the Union may file a grievance pursuant to Article 7. The timeframes for filing the grievance begin the date of the APC meeting. If the matter remains unresolved, the Union may appeal to mediation. Such grievances shall not be subject to arbitration.

GRIEVANCE

The grievance of Patricia Hamad was filed with the Employer on July 25, 2018. It reads as follows.

Statement of Grievance: The Employer has violated Article 5 and 43.00 of the collective bargaining agreement. The grievant was paid incorrectly while on approved administrative leave and the employer violated their policy.
Resolution Requested: That my employer follows the directives of the grievant collective bargaining agreement and, more specifically, Article 5 their own written directives, rules and policies relevant to 35-PAY-07.
That grievant is made whole including but not limited to back pay.

ISSUE

The parties jointly agreed that the issue to be decided by the arbitrator in this matter is as follows.

> Did DRC violate Article 5 or Article 43 by paying Grievant incorrectly for the time Grievant was on paid administrative leave, and if so, what shall the remedy be?

BACKGROUND

The Grievant, Patricia Hamad, is a Social Worker 1 and is employed by the Department of Rehabilitation and Correction. Information provided by the parties does not indicate to which facility the Grievant is assigned. The Employer placed the Grievant on paid administrative leave on June 1, 2018 during the time an investigation was conducted. It is not known if the investigation resulted in discipline. Prior to administrative leave, the Grievant's hourly rate of pay was $30.44. Pursuant to the collective bargaining agreement, the Grievant earned Risk Supplement of $.77 per hour and Recruitment/Retention Supplement of $4.09 per hour. During the time the Grievant was on administrative leave, she was paid an hourly rate of $25.58. The Employer did not pay either the Risk Supplement nor the Recruitment/Retention Supplement. The rate of $25.58 per hour includes base step rate and longevity only.

The Grievant grieved the rate being paid while on administrative leave believing that she was also entitled to the Risk and Recruitment/Retention Supplements. Following the various steps outlined in the Grievance Procedure, the dispute was moved to arbitration. The parties agreed to forego an evidentiary hearing and submitted stipulations of fact, exhibits and closing briefs to the arbitrator.

POSITION OF THE UNION

The Union states that Article 43 of the collective bargaining agreement does not provide for exceptions to employee supplemental pay rates during paid administrative leave. Therefore, the Union argues that any bargaining unit employee, who is placed on paid

administrative leave by the Employer, must receive their full or normal wages including supplements as contained in Article 43. The Union states that Section 43.10, Risk Supplement, does not provide exceptions regarding the payment of the supplement. The Union argues that the parties never intended that there be exceptions. The parties to the Agreement never included a specific exception during the placement of an employee on paid administrative leave by the Employer for purposes of an investigation. Likewise, there is no exception regarding the payment of the Recruitment/Retention Supplement. The Union argues that the parties never intended there to be an exception during administrative leave for investigatory purposes.

The Union argues that the reduction of the Grievant's pay, while on administrative leave, is tantamount to discipline without just cause. The Union states that, in the case of an employee being placed on administrative leave during an investigation and then it is determined that there has been no wrongdoing or policy violation, the loss of a portion of wages is disciplinary without just cause.

The Union argues that the Employer's contention regarding a binding past practice lacks merit. Sections 43.10 and 43.11 of the Agreement include clear and unambiguous language regarding the payment of the supplements without any exclusions. The Union cites the "plain meaning" principle and argues that any alleged past practice is inconsistent with the clear and unambiguous provisions of the Agreement. The Union states further that it was not aware of the Employer's practice of reducing the rate of pay of employees placed on administrative leave. The Union argues that, for a past practice to legitimately exist, both parties must be aware and accepting of its existence. This is not the case regarding this matter.

The Union states that the Employer's belief, that ORC Section 124.388 is controlling, is misplaced as the collective bargaining agreement supersedes the statute as the language in Section 43 is clear and explicit. Both Article 1 of the Agreement and ORC Chapter 4117 make it clear that, in the case of conflict between the Ohio Revised Code and the collective bargaining agreement, what the parties have bargained supersedes.

The Union states that employees who receive the supplements contained in Section 43 of the Agreement, continue to be paid their full pay rate when on Union leave, compensatory time off and vacation. It therefore makes no sense to reduce the pay of employees placed on administrative leave by the Employer. The Union states that any argument, that Section 43.11 does not permit arbitration over disputes regarding Recruitment/Retention Supplements, lacks merit as this provision relates only to disputes over which employees/classifications may be eligible for the additional pay. The Union states that the DRC policy regarding the Recruitment/ Retention supplement, in effect at the time of the grievance, provides that employees, who are placed on administrative leave, will continue to receive the supplement.

The Union states that the loss in pay suffered by the Grievant violated the collective bargaining agreement and therefore requests the arbitrator to restore lost supplemental pay and grant the grievance in its entirety.

POSITION OF THE EMPLOYER

The Employer states that there is no disagreement that the Grievant was appropriately placed on administrative leave. Ohio Revised Code Section 124.388 states that an employee placed on administrative leave receives pay equal to the base rate of pay. The collective

bargaining agreement then defines the base rate of pay which applies to bargaining unit employees. The Employer states that it complied with both the statute and collective bargaining agreement when the Grievant was placed on administrative leave and paid her base rate less supplements as contained in Section 43. Section 43.01 defines the base rate as the step rate plus longevity. The Employer states that it was in compliance with the Agreement when the Grievant was paid in this manner while on administrative leave. Beyond the definition of base rate, the Employer states that the Agreement is silent regarding the rate of pay due an employee who is on administrative leave pending an investigation. This being the case, Ohio statute and Department policy are the controlling authorities, and this determination is supported by ORC Chapter 4117.10(A). The Employer states that other Unions representing state employees, have specifically bargained over the appropriate rate of pay for employees placed on administrative leave. The fact, that the SEIU District 1199 collective bargaining agreement is silent regarding supplemental pay, enforces the principle that statute and department policy control.

The Employer states further that since 2012 bargaining unit employees, who have been subject to paid administrative leave during an investigation, have been paid their base rate, step rate plus longevity only. The Union has never challenged the payments, and this is the first arbitration regarding the issue. The Employer argues that a binding past practice exists which must be considered by the arbitrator. The practice has been clearly enunciated and consistently acted upon. The method of payment has occurred long enough to constitute a past practice and is therefore binding on the parties.

The Employer states that approved administrative leave for Union officers and for attendance at conferences or workshops includes the pay supplements contained in Section 43. An employee requests approval, and the Employer may grant such requests by mutual agreement. In contrast, it is the Employer which makes the decision to place an employee on administrative leave for reasons of safety or investigation, and this has been a long standing past practice. Supplemental pay applies only for hours actually worked unless otherwise negotiated. An employee on paid administrative leave during an investigation is not performing the duties for which the supplement was established.

The collective bargaining agreement is silent regarding rate of pay during an imposed administrative leave. Statute and policy then control. An established and long standing past practice exists. The grievance of the Union must therefore be denied in its entirety.

ANALYSIS AND OPINION

The parties have not provided information regarding the facility to which the Grievant is assigned. In addition, the outcome of the investigation, which required the placing of the Grievant on paid administrative leave, is not known. Nevertheless, the parties have provided sufficient information through their stipulations in order to make a binding decision regarding the supplemental pay issue.

The Employer argues that Ohio Revised Code, Section 124.388, Administrative Leave With or Without Pay, is controlling. The Union counters that Article 1 of the collective bargaining agreement states that negotiated provisions “modify or supersede” conflicting rules, policies and sections of the Ohio Revised Code except those incorporated in Chapter 4117, the

collective bargaining statute. Provisions contained in Section 43 of the Agreement, relating to pay supplements, supersede provisions of the referenced statute. What is in question is the application of the supplemental pay rates when employees are placed on paid administrative leave by the Employer. There is no evidence how the drafters of the statute defined base rate of pay, and this language may mean different things from one collective bargaining agreement to another. As the Employer suggests, the statutory definition of base rate of pay, as contained in ORC Section 124.388, does not necessarily apply to bargaining unit employees.

The Union argues that the language in Section 43.10, Risk Supplement, is clear and unambiguous, and the section provides no exceptions. The Union states that the supplement is part and parcel of an employee's overall rate of pay whether working or on leave. This argument is compelling as the parties have not bargained specific exceptions. Additionally, employees, who are eligible for the supplement, continue to earn it when on vacation, compensatory time off, administrative leave for Union leave and administrative leave for attendance at workshops and conferences. This is what the parties have bargained, and there is no exception in Article 43 of the Agreement for an employee who is placed on paid administrative leave by the Employer for purposes of an investigation. The argument of the Employer, that ORC 124.388 controls, is not compelling in that the negotiated provisions of the collective bargaining agreement supersede the statute. The same holds true for provisions contained in Section 43.11. The parties have bargained a recruitment/retention supplement of up to 25% of an employee's class rate. There are no exceptions to the payment of the supplement once it is approved by the Employer. This is what the parties have bargained. And we know that the supplement is paid during vacation, compensatory time off, administrative

leave for Union leave and administrative leave for attendance at workshops and conferences. In addition, Employer policy 35-PAY-07, dated 11/29/13, enhances what is contained in the collective bargaining agreement. Paragraph D (3) includes payment of the supplement for approved administrative leaves. The Employer may argue that placement on administrative leave for purposes of investigation by the Department is not an approved leave in the traditional sense. But this is a play on words. It is difficult to argue that placement on administrative leave by the Employer is not approved leave. If it was not approved leave, the affected employee would not be paid. Placement on administrative leave, for purposes of investigation, is a unilateral act on the part of the Employer. It is not a leave which is requested by the affected employee. In cases in which an employee requests leave and is approved for vacation, compensatory time off, etc., supplemental pay continues. It is difficult to understand the proposition that supplemental pay is eliminated when an employee is forced to leave the workplace during an investigation, a unilateral act on the part of the Employer and out of the control of the affected employee but nevertheless an approved leave. The Union argues that the reduction in pay is tantamount to discipline. While this is not completely accurate contractually, the analogy is compelling. Consider the case of an employee who is placed on administrative leave for purposes of investigation and then returned to regular employment with no finding of wrong doing or policy violation but is nevertheless penalized by loss of supplemental rates of pay. Again, the discipline analogy resonates. Compare the case at hand to an appeal to arbitration of a disciplinary suspension or termination of employment. An arbitrator has the authority to award a make whole remedy which may include reinstatement and payment of lost earnings including base pay, supplemental pay, sift differential if applicable

and, in certain cases, proven regularly scheduled overtime. The Employer's position regarding the exclusion of supplemental pay cannot be sustained.

The Employer argues that there is a binding past practice which bars supplemental pay during an imposed administrative leave. Employer Exhibit 3 contains a list of bargaining unit employees who have been placed on administrative leave during an investigation and whose pay during the leave excluded the Risk and Recruitment/Retention Supplements. The exhibit illustrates a six year history and includes a list of seventeen bargaining unit employees who were so impacted by the Employer's policy. The traditional and accepted definition of standing past practice is the following: The practice must be unequivocal; it must be clearly enunciated; and it must be followed for a length of time as a fixed and established practice accepted by both parties. The Employer argues that the practice of deleting the supplemental pay rates is unequivocal, clearly enunciated and acted upon for at least the past six years. But the Union states that it has never been a party to the practice. It states that it was unaware of the practice of reducing overall pay for employees placed on administrative leave by the Employer. There is no evidence to suggest that the Union was aware of the practice or that the Employer ever provided notice to the Union of its policy and intended practice. While it may be surprising that the Union was not aware of the practice, there is nothing to suggest otherwise. Additionally, it is important to note that the parties stipulated that the Union was "unaware of past cases. . ." Clearly then, the practice was not recognized or accepted by both parties. The Employer's argument regarding binding past practice, therefore, cannot be sustained. There is no finding of a binding past practice. As already noted, there are no provisions contained in

Sections 43.10 and 43.11 which suggest deletion of supplemental pay during an Employer imposed administrative leave.

> While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the "plain meaning" principle of contract interpretation will refuse to consider evidence of past practice that is inconsistent with a provision that is "clear and unambiguous" on its face.
> *How Arbitration Works, Elkouri & Elkouri, Sixth Edition, page 627.*

The editors of "Elkouri" refer to Phelps Dodge, page 627.

> Plain and unambiguous words are undisputed facts. The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used.
> *Phelps Dodge Copper Products Corp., 16 LA 229 233 (Justin)*

An award sustaining the Employer's case would, in effect, add words and intent to Sections 43.10 and 43.11 which were not explicitly bargained by the parties.

The Employer argues that disputes involving the Recruitment/Retention Supplement are not subject to arbitration. Paragraph A (5) of Section 43.11 states that disputes arising out of the application of the supplement may be taken to the Agency Professional Committee. If the dispute is not resolved, the Union may grieve, but, if the matter remains unresolved, the matter may not be arbitrated following grievance mediation. The Employer's assertion here is not convincing. What the parties bargained was a bar to arbitrating a dispute regarding the selection or non-selection of a particular position or classification for the supplement or

percentage increase to be applied because it is the Employer, ultimately, that decides which position to designate for the supplement and the appropriate amount of pay up to 25%. The bar to arbitration is not applicable to the instant dispute.

The Employer cites various state employee collective bargaining agreements which contain language regarding pay during imposed administrative leave. None of the collective bargaining agreements presented as exhibits make reference to Risk or Recruitment/Retention supplements. Of the various Agreements referenced, only the OCSEA collective bargaining agreement makes reference to ORC 124.388. Other referenced Agreements state no loss of "any pay, fringe benefits or seniority." What occurred at the bargaining table during other state employee negotiations and language regarding administrative leave is not particularly relevant to the history of bargaining between the State of Ohio and SEIU District 1199. In the instant case, the issue, regarding Section 43 pay supplements as contained in the SEIU collective bargaining agreement, is what is before the arbitrator by stipulation of the parties. As an aside, internal comparables may have relevance in fact finding cases pursuant to ORC 4117, but they are not particularly relevant in a case of this nature.

Section 43.10 of the collective bargaining agreement provides "A special institutional supplement of three percent (3%) shall be paid to those employees in non-correction specific classifications of the Department of Rehabilitation and Correction who work in institutions and whose classification title does not include the term 'correctional' or 'corrections.'" This

provision does not provide for an exception to the supplemental rate of pay for those employees who are placed on paid administrative leave by the Employer for purposes of investigations. Section 43.11 of the collective bargaining agreement provides that "The Employer may establish a supplement at any amount up to twenty-five percent (25%) of the employee's class base as defined in Section 43.01. . . When the Employer determines to establish a supplement for a particular position, employees of positions which carry the identical certification, specialty, education, institution/facility or office location, shift and/or weekend, or other factor for which there have been recruitment or retention problems will be granted the same percentage supplement." Neither Sections 43.10 nor 43.11 provide for an exception to the payment of the supplements when affected employees are placed on administrative leave by the Employer for purposes of investigations. Additionally, there is no finding of a binding past practice. Therefore, the Employer violated Sections 43.10 and 43.11 of the collective bargaining agreement when the Grievant was not paid the Risk Supplement and Recruitment/Retention Supplement when placed on paid administrative leave. The Grievance is therefore granted.

AWARD

The Employer violated Sections 43.10 and 43.11 of the collective bargaining agreement when the Grievant was not paid the Risk Supplement and Recruitment/Retention Supplement during the imposed paid administrative leave. The grievance of Patricia Hamad, filed on July 25, 2018, is hereby granted. Grievant is to be reimbursed lost Risk Supplement pay and lost

Recruitment/Retention Supplement pay during the period of time she was placed on administrative leave by the Employer.

Signed and dated this 21st Day of March 2019 at Lakewood, Ohio.

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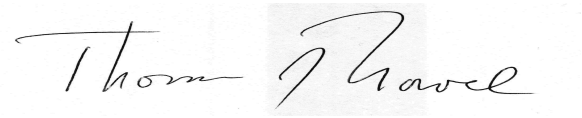
Thomas J. Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st Day of March 2019, a copy of the foregoing Award was served, by electronic mail, upon Amanda M. Schulte for SEIU District 1199 WV/KY/OH; Cullen Jackson for the Ohio Department of Rehabilitation and Correction; and Cassandra Richards for the Ohio Office of Collective Bargaining.



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Thomas J. Nowel, NAA
Arbitrator