

AMERICAN ARBITRATION ASSOCIATION

ARBITRATION OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

UCONN HEALTH CENTER

and

UNIVERSITY HEALTH PROFESSIONALS, LOCAL 3837

Case No. 01-20-0005-5714

Grievance: Failure to pay double time during a pandemic

Hearing Held: January 20, 2021
February 16, 2021

Susan R. Meredith, Arbitrator

Appearances

For the Employer: Kelly L. Bannister, Esq.

For the Union: Robert Cerritelli, Field Representative

Date of Award: July 6, 2021

ISSUE

Did the UConn Health Center violate Article 15.3.b “Patient Care Emergencies”, Section 1. “Emergency Coverage” when it failed to pay hourly employees at any worksite double time for all hours worked between March 10, 2020 through the present (including any limited portion thereof)?

If so, what shall the remedy be/

RELEVANT CONTRACT PROVISIONS

ARTICLE 15 OVERTIME

15.3a. Staffing Program. The parties agree that the following provisions will apply to all hourly John Dempsey Hospital employees, including clinical support Departments (e.g.: Laboratory Medicine, Radiology, Pharmacy). The clinical support Departments are free to utilize these provisions in accordance with the procedures herein, and also to utilize the current procedures for “on call” listed in Article 15.4.

The volunteer staffing program described below is a program created and implemented by a partnership between UCONN Health and UHP. Any issues arising under this Section will be referred to the monthly staffing committee established in Section 19.13 for discussion and resolution.

b. Patient Care Emergencies: The parties agree that emergencies arise that may affect staffing and patient care. These emergencies fall into two categories:

1. Emergency Coverage: Staff members who must remain on duty when non-essential staff are dismissed from duty or are sent home (during an emergency, disaster or weather event), or in an event that threatens the public health of the community, (such as a transportation disaster or an

epidemic) shall receive double time if they are hourly. This Section shall not be pyramided with Section 19.11.

2. Acuity: Staff necessary to address acute patient care needs will be compensated at the rate of double time if hourly. Examples of acute patient needs include:

(a) Completion of neonatal transport or interventional procedures, such as surgical, cath lab, GI, and radiology special procedures currently underway if no one is available to replace the employee at the procedure or it is not in the patient's best interest to change staff assisting with the procedure.

(b) During a Code Blue or Code Yellow.

(c) Any incident not covered above that management considers an emergency, in which case the Director of Nursing or designee and the Union President or designee will be notified by fax of the emergency situation. Each emergency situation will be evaluated by the Director or designee on the next business day and discussed with the Union President.

3. Emergency situations will be reviewed at the monthly staffing committee meeting.

c. **Low Census:** UCONN Health will have the prerogative to immediately adjust staffing if the census cannot support the current staffing level. Such adjustment of staffing will take place in the following order as listed below:

ARTICLE 19

19.11 Facility Closing. Facility closings ordered or authorized in accordance with Policy No. 2001-02 due to severe weather or other emergency will not result in loss of pay for any employee. Those employees required to work shall receive compensatory time for such work.

THE PROCEEDINGS

The UConn Health Center (UConn Health) and the University Health Professionals, Local 3837 AFT/AFT-CT/AFL-CIO (UHP or Union) submitted to arbitration a dispute concerning the Union's claim that UConn Health should pay all employees double time during the Covid-19 pandemic. The matter was heard on January 20 and February 16, 2021. The parties filed initial briefs and UConn Health filed a reply brief. The Union waived the filing of a reply brief. The hearing was closed by AAA on June 7, 2021, and a due date of July 6, 2021 was set for the award.

FACTUAL BACKGROUND

The parties agreed to Stipulated Facts as follows:

1. The UConn Health Center (UCH) and the University Health Professionals, Local 3837 (UHP) are parties to a collective bargaining agreement (CBA) dated July 1, 2016 through June 30, 2021 (submitted as Joint Exhibit 1).
2. During negotiations over a successor agreement the parties reached a tentative agreement on March 15, 2002, titled "Tentative Agreement Regarding The Conversion of Mandatory Overtime to a Voluntary System" (submitted as Joint Exhibit 2). Said tentative agreement states in part, at #3:
3. Replaces 15.3?? Patient Care Emergencies: The parties agree that emergencies arise that may affect staffing and patient care. These emergencies fall into two categories:
 - a. Emergency Coverage: Staff members who must remain on duty when non-essential staff are dismissed from duty or are sent home (during an emergency, disaster or weather event), or in an event that threatens the public health of the community, (such as a

transportation disaster or an epidemic) shall receive double time if they are hourly. This Section shall not be pyramided with Section 19.11 (also need to add language to 19.11).

3. On April 3, 2020 UHP filed a grievance stating:

UCONN Health refuses to follow the contract regarding emergency coveratge [...or in an event that threatens the public health of the community, (such as a transportation disaster, or an epidemic) shall receive double time if hourly.] (submitted as Joint Exhibit 3.)
4. The parties agreed to move the grievance to Step II (submitted as Joint Exhibit 4). A Step II hearing was held, and UCH issued its decision to deny the grievance on May 27, 2020 (submitted as Joint Exhibit 5).
5. UCP filed a demand with AAA for arbitration on June 8, 2020. (submitted as Joint Exhibit 6).
6. UCH has an Administrative Policy titled “Emergency Closing Policy”, numbered 2001-02. The current version of the policy has an effective date of December 4, 2019. (submitted as UCH Exhibit 1).
7. On April 24, 2020, the parties entered into a Memorandum of Agreement (MOA) to “...ensure that there are sufficient staff to meet an increase in acuity and potentially census of patients at John Dempsey Hospital who are COVID-19 positive or suspected.” (submitted as Joint Exhibit 7).
8. UCH and UHP were parties to a collective bargaining agreement dated July 1, 2002 to June 30, 2006 (submitted as Joint Exhibit 8).
9. On December 23, 2020, the parties entered into a MOA to “...ensure that there are sufficient staff to meet a potential increase in acuity and an increase census of patients at John Dempsey Hospital in the following units ICU, IU, ED, MED SURG, PSYCHIATRY 1, CRITICAL CARE AND MED SURG FLOAT POOL...” (submitted as Joint Exhibit 9)
10. The parties entered into a MOA on December 23, 2020 to “ensure that there are sufficient to supervise staff to meet a potential increase census of patients at John Dempsey Hospital in the following units...” (submitted as Joint Exhibit 10)

11. UCH Human Resources issued a “Payroll Guidance for Regular Payroll Timekeepers” related to recording time which may be impacted by COVID (submitted as UConn Health Exhibit 2)

The UConn Health Center is an academic medical center consisting of a research arm, an outpatient medical group referred to as University Medical Group (UMG), and the John Dempsey Hospital (JDH). Through the Covid-19 pandemic, UConn Health and particularly the JDH treated patients diagnosed with and suspected of having Covid-19. Both during and before the pandemic, UConn Health treated patients with other infectious disease. Some UConn Health employees worked with Covid-19 patients, some did not. Employees were provided personal protective equipment when required for health and safety.

The Governor of Connecticut declared a Public Health and Civil Preparedness Emergency on March 10, 2020 which was extended twice until April 20, 2021. The emergency declaration did not close UConn Health. UConn Health does not follow the Governor’s decisions with regard to closure of state agencies or facilities. The Health Center has an Emergency Closure Policy which provides that emergency closing decisions are made solely by UConn Health. The collective bargaining agreement references the policy with regard to facility closings, and the Union has not filed any grievances over the policy. The Union asked several times whether UConn intended to declare an emergency and was told that UConn Health did not intend to do so.

UConn Health did authorize some employees to work from home, assigned some to platoons of which some would be working at home, some on site, and some in “ready reserve.” Those in ready reserve were available to work and expected to socially isolate to be ready to report when needed. No employees were “dismissed from duty,” though their duties may have been changed or relocated.

Bargaining history for Article 15.3 The article which is in dispute here was negotiated into the contract which took effect on July 1, 2002. The Union entered that negotiation with a high priority on ending mandatory overtime. The parties negotiated a system of incentives for voluntary overtime shifts but recognized that there would be situations in which the employer would need to force some employees to work involuntary overtime. There was existing language which covered situations where employees might be required to work beyond the end of their shift in order to provide care for an individual patient, but UConn Health was concerned with emergencies which might involve multiple patients and require a number of employees to be held over. Those limited exceptions are the subject of this dispute. All of the negotiating proposals and negotiations referred to the subject of overtime and in what circumstances an employee could be required to stay after their shift ended. The result was the language of 15.3 as it now exists.

After the parties reached a tentative agreement, the Union produced communications to its members concerning the proposed changes. UConn Health Ex. 7

was a document produced by the Union titled “Replacing Mandatory Overtime” which says that employees could still be mandated to stay over in certain circumstances, including a transportation disaster or an epidemic, and would “still” be paid double time for these occasions.

After the parties ratified the contract, there were information sessions for supervisors conducted jointly by UConn Health and UHP. Documents produced for these sessions provided that the new language had as its purpose covering situations “when staff will have to work extra, double time will be paid . . . during public health emergencies.” Examples included individuals who were to be paid double for time employees were required to stay past the end of their shift to perform extra work due to the impact of a flu epidemic. One of the documents produced by the parties in discussion of the emergency pay specifically provides that “Staff coming in for a regular shift will not receive double time.”

UConn Health has experienced previous epidemics, though not with as overwhelming an impact on the hospital and its staff as Covid-19. In 2014, a public health emergency was declared related to the Ebola virus. This emergency extended from October, 2014, to April, 2016. During this epidemic, UHP employees were not paid double time for all hours worked. No grievance was filed.

From April 2009 to March 2010, a public health emergency was declared related to the H1N1 virus. UConn Health employees were not paid double time for all hours worked and the Union did not file a grievance.

UConn Health calculated that the Union's proposal would add approximately \$1.2 million to each week's payroll, excluding the impact on fringe benefits.

POSITIONS OF THE PARTIES

The Union - The Union argues that the plain language of Article 15.3b.1 requires hourly employees to be paid double time during a transportation disaster or an epidemic. The President, Bill Garrity, testified that he reads the language in Article 15.3b.1 as two separate clauses. One relates to employees who must remain on duty when others are sent home in an emergency disaster or weather event. The second clause requires that employees shall receive double pay in a global emergency. The provision does not require that employees work over their regular shift to receive this double time pay.

The Union advocates an "objective" approach to the language which looks at the contract provision and assigns the meaning to the words which a reasonably intelligent person would assign the words. This approach does not consider the meaning the parties may have attached to the language. The history of the bargaining and the discussions of the parties are, under this approach, irrelevant to the interpretation of the contract language.

Using this approach, Article 15.3b.1 provides two separate and distinct events that trigger the double time provision for staff on duty - (1) when non-essential staff are dismissed from duty or are sent home”, and (2) in an event that threatens the public health of the community. A grammatical analysis shows that the two circumstances are distinct yet each trigger the same response - pay at the double time rate.

The Union contends that the hospital did dismiss non-essential employees from duty during the pandemic, but even if they did not, the second clause triggered the double pay provision. The distinct clauses are separated by a comma and parenthesis which makes clear that the second clause is not a repeat of the first. That is, it is not triggered by the sending home of non-essential staff but by the epidemic itself.

The Union also says that the parol evidence rule means that the words of the contract may not be contradicted by evidence of prior or contemporaneous oral or written understandings and negotiations. Thus, evidence offered by UConn Health about understandings of the parties represented by contemporaneous comments by UHP should not be given any weight.

The Union requests as a remedy a finding that UConn Health violated the contract when it failed to pay hourly employees at any worksite double time for all hours worked for the period between March 10, 2020, and the present and to make all affected employees whole for their losses.

The Employer - UConn Health argues that contract provisions cannot be read outside of the context in which they appear. The arbitrator is required to consider the instrument as a whole and the intent of the parties. The Union's interpretations of 15.3b.1 is wrong because it isolates the phrase "in an event that threatens the public health of the community (such as a transportation disaster or an epidemic) shall receive double time if they are hourly" from the rest of 15.3 as a whole and from the rest of the contract. This eliminates the requirement that non-essential staff must be sent home before employees who are required to stay are paid double time, which is a condition precedent for the double time pay. The Governor's declaration of an emergency did not close UConn Health or relieve any of its employees of their obligation to work. UConn Health did not declare an emergency or send any employees home with no obligation to work or to serve as ready reserve.

The article at issue is contained in the section of the contract entitled "Overtime". The remainder of Article 15 provides for other situations in which employees may work overtime either voluntarily or on a mandated basis, such as a patient acuity issue. This supports UConn Health's argument that the double time provision refers only to time in which an employee is required to continue to work when their regularly scheduled shift has ended.

The employer argues that UConn Health would never have agreed to a provision which would pay employees for all hours worked during an epidemic. The Health Center

could not have financially tolerated such a situation. In the same negotiations in which this language was adopted UConn Health made clear that its priority was to achieve a contract which protected the financial position of the Health Center. The Union's interpretation of this language would expose UConn Health to unknown potential expenses which could not be covered by the Health Center's finances.

The employer argues that the Union's position would result in unfairness since it would provide that hourly employees, whether they worked with Covid-19 patients or not, would be paid double time for all hours worked, while salaried employees or employees in some areas of the Health Center, would not. Their argument implies that the Union obtained this double time benefit for a subset of its membership and has never attempted to expand it to cover all Union members.

The adoption of the Union's interpretation would constitute a prohibited addition to the parties' agreement, adding to the Overtime section a provision for double time payment for regular hours worked.

The employer argues that the bargaining history supports its interpretation of the language in question. The parties adopted the language to avoid having to require mandatory overtime from employees in most situation. The language replaced the mandatory overtime requirement and did not add a new double time benefit for regular hours. Post bargaining statements by the parties support this interpretation. If the Union

thought that it had achieved a new benefit of double time for all hours worked in an emergency, it would have told its member of the change.

Finally the Health Center argues that past practice supports its interpretation. In previous epidemics which threatened the public health, the Ebola emergency and the H1N1 epidemic, employees were not paid double for all hours worked, and the Union did not file grievances in these instances. The fact that those epidemics resulted in few patients at UConn Health does not change the requirement of the contract. If it is required in this pandemic, it would have been required in the previous epidemics as well.

DISCUSSION

In this contract interpretation case, the Union bears the burden of proof. The Union brings this grievance under Article 15.3b.1 arguing that the contract provides double pay for all hourly employees for all hours worked during an epidemic. This argument fails on several grounds.

The Union argues that the only question is what the specific language of Article 15.3b.1 provides. It separates the language concerning an epidemic from any context or any other language. The President of the Union testified that “we believe in our contract it says shall receive double time pay if hourly - in the middle of a global pandemic.” He separates the two instances in the article and concludes that the second clause covers all working hours in an epidemic.

Contract language cannot be read in isolation. The Union argues that the analysis is constrained from relying on extrinsic evidence but also attempts to ignore the intrinsic evidence of the parties' meaning as it is represented by the context of the disputed language in the contract. The language which the Union argues supports its analysis is part of a sentence which is part of a provision which is itself a part of the section of the contract labeled "Overtime." Reading the provision, it addresses the situation in which an employee is required to work outside that employee's normal schedule. The language itself addresses "[s]taff members who must remain on duty," not staff members who are working their regular schedules. If the employee is not required to work overtime, then the pay arrangements in the provision do not apply. The pay for one's regular schedule are contained in other sections of the contract which address base pay, pay for voluntary additional shifts, shift differentials and other elements of pay. This section addresses only those situations in which the employer can require, or mandate, attendance outside of normal hours for certain emergency situations.

Article 15.3 does provide double pay for certain regular hours. When non-essential employees are sent home with pay and relieved of their duties, those employees who are required to remain and finish their shifts may be paid double time for that shift. This corrects an inequity between those employees who get "snow days" and those who have to stay and work regardless of the weather.

There is no real dispute that in the Covid-19 pandemic employees were not sent home and relieved of their duties. Some employees were required to work from home, some were required to social distance in ready reserve, some were assigned to alternative work spaces to maintain social distancing. These changes in assignment do not trigger the provision that those who remain in the hospital receive double time, since no employees were relieved of their duties or given paid time off.

Article 15.3b.1 addresses two of the types of emergency situations which allow the employer to require employees to work outside of their normal schedule. The first, which addresses weather and disasters, requires that some employees be relieved of their duties and sent home. The second addresses emergencies with a greater impact on the hospital because more people may be affected, such as a transportation disaster or an epidemic. There is a dispute as to whether the requirement for double pay in the latter situation required that some employees be sent home. For purposes of this grievance it is not necessary to resolve that question. Although the Covid-19 pandemic did not result in non-essential employees being sent home, the Union's argument fails on different grounds.

The Union argues that the plain language of Article 15.3b.1 provides for double pay for all hours worked by hourly employees in an epidemic. Since the language in question is disputed, it is permissible and useful to look at the bargaining history of the provision in question. The parol evidence rule, cited by the Union as a basis for ignoring the bargaining history of this language, does not exclude evidence offered to interpret the

terms of the agreement, especially where the language is ambiguous. In this case, the Union's reading of the language indicates that there is enough ambiguity in the provision to make the extrinsic evidence of bargaining history both admissible and probative. The evidence is not used to determine what the parties negotiated but to understand the meaning of the terms used in the agreement. This is not an inquiry as to what was in the minds of the parties when they negotiated the disputed language but what was said across the table or in joint venues such as the supervisor training which the hospital and the Union conducted jointly.

In this case, the language that is disputed here was negotiated into the parties' collective bargaining agreement in 2002. At that time, the Union came to the bargaining table with a stated goal of eliminating mandatory overtime, which was very unpopular with its members. The hospital was sympathetic to the goal but also concerned with its financial position. Thus, the parties negotiated a number of provisions designed to reduce the instances of mandatory overtime to the smallest possible number of situations. The result included additional incentives to persuade employees to volunteer for overtime. The section which this grievance addresses sets out those situations in which the Health Center may still require that employees work beyond their regular schedule. One of those exceptions is an epidemic.

The Union presented its objective as reducing mandatory overtime. The proposal did not contain any language which sought to change the pay received by employees working their regular schedules.

After the parties reached a tentative agreement on the 2002 contract, the Union informed its membership of the changes negotiated. This information did not say that employees would be paid double time for all time worked during an epidemic. Instead, employees were told that they would “still” be paid double time if required to do extra work. In information the Union and employer jointly used in training, the information explicitly stated that employee would not receive double time pay when “coming in for a regular shift.”

The past practice also supports the hospital’s understanding of the contract provision. In the Ebola epidemic and the H1N1 flu epidemic, employees were not paid double for their time worked, and the Union did not grieve the pay in those circumstances. There is no question that the impact of the Covid-19 pandemic was far greater on the hospital and on its employees than the previous epidemics. That fact is reflected in the MOUs which were negotiated to provide incentives for employees to fill needed shifts and was clearly evident in the Union’s evidence. But the difference in impact does not create new contract language.

In summary, the Union has failed to carry its burden of proving that the contract requires double time pay for all hourly employees who work during an epidemic. The

hospital's position is supported by the contract language, by the negotiating history, and by the practice of the parties.

AWARD

The UConn Health Center did not violate Article 15.3b "Patient Care Emergencies", Section 1 "Emergency Coverage" when it failed to pay hourly employees at any worksite double time for all hours worked for the period between March 10, 2020 through the present. The grievance is denied.

Susan R. Meredith