THE LABOR RELATIONS CONNECTION

In the Matter of the Arbitration	*	
between	*	
1199SEIU, UNITED HEALTH CARE WORKERS EAST	*	Grievance: [redacted] - Classification Pay
and	*	LRC #99-18
TOBEY HOSPITAL	*	

BEFORE: John B. Cochran, Esq.

APPEARANCES:

For the Union: Jillian M. Ryan, Esq.

For the Employer: Anthony D. Rizzotti, Esq.

HEARING DETAILS:

Place of Hearing: Tobey Hospital, Wareham, MA

Date of Hearing: October 25, 2018

ISSUE:

The parties stipulated to the following issues:

1. To the extent the grievance is based on shifts the grievant worked as Lead Phlebotomist prior to twenty-one (21) calendar days before the grievance was filed, is that portion of the Union's grievance procedurally arbitrable?

2. Did the Hospital violate the collective bargaining agreement by failing to pay the grievant pursuant to Article 3, Section 3.4 when she worked as a Lead Phlebotomist? If so, what shall be the remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE II

Section 2.1. Wages

. . .

If an employee has a Hospital designated "secondary" position for work that is not regularly scheduled in such position and that is in addition to her/his regularly-scheduled hours, she/he shall be paid at the salary rate for such "secondary" position at a Step to be determined by her/his Department Director . . .

ARTICLE III

Section 3.4. Relief in Higher Classification

Workers who are assigned by Southcoast to relieve another bargaining unit worker in a higher classification and perform such work for at least four (4) hours shall be paid for such time at the relieving worker's seniority step in the higher classification for all hours worked in that shift.

ARTICLE XI

Section 11.2. Grievance and Arbitration

(a) The parties recognize that day-to-day problems affecting workers shall normally be adjusted informally between a worker and her/his immediate supervisor. Such matters shall not be deemed grievances. Any grievance or dispute which cannot be adjudicated in this manner shall be settled in accordance with the following

procedure:

STEP 1 Within twenty-one (21) calendar days of the event(s) on which a grievance is based, the aggrieved worker or workers may present the matter in writing through or with a representative of the Union if such worker or workers so elect, to the worker's Department Head (or if the complaint is about an action by another Department Head, to such other Department Head) in a further effort to reach an informal settlement. The Department Head shall meet and give her or his written answer within seven (7) calendar days.

FACTS:

Tobey Hospital (Hospital) is part of the Southcoast Hospital Group (Southcoast). 1199SEIU, United Health Care Workers East (the Union) is the certified collective bargaining representative for a bargaining unit of approximately 240 service, maintenance, technical, clerical, business office, medical records, and admitting office workers employed by Southcoast at its Tobey Hospital site, including the positions of Phlebotomist and Lead Phlebotomist.

Since at least 2003, the parties have had language in their collective bargaining agreement regarding work in a higher classification that mirrors the language in Section 3.4 of their current agreement. Prior to 2006, the parties had no contract language regarding "secondary" positions, although the Hospital did have employees who worked shifts in a secondary position in addition to working their regularly-scheduled hours. In their 2006-2007

agreement, however, the parties included language regarding secondary positions that is identical to language in Section 2.1 of their current contract. In addition, Appendix C to 2006-2007 agreement included a list of those employees in secondary positions who would "continue to be paid on the same step of the grade(s) for such 'secondary' position(s) as her/his step for her/his "primary" position." Therefore, even though the new language regarding "secondary" positions added to Section 2.1 authorized department directors to determine the step at which employees working in "secondary" positions would be paid, those employees already working in "secondary" position who were listed in Appendix C were grandfathered at the step for their primary positions. During the negotiations leading up to their 2017-2019 contract, the parties agreed to amend Appendix C to delete the names of the grandfathered employees who no longer worked for the Hospital.

[redacted] and the Lead Phlebotomist Position

The Hospital hired [redacted] ([redacted]) as a Phlebotomist in 2010, and she worked under the direction of Lead Phlebotomist [redacted]). By the latter part of 2015, [redacted] was paid at Grade 8, Step 9 of the salary schedule in her Phlebotomist position.

As a Phlebotomist, [redacted] worked forty hours a week and received overtime for all hours over forty.

On November 6, 2015, the Hospital posted a per diem Lead Phlebotomist.[1] It did not notify the Union at the time. [redacted] applied for the position, and the Hospital awarded the position to her on or about December 6, 2015. The employee action form completed by the Hospital's Human Resources Department at the time characterized the position as a "secondary" position and identified her pay grade for working in that position as Grade 9, Step 6. [redacted] recalls that someone in the Hospital's Human Resources Department told her at the time what her pay rate would be as per diem Lead Phlebotomist, and when she asked if it could go up higher, was told it could not under the contract.

After being awarded the per diem Lead Phlebotomist position, [redacted] would fill in for [redacted] whenever [redacted] was absent. When [redacted] was working, [redacted] would continue to perform her Phlebotomist duties forty hours a week, and when [redacted] was absent, [redacted] would work the same number of hours as Lead Phlebotomist.

In November 2017, [redacted] announced that she was retiring, and [redacted] applied for [redacted] Lead Phlebotomist position. The Hospital

[1] Pursuant to Section 3A.1 of the parties' agreement, per diem employees are not covered by the agreement.

offered [redacted] the position, and [redacted] spoke with Union representative [redacted] ([redacted]) to confirm the proper pay level for the new position. During that conversation, [redacted] informed [redacted] that she was paid at Grade 8, Step 9 as a Phlebotomist, and had been paid at Grade 9, Step 6 when filling in for [redacted] as the Lead Phlebotomist. [redacted] concluded that [redacted] should have been paid for working in a higher classification when she was filling in for [redacted] as the Lead Phlebotomist, and on November 16, 2017, she filed a grievance on [redacted] behalf claiming that the Hospital had failed to compensate [redacted] at the proper rate for working out of classification from December 6, 2015 to November 14, 2017.

POSITIONS OF THE PARTIES:

ARBITRABILITY

Hospital

Initially, the Hospital argues that those portions of the Union's grievance alleging a contract violation prior to twenty-one (21) days before the date on which the Union filed its grievance are untimely. According to the Hospital, Article XI of the parties'

agreement requires grievances to be filed within "twenty-one (21) calendar days of the event(s) on which a grievance is based." Here, the Hospital contends, an alleged violation occurred each time the Hospital paid [redacted] for her work as the Lead Phlebotomist in [redacted] absence. However, the Union did not file its grievance until November 16, 2017. Therefore, the only portions of the grievance that are arbitrable are the alleged improper payments within the period beginning twenty-one (21) days prior to November 16, 2017.

Union

The Union counters that its grievance is procedurally arbitrable as it relates to all shifts [redacted] filled in as Lead Phlebotomist, not just those occurring within twenty-one (21) days before it filed the grievance on [redacted]behalf. In the Union's view, the Hospital should not be permitted to limit its liability to twenty-one days before the grievance was filed because the Union filed it as soon as it learned of the contract violation. Even though the contract allows an aggrieved unit member to file a grievance individually, [redacted] had no reason to know the Hospital was paying her improperly when she filled in as the Lead Phlebotomist until she spoke with [redacted] in November 2017. Because the Hospital posted the position as a non-Union "per diem" position, [redacted]had

no reason to consult the Union contract or talk with a Union representative earlier than she did. Therefore, limiting [redacted] remedy to the grievance filing period would unjustly enrich the Hospital at [redacted] expense.

MERITS

Union

The Union asserts the Hospital violated Section 3.4 of the parties' collective bargaining agreement by failing to pay [redacted] for her shifts filling in for [redacted] as Lead Phlebotomist at the rate specified in that section. Therefore, it seeks an order directing the Hospital to make [redacted] whole for all shifts between January 13, 2016 and December 26, 2017 that the Hospital did not pay her the rate in Section 3.4.

According to the Union, [redacted] should have been paid for working out of classification pursuant to the unambiguous language in Section 3.4. The Union emphasizes that the clear language of Section 3.4 provides that unit members who relieve another unit member in a higher classification and perform that work for four hours shall be paid in the higher classification at the relieving worker's seniority step. Therefore, this clear language required the Hospital to pay [redacted] at Grade 9, Step 9 when she was filling in for [redacted] as the Lead Phlebotomist.

The Union contends there is no merit to the Hospital's position that Section 3.4 did not apply to [redacted] because she voluntarily applied for and accepted the per diem Lead Phlebotomist position, and, therefore, the Hospital did not assign her to that position as required by Section 3.4. In the Union's view, I should reject the Hospital's argument because it would permit the Hospital to circumvent Section 3.4 merely by posting positions classified as "per diem" positions to serve as back up for higher classified unit positions to avoid paying employees for working in a higher classification.

Next, the Union claims that [redacted] was not working in a secondary position when she was filling in as Lead Phlebotomist. Rather, Section 2.1 of the parties' agreement states in clear, unambiguous terms that secondary positions only include work that is not regularly scheduled and "is in addition to her/his regularly-scheduled hours. However, [redacted] did not work Lead Phlebotomist shifts in addition to her regularly scheduled hours. Rather, her work as a Lead Phlebotomist was built in to her regularly forty-hour work schedule in place of her regular Phlebotomist shifts. Therefore, her work as a Lead Phlebotomist fell outside the scope of Section 2.1 and was instead governed by Section 3.4.

Finally, the Union contends the Hospital cannot successfully

claim a past practice was established because the Union never filed a grievance challenging a secondary job classification for two principal reasons. First, because the language of Section 3.4 is clear on its face, I should look no further. Second, even if it is not clear on its face, the Union was unaware that the Hospital had treated any similarly situated employees as secondary employees to avoid paying them pursuant to Section 3.4.

Hospital

The Hospital's position is that it followed the plain language of the parties' contract when it set [redacted] pay rate for her secondary job as the Lead Phlebotomist. Therefore, the grievance should be denied.

The Hospital argues that, contrary to the Union's position, the language of Section 3.4 did not apply to [redacted] because it only applies when the Hospital *assigns* an employee to relieve another employee in a higher classification. Here, however, the evidence demonstrates that the Hospital never *assigned* [redacted] to work as the Lead Phlebotomist to temporarily relieve [redacted] during her absences. Rather, [redacted] applied for and received a secondary position as the Lead Phlebotomist in 2015. Therefore, the Hospital was not required to compensate her at the rate set out in Section

3.4 because that section simply did not apply to her.

Instead, [redacted] work as the Lead Phlebotomist between 2016 and 2017 fell squarely within the scope of Section 2.1 because she was working in a secondary job, not listed in Appendix C to the parties' agreement. Any other interpretation of the agreement, the Hospital argues, would render Section 2.1 meaningless because it would nullify the Hospital's discretion to set pay rates for secondary jobs.

Next, the Hospital argues that, even if the contract language is ambiguous, the parties have a ten-year practice of permitting the Hospital to set the pay rates for secondary positions. Since 2016, the Hospital has regularly exercised its right to set pay rates for employees in secondary positions, without any objection from the Union. During that time, the parties have also negotiated several collective bargaining agreements that include language permitting the Hospital to set pay rates for secondary positions, and the Union has never sought to re-negotiate that language. Therefore, the Union has effectively ratified the Hospital's practice, and the Union cannot now attempt to obtain through arbitration what it has conceded at the bargaining table since 2006.

DISCUSSION:

The Hospital has raised a threshold procedural arbitrability issue, arguing the grievance before me is untimely to the extent it seeks to challenge the pay rate [redacted] received while filling in as the Lead Phlebotomist prior to the grievance filing period. However, I believe it makes more sense to address the merits of the Union's grievance first, and to consider the Hospital's arbitrability argument, which seeks to limit any remedy, only if I find a contract violation. Therefore, I will focus my initial analysis on whether the Hospital violated the parties' agreement by failing to pay [redacted] pursuant to Section 3.4 when she was filling in as the Lead Phlebotomist.

The crux of the parties' dispute is whether [redacted] was: 1) assigned to provide relief for [redacted] and therefore entitled to be paid at the rate specified in Section 3.4; or 2) was working in a Hospital-designated "secondary position as defined in Section 2.1 at the time? The facts are clear that [redacted] relieved [redacted] as the Lead Phlebotomist for several four hour periods during 2016 and 2017. In the Union's view, the Hospital "assigned" her to that work pursuant to Section 3.4. The Hospital counters that Section 3.4 did not apply because she voluntarily accepted a secondary position as the per diem Lead Phlebotomist. Therefore, I must consider the meaning of the term "assigned" as used in Section 3.4.

The common usage of the term "assign" is to designate or appoint an individual to perform particular duties, tasks, or work. Regardless of whether an individual voluntarily agrees to do the work or is ordered to do it involuntarily, the act of designating or appointing the person remains the same. Applying this reasoning here, the fact that [redacted] voluntarily agreed to fill in for [redacted] did not fundamentally change the character of the Hospital's action, which was to designate or appoint [redacted] to fill in for [redacted] as Lead Phlebotomist. Therefore, I am satisfied that, pursuant to the plain meaning of Section 3.4, the Hospital "assigned" [redacted] to serve as Lead Phlebotomist in [redacted] absence.

Nevertheless, the Hospital contends [redacted] was not merely filling in for [redacted] on an as-needed basis. Rather, she was filling a separate, distinct position of per diem Lead Phlebotomist, which was a secondary position within the meaning of Section 2.1. I am not convinced by the Hospital's argument on this point for two principal reasons. First, Section 2.1 defines a secondary position as one that is in addition to an employee's "regularly-scheduled hours." The clear intent of this language is that an employee of the Hospital who works additional hours in a different position that her/his regular position will be considered a secondary employee. However, [redacted] did not regularly work additional hours when filling

in as the Lead Phlebotomist. Rather, she worked the normal forty-hour schedule she would have worked as the Phlebotomist and merely performed different duties during her regularly scheduled hours. Therefore, I do not find that the work [redacted] performed while filling in for [redacted] can be characterized as a secondary position within the meaning of Section 2.1.

Second, if taken to its logical conclusion, the Hospital's argument would nullify Section 3.4. If the Hospital could avoid paying an employee for working in a higher classification by creating a non-bargaining unit secondary "per diem" position performing identical duties as the higher-ranked classification, the Hospital would be able to circumvent its obligation pursuant to Section 3.4. However, a basic principal of contract interpretation is that an agreement must be read as a whole to give effect to all terms. Accordingly, the interplay of Sections 2.1 and 3.4, when applied to the facts of this case, required the Hospital to compensate [redacted] at the rate set forth in Section 3.4 when she was filling in for [redacted] as the Lead Phlebotomist.[2]

Remedy

[2] Although the Hospital also argues there is a long past practice of permitting the Hospital to set pay rates for employees in secondary jobs. Because I have concluded that [redacted] was not in a secondary job within the meaning of Section 2.1, however, I express no opinion about any past practice regarding how the Hospital pays employees in secondary jobs.

Finally, I must consider whether any remedy [redacted] is entitled to receive should be limited to the twenty-one day grievance filing period, as the Hospital argues. I begin my analysis with the language of Section 11.2(a), which provides than an employee may present a grievance in writing "within twenty-one (21) calendar days of the event(s) on which a grievance is based. . ." Like any other provisions of an agreement, arbitrators are bound to give full effect to negotiated time limits for filing grievances. Further, Section 11.2(g) of the parties' agreement provides that I have no authority "to award or determine any change in, modification or alteration of, addition to, or detraction from, any of the provisions of this Agreement." Therefore, I must determine whether the language of Section 11.2(a) permits me to award [redacted] a monetary remedy for shifts she filled in for [redacted] prior to the grievance filing period.

The Union makes a strong argument that the remedy here should not be limited because neither [redacted] nor the Union knew there was a possible contract violation until the fall of 2017. Unfortunately, however, Section 11.2(a) incorporates a well-defined filing period, without any exceptions or discretion built in. For me to adopt the Union's argument on this point, I would have to effectively read language additional into the agreement allowing grievances to be

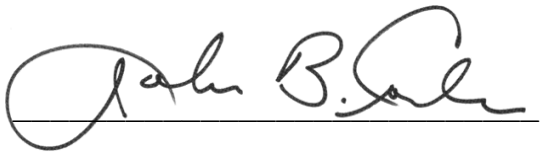
filed with twenty-one days of when an employee or the Union knew about the event(s) on which the grievance was based. As I have already observed, however, I have no authority to modify the parties' agreement by reading additional language into it. Therefore, even though the result may be appear harsh, I am constrained to honor the language agreed to be the parties and conclude that the Hospital is only obligated to compensate [redacted] at the rate specified in Section 3.4 for any shifts she filled in as Lead Phlebotomist during the twenty-one calendar day period prior to November 16, 2017

AWARD:

1. To the extent the grievance is based on shifts the grievant worked as lead phlebotomist prior to twenty-one (21) calendar days before the grievance was filed, that portion of the Union's grievance is not procedurally arbitrable.

2. The Hospital violated the collective bargaining agreement by failing to pay the grievant pursuant to Article 3, Section 3.4 when she worked as a Lead Phlebotomist. Therefore, the Hospital shall pay [redacted] the difference between what she was paid when working as the Lead Phlebotomist during the twenty-one day period prior to the filing of the grievance and the pay rate specified in Section 3.4. I will retain jurisdiction for a period of thirty (30) days for the sole purpose of resolving any disputes about

the implementation of this remedy.



John B. Cochran, Arbitrator

January 31, 2019