

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

**UNION OF PHYSICIANS OF  
WASHINGTON and Kamran Naficy et al.)**

**Union/Grievant**

**vs.**

**DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES, STATE OF  
WASHINGTON**

**Employer/Respondent**

**Re: Extra duty pay for physicians  
FMCS # 120131-52992-6**

**DECISION AND AWARD**

**of**

**WALTER KAWECKI, JR.  
ARBITRATOR**

**November 4, 2012**

**Appearances: Arbitrator: Walter Kaweck, Jr., Esq.**  
756 Barton Way  
Benicia, CA 94510

**Employer: Andrew L. Logerwell**  
Assistant Attorney General  
7141 Clearwater Drive S.W.  
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**Union: Rhonda J. Fenrich, Attorney**  
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**BACKGROUND**

The arbitration hearing was held on July 11, 2012 at Western State Hospital, located at 9601 Stellacoom Blvd S.W., Lakewood, Washington 98498.

This hearing arose pursuant to the current Collective Bargaining Agreement (CBA) with The State of Washington and Coalition effective July 1, 2011 through June

30, 2013. The Coalition are composed of several unions to include the Union of Physicians of Washington (Union Exhibit 1 and Employer Exhibit 16).

The Collective Bargaining Agreement (hereinafter referred to as the CBA) between The State of Washington ( hereinafter referred to as the Employer or State) and the Union of Physician of Washington (hereinafter referred to as UPW or the Union) concerns this arbitration case involving whether "extra duty pay" for physicians would be subject to the same three percent (3%) salary reduction that applies to regular base salary.

A grievance was filed on September 30, 2011 by Kamran Naficy, Robert Henry and all other bargaining members of UPW receiving a reduction of three (3%) in "extra duty pay" for physicians effective September 23, 2011. (Union Exhibit 2). The grievance addressed articles of the CBA violated, the facts and remedy requested.

In accordance with the CBA, Walter Kaweck, Jr., was selected by the Employer and the Union to serve as Arbitrator, from a list provided by the Federal Mediation and Conciliation Service.

At the hearing, the parties were given an opportunity to state their positions, examine and cross-examine witnesses, present documentary evidence and argue their case. The parties stipulated there were no procedural issues regarding filing the grievance in this matter. The parties also stipulated they had presented all the evidence at the hearing regarding the case and they requested the Arbitrator make a decision based on the evidence presented. Further, the parties stipulated that the arbitration case was properly presented before the Arbitrator, and that the Arbitrator has jurisdiction and retention of the case.

The parties also agreed they would both submit closing briefs by September 14, 2012. By mutual agreement, the Union and Employer agreed to delay the submission of their post hearing briefs to the Arbitrator on October 5, 2012. The Arbitrator received the Employer and Union post hearing briefs on October 5, 2012. The parties also agreed the Arbitrator had 30 days after receiving the post hearing briefs to complete his decision and award.

### **ISSUE**

The issue agreed to by the parties was the following: "Did the State of Washington violate article 7.9c2, 41.1, 41.28 or MOU A-37 on Salary reduction by reducing the doctor's extra duty pay by 3%? If so what is the appropriate remedy?"

### **RELEVANT CONTRACT TERMS**

#### **Article 7.9 C.2:**

The salary paid to overtime-exempt employees is full compensation for all hours worked except: ... 2. UPW Compensation for physicians working "Extra Duty" as defined in Section 7.2D will be given on a hour for hour straight time basis at their regular rate of pay for the time they are assigned to extra duty. The physician may request exchange time in lieu of payment as compensation for the extra duty hours worked.

#### **Article 7.2 D**

#### UPW

Physicians are expected to work as many hours as necessary to accomplish their assignment or fulfill their core responsibilities. However, because DSHS has a unique situation that requires physicians to work hours over and above those

necessary to accomplish their assignment and fulfill their core responsibilities, physicians will receive additional straight time pay at their regular rate of pay for working these "extra duty" hours.

**Article 41.1 Pay Range Assignments**

A. Effective July 1, 2011, each classification represented by the Union will continue to be assigned to the same salary range of the "Washington State General Service Salary Schedule Effective July 1, 2009 through June 30, 2011" as it was assigned on June 30, 2011. Effective July 1, 2011, each employee will continue to be assigned to the same range and step of the General Service Salary Schedule that he/she was assigned on June 30, 2011.

B. Effective July 1, 2011, all salary ranges and steps of the General Service Salary Schedule will be reduced by three percent (3%) except for those steps within a salary range that full-time equivalent monthly salary is less than \$2500. The exemption to the three percent (3%) salary reduction (employees making less than \$2500 a month full-time equivalent salary) does not apply to employees who receive a disciplinary action that impacts salary. This salary grid will remain in effect until June 29, 2013 as shown in Compensation Appendix D, attached. The three percent (3%) salary reduction will not apply to compensation an employee receives for overtime or for leave cashed out in accordance with Articles 8.7D, 12.14, 13.6 and 13.8.

C. Effective June 30, 2013, the "General Service Salary Schedule Effective July 1, 2009 through June 30, 2011" will be reinstated as shown in Compensation Appendix A.

D. In those cases where the employee's current salary exceeds the maximum amount of the salary range for his or her current position, the three percent (3%) salary reduction will apply except for employees making less than \$2500 a month full-time equivalent salary.

**Article 41.28 Temporary Salary Reduction (TSR) Leave**

In lieu of reducing the daily work hours of employees as a result of the three percent (3%) salary reduction, the Employer and the Unions agreed to establish Temporary Salary Reduction (TSR) leave.

A. Employees will only accrue TSR leave during the period the three percent (3%) salary reduction is in effect. Only employees subject to the three percent (3%) salary reduction will qualify to earn TSR leave.

B. Employees may be credited up to a maximum of 5.2 hours of TSR leave per month.

C. Full-time employees who have been in pay status for eighty (80) non-overtime hours in a calendar month will accrue 5.2 hours of temporary salary reduction leave per month. Part-time employees will accrue temporary salary reduction leave proportionate to the number of hours the part-time employee is in pay status during the month to that required for full-time employment.

D. TSR leave has no cash value and balance must be used by July 1, 2013; however, employees may carry up to sixteen (16) hours of TSR leave that must be used prior to September 1, 2013.

E. TSR leave must be requested and scheduled in accordance with the vacation leave scheduling requirements of Article 12, Vacation Leave.

F. TSR leave will be used prior to either vacation or sick leave unless by doing so the employee would exceed the vacation leave maximum in accordance with Article 12. Vacation Leave. An employee will not be required to use TSR leave prior to sick leave when he or she has submitted a written liquidation plan that has been approved by his/her supervisor that ensures the use of TSR leave prior to the June 30, 2013 expiration, except as provided in H below.

G. TSR leave may be used alone or in conjunction with other leave. TSR leave may not be donated as shared leave.

H. This section will expire on June 30, 2013, except subsection D, which will expire on September 1, 2013.

#### MOU A-37

It is the State's intention to apply the 3% across-the-board salary reduction to all general government employees including management staff, and all general government employees covered by RCW 41.80 (excluding Teachers at the Center for Childhood Deafness and Hearing Loss and at the School for the Blind and employees making less than \$2500 a month full-time equivalent salary as of June 30, 2011. If subsequent to negotiations of the parties' 2011-2013 collective bargaining agreement, the Employer agrees to or implements more favorable treatment regarding the across-the-board salary reductions, shift premium rates, callback, standby or enhances leave accruals for general government employees whether management staff or employees covered by RCW 41.870, then the Employer will apply such treatment to employees covered by this agreement. Provided, that any agreement which provides for temporary layoff days instead of

a salary reduction which involves rounding up the number of days for the 3% reduction language and rounding down the number of days for the 2% reduction language, shall not be regarded as a violation of this MOU. The parties will meet promptly upon request of the Union to negotiate the implementation of that more favorable treatment. Any change in the across-the-board salary reduction, shift premium rates, callback, standby or enhanced leave accruals is subject to legislative approval.

### **FACTS**

The following are facts based on documents that were introduced and admitted into evidence and testimony of witnesses:

The Collective Bargaining Agreement between the State of Washington (hereafter the Employer or State) and the Coalition effective July 1, 2011 through June 30, 2012 which includes several Unions who represent less than 500 bargaining unit members and the State of Washington (Employer or State). The Coalition includes the Union of Physicians of Washington (UPW or Union). (Employer Exhibit 16 and Union Exhibit 1). UPW represents the physicians who are employed by the Department of Social and Health Services (DSHS) who work at Western State Hospital and Eastern State Hospital which are the State run psychiatric hospitals located in the State of Washington.

The Employer and the Coalition negotiated an CBA which, by statute, was submitted to the Office of Financial Management (OFM). This original CBA did not include a salary reduction. This CBA was determined by OFM not to be "financially feasible," thereby forcing the parties back into negotiations. The parties then negotiated a CBA which included an across-the-board three percent (3%) salary reduction in exchange

for 5.2 hours per month of temporary salary reduction leave (TSR). The language in the CBA stated that the three percent (3%) salary reduction did not apply to overtime. This was considered financially feasible by OFM.

On June 24, 2011, DSHS Human Resources Director, Glen Christopherson, sent a memorandum to all DSHS employees, including physicians, reminding them of the 3% salary reduction to the base salaries for most DSHS employees. The memo. stated the 3% reduction applied to Coalition and non-represented employees who were full time equivalent employees earning \$2500 or more per month. The memo. also stated full time employees would accrue 5.2 hours per month of TSR leave. (Union Exhibit 9).

Reductions of 3% were not initially made to the "extra duty pay" received by the physicians. On September 22, 2011, Dr Brian Waiblinger sent an email to physicians stating that "extra duty pay" was inadvertently not subjected to the 3% pay reduction between July 1, 2011 and August 31, 2011 and those doctors affected will be receiving a letter and repayment notice. (Union Exhibit 4).

On September 30, 2011, Drs. Kamran Naficy, Robert Henry and all other bargaining unit members of UPW filed a grievance concerning the 3% reduction in "extra duty pay". They said the articles violated were 7.9C; 41,11 41.28 and the MOU, A-37 on salary reduction. They provided facts regarding the grievance to include their understanding that the 3% reduction would not reduce payment for non-base rate compensation including overtime, benefit cash outs and extra duty pay. They requested a remedy to repay all members for all lost pay and benefits due to the 3% salary reduction in "extra duty pay" (Union Exhibit 2).

The Employer submitted exhibits 1 thru 15 that were accepted into evidence. These were Brad Garrets, the chief negotiator for the Employer, bargaining notes, Coalition and Employer proposals and counter proposals on Articles 7 - Hours of Work, Article 8 - Overtime, and Article 41 - compensation.

The witnesses for the Union were Wayne Johnson, Dr. Robert Henry, Dr. Helmut Steinwender. The witness for the Employer was Brad Garrett. The Union's witnesses testified as follows:

Wayne Johnson testified he was the business representative for Teamsters local 760 representing the Fish and Wildlife sergeants, and participated in negotiations for the 2011-2013 coalition collective bargaining agreement. (Tr. p.11). He attend the January 2011 bargaining sessions regarding the 3% reduction and temporary salary leave. " The salary reduction was suppose to be on base pay. I remember having quite a few discussion about that because my sergeants get specialty pay, and we wanted to make sure that it didn't affect any other pay other than just their regular base salary"(Tr. p. 14). The sergeants are having 3% of their base pay reduced but their specialty pay is not reduced by the 3%. The sergeants specialty pay is a percentage of their base rate of pay. (Tr. p. 15). On cross examination Mr. Johnson was asked if the agreement, not to reduce the specialty pay was written into the Agreement. Mr. Johnson said no, the 3% reduction just applies to base pay. (Tr. p. 17).

Dr. Robert Henry testified he is a psychiatrists at Eastern State Hospital and a representative for the Union, and vice president of the Union (Tr. p. 20). He testified that in the negotiations we made in January 2011, it was our understanding that we would just continue to get paid any extra hours at straight pay, but instead there's been a 3%

reduction in that pay, as well as our base salary. The agreement that was made, was that we would accept a three percent pay cut in our base salary... and any work above and beyond that, what might be considered overtime, would not be affected. The State responded to this understanding with a Yes, that's the case (Tr. p. 24-25). He stated there were discussions how it would apply to "extra pay". He stated in the discussion, the reduction would affect just the core salary (Tr. p. 26). He testified that there were no discussion that doctors who work to backfill for vacancies and perform OD work would receive the extra duty pay at a reduced 3% rate of pay (Tr. p. 27).

He testified the doctors are overtime-exempt (Tr.p.29). He testified that we just assumed that any extra duty was considered overtime. We did not propose any language regarding extra duty pay because we didn't feel we needed to, because we were reassured in those meetings that extra duty pay would not be affected (Tr. p. 32). Dr. Henry was asked if they ( Brad Garrett and Diane Leigh) state that pay based on straight time wage, if they were incentive pays for the other groups wouldn't be affected by the salary reduction? Dr. Henry testified that is correct. Dr. Henry was asked if they ever said extra-duty pay would be reduced at all and his response was No (Tr. p. 39). Dr. Henry was asked the following: When you negotiated *the initial agreement*, not the 2011, that got extra duty pay into the CBA, did the parties agree that extra duty pay, the title, was a euphemism for overtime for the doctors. His response was that was my understanding. (Tr. p. 46).

Dr. Helmut Steinwender testified he is a psychiatrist at Western State Hospital, one of the officers in the Union, with official title of chief negotiator for UPW (Tr. p. 49). He testified that there is no coverage for weekends, so those are allocated as extra work

for all members of the psychiatric staff. His understanding of extra-duty pay is, to him, as it was to Dr. Henry, a euphemism for overtime pay (Tr. p. 50-51). He testified that all hours worked in a position that is not my core position and that I am assigned to another ward beyond my regular 40 hours, then that is extra duty, or overtime (Tr. p. 52).

He testified that pharmacists receive standby pay and it is not reduced by the 3% but it is not in article 41, or in writing as an exception. When he negotiated the CBA he basically said: Okay, this pertains to base pay, all right? And our negotiating partner said: Yes. (Tr. p. 57). He testified that managers that work here who get compensated for standby additional pay, their standby pay is exempt from the 3% reduction based on his discuss with some of the managers (Tr. p. 63). He testified that we felt quite assured that the agreement was that our regular base salary, our 40 hour salary, would be docked by 3%, and therefore we will get 5.2 hours per month extra leave which equated to 3% of our base pay. (Tr. p. 71).

On cross examination he agreed that the plain language of the contract only exempts the 3% reduction from overtime or leave cashed out, however, we never felt it was necessary to include extra duty pay as an exception because he thought they were bargaining in good faith when they assured us that the language really only meant the base salary would be reduced by 3%. It was our intent that the 3% pay reduction did not apply to extra duty pay ( Tr. p. 76). He also testified that 41.1B does not specify overtime as defined in the CBA or give a specific article. (Tr. p. 77). He was asked the following: Does the MOU specifically state, if there's better treatment given to anybody, including management staff or other unions, you would receive that same treatment? He testified Yes (Tr. p. 78).

On cross exam he testified that he asked some managers who work here whether their standby ... was reduced, to see if there were any analogs to our situation, and they said no (Tr. p. 80).

The witness for the Employer, Brad Garrett proceeded to testify.

Brad Garrett testified that he worked at the Office of Financial Management in the Labor Relations Office as a negotiator and he was the chief negotiator for the Employer (Tr. p. 85). He testified he bargained the coalition contract for the Employer. As chief negotiator he was the spokesperson for the State of Washington. In some testimony earlier, the Union claimed that they've always seen "extra duty" as a euphemism for "overtime." Have they ever expressed that to you at the bargaining table, that you recall? He testified, you know, I heard that said, and I have to say that I have never heard extra duty pay talked about in terms of--or used in conjunction with overtime, nor have I viewed it as such. It looks like, by August the Union dropped the proposal that they be paid at two times the regular rate of pay. It just says additional straight time pay? His response was yes. (Tr. p.90).

Now Article 41, as tentative agreements (TA) in January, and 41B notes state that the 3% salary reduction will not apply to compensation an employee receives for overtime? Mr. Garrett's response was Yes. Did the Union's representative ever tell you that they intended overtime to cover extra duty pay? Mr. Garrett responded that I have no recollection of that. I didn't talk about it. Would you have agreed to that definition of extra duty pay as simply equaling overtime? Mr. Garrett's response was No. Also he testified that they are overtime exempt. They receive a salary for the time it takes to do

the work, whereas overtime eligible receive after 40 hours or their shift they receive overtime at time and a half.(Tr. p. 94-96).

Was it your intent or the State's intent-- in agreeing not to reduce overtime by three percent, was it your intent that that also fold in extra duty? Mr. Garrett responded No.

The argument appears to have been made by the Union that the reason we still have Appendix A is to show that the other compensation is not subject to the reduction in pay, as opposed to Appendix D. Why do we have Appendix A? Mr. Garrett testified that we will have it remain in effect until June 29, 2013 so that it would revert back to the previous salary grid so there wouldn't be any loss of pay for one day so that when we changed over, we would be at a starting point from the original 2009-2011 salary grid. So when we go into the next negotiations, we are going in with the assumption that the base salary is Appendix A, Not D (Tr. p.99).

Staying with Article 41.1 was there ever any language passed to you that said, We're going to exempt the extra duty from the 3% salary reduction? Mr. Garrett responded No (Tr. p. 100).

So going to Appendix A-37 can you explain the impetus for this MOU. Mr. Garrett testified it was sort of what we would call a "me too". We were trying to treat people the same and not give more favorable treatment regarding across the board salary reduction, shift premium rates, callback, standby or enhance leave accruals (Tr. p. 103-104).

On cross examination Mr. Garrett was asked is standby pay exempted from the 3% salary reduction? Mr. Garrett stated I believe that it is-- or excuse me. No, I don't

believe that it is. So is it your testimony that across the board all standby pay has been reduced by 3%? Mr. Garrett responded I couldn't tell you what everybody has done everywhere.

On cross examination, Mr. Garrett was asked to look at the appendices to determine standby pay. Mr. Garrett said it was not there and they had to hand-do the pay, but I was not involved, it is payroll stuff. I believe our intent was that it's exempted from the 3%, and so it wouldn't be this for time and a half. The question was asked, where is your intent specified because you said everything was specified in the contract, that you would look at the one salary schedule for one item and the other salary schedule for another item? Mr. Garrett testified it doesn't say. So Mr. Garrett, what I understand your testimony is the 2009 salary schedule was left in there merely because there was a jump back provision on June 30, 2013? Mr. Garrett said Yes. Wouldn't I look at the 2009-2011 salary schedule for the correct overtime? Mr. Garrett responded you could do that.(Tr. p. 115).

Did you give them direction to not look at that schedule or did you give them direction on how to compute an overtime rate? Mr. Garrett said No. I did not give them any direction (Tr. p.115).

Would a furlough have reduced the pay the doctors received for extra duty pay? Mr. Garrett said potentially, because they may be on furlough, but when the attorney reminded him that the wards are required by law to cover these vacancies, Mr. Garrett changed his opinion. And do doctors receive overtime if they work on a holiday, even though they're overtime-exempt? Mr. Garrett responded they receive holiday pay, which is at time and a half, but it's not characterized as overtime (Tr. p. 120).

Mr. Garrett was asked is there any specific language in Article 41 that would exempt Specialty pays from this reduction? Mr. Garrett said I don't believe so. And you don't recall any conversation with them? Mr. Garrett said I don't (Tr. p. 125)

Let's talk a little bit about extra duty pay itself, you know, the crux of today's issue. You were not a representative of OFM when extra duty pay was first negotiated? Mr. Garrett said I was not. Did you review any notes to acquaint yourself with the history of how extra duty pay came in to being? Mr. Garrett said No. You were here during Dr. Henry's testimony, correct? Mr. Garrett said I was. And do you have any documentation that would refute his statement that, while they were bargaining about it, they used extra duty as a euphemism for overtime, that was the intent of the parties? Mr. Garrett said I can't dispute what he said.(Tr. p. 125-127).

Why was overtime exempted from the salary reduction? Mr. Garrett said...We hoped the 3% reduction of base pay would be enough. Did your office cost out the reduction in the extra duty pay for the physicians? Mr. Garrett said not that I'm aware of. Did the legislative omnibus budget cost out a reduction in the extra duty pay to be received by the physicians? Mr. Garrett said I don't know. In the 3% salary reduction and the budget office acceptance, do they show a savings from a reduction in the extra duty pay received by the doctors? Mr. Garrett said I am unaware of any. Did DSHS ever go to your office and say, We have to have extra duty pay reduced as well? Mr. Garrett said not that I am aware of.

## **EMPLOYER AND UNION ARGUMENTS**

Mr. Andrew Logerwell, Assistant Attorney General for the Employer argues that because the issue involves contract interpretation, the Grievant bears the burden of proving by a preponderance of evidence that the Employer violated the CBA and where the CBA is clear, the contract language controls. He further argues that an Arbitrator must give words their ordinary meaning, absent evidence that the parties intended a special meaning.

Mr. Logerwell argues that the language of the contract is clear: there is no exemption for the "extra-duty pay." To start with it is incontrovertible that under Article 7.9(C)(2) the physicians are overtime exempt and to the extent the contract does exempt employees non-regular pay from reductions, those are listed in Article 41.1(B). None of those apply to the physicians. Those exemption only apply to compensatory time cash outs under Article 8.7(D), vacation leave cash out upon separation from employment under Article 12.14 and sick leave cash out under Articles 13.6 and 13.8. It is important to keep in mind that this contract covers over 30 bargaining groups of less than 500 employees. Because of that reality, the contract contains several specific provisions that cover specific circumstances affecting specific employee groups. While it is clear that some groups bargained to have overtime or specific cash outs exempted, it is equally clear that no such language exists in this CBA. To interpret the contract in such a fashion as to sustain the grievance would be to add in very specific language that does not exist.

Mr. Logerwell argues that when the plain language of the contract does not entirely resolve the issue, arbitrators also look to the bargaining history as an important indicator of contracting intent. The evidence is clear that the State never intended to exempt "extra-duty pay" from the 3% reduction. While there may have been some after

the fact presumption that extra duty pay was exempt, , given that those exemptions in the contract that are recognized are the product of specific language, the notion that doctors' unexpressed presumptions should be given the power of contract language is without support in the law.

Ms. Rhonda Fenrich, attorney for the Union argues the parties agreed to a salary reduction which equated to 5.2 hours of employee work time per month, or 3%. The intention of both parties was to limit the economic loss to the employees to this 3%, and not to reduce overall employee compensation by 3%. This intent is evidence in numerous ways. First, the State altered its initial proposal reducing employee compensation, to a reduction in base wages only, thereby exempting other forms of compensation, such as overtime, Specialty pay, stand-by pay and the like.

Ms. Fenrich argues that the State's only witness, Mr. Garrett, testified that he could not remember why the State changed its proposal regarding a 3% reduction from compensation to base salary. The Union witnesses recalled clearly that the change was based upon the agreement by the parties that the reduction was to be limited to base salary alone and no other forms of compensation. Mr. Garrett also testified he was not responsible for the Sate's proposal, that these discussions were led by Diane Leigh, not him. The State did not call Ms. Leigh as a witness.

Ms. Fenrich argues that the intent of Article 41.28 was to offset the salary reduction with an equal number of leave hours This is also evidence in the State's separate agreement with SEIU which did not reduce their wages, but gave them an equal number of unpaid furlough days to be taken in the 2011-2013 contract term.

Ms. Fenrich argues that in construing a written contract, such as a CBA here, we have consistently applied the following rules: (1) the intent of the parties controls; (2) we ascertain that intent from the reading of the contract as a whole; and (3) we do not read ambiguity into the contract. Application of this standard to the contract language at issue in this case, as well as the original intent of the parties in agreeing to extra duty pay for the physicians supports the Union's position that the State did not bargain for a reduction in the physician's extra duty pay.

Ms. Fenrich argues that the Union provided consistent, uncontroverted testimony that the discussions and agreement limited the reduction to base wages only not extra pays even if they were not specifically mentioned in Article 41.1. Mr. Wayne Johnson testified that he remembered quite a few discussion that the reduction of 3% was suppose to be on base pay because of his concerns about specialty pay received by his sergeants that he represented and the 5.2 hours went into a bank to make up for the 3% salary reduction.

Ms. Fenrich argues that Dr. Henry testified that the initial agreement concerning extra duty pay was intended to compensate doctors for the overtime hours necessary to cover for the State's inability to recruit a sufficient number physicians to work at Eastern and Western Hospitals, as well as to provide after hours coverage in lieu of hiring additional physicians to appropriately staff the hospital twenty-four hours a day. Dr. Henry testified that in order not to be confused with general government employees who are classified as overtime eligible in the traditional sense of the word, the State and Union agreed to call the physician's overtime pay "extra duty pay" even though both parties conceded this was overtime. Ms Fenrich stated arbitrators must strive to determine what

the parties were attempting to accomplish by the contract language used to effectuate the intent. The intent of the parties in creating "extra duty pay" was to compensate physicians for the overtime work they performed beyond 40 hours that was beyond the physician's core duties.

Ms. Fenrich argues that in January 2011 the parties negotiated replacement Article 41, as well as MOUs to effectuate a 3% salary reduction of base salary without reduction other compensation. This is supported by testimony of Mr. Johnson Tr. p 14; Testimony of Dr. Henry, Tr. p. 26-27; Testimony of Dr. Steinwender, Tr. p. 57-60.

Ms. Fenrich argues the State has focused on the word "overtime" as an exemption to the reduction, but in reading all of the contractual components related to this reduction, as well as factoring in the intent of the parties as explicitly express at the negotiation table , it is clear that the 3% was intended to be of the base rate which equated to 15 minutes a day or 5.2 hours per month. Article 41.1 clearly expresses this intent.

Ms. Fenrich argues that the Union provided uncontroverted testimony that Fish and Wildlife Sergeants receive Specialty pay without a 3% reduction even though it is based on straight time pay and not specifically exempted from reduction in Article 41.1. Testimony of Mr. Johnson Tr. p. 15-16. Also see Exhibit U-1 p. A-34 and Article 41.22 reference #7. In addition, the stand-by pay received by the pharmacists was not subject to a 3% reduction, even though it is based on their base salary. Testimony of Dr. Steinwender, Tr. p. 57. Exhibit U-1, p. 106, Article 41.19D. (pharmacists receive 7% of their hourly base salary as standby pay. The State provided no contradictory testimony or evidence as to these exemptions.

Ms. Fenrich argues that the State is claiming that since it used the term "overtime" it must not have meant extra duty pay. However, the State's witness testified that he just couldn't recall the discussion if it occurred, not that it did not happen. Testimony of Mr. Garrett, Tr. p. 119. He also couldn't recall the discussions regarding the Sergeant's Specialty pay Tr. p. 125. Given the lack of memory of Mr. Garrett and the clear memory of the Union witnesses, it is evident a discussion was had that extra duty is overtime and not subject to the 3% reduction. Mr. Garrett's assertion he would not have agreed to it if discussed is difficult to comprehend given his lack of memory and the fact he did not negotiate this aspect of the contract, Ms. Leigh did.

Ms. Fenrich argues the State's clearly stated intent that this wage reduction be equitably distributed throughout all employees in the State could not be effectuated by the reduction in the extra duty pay. Mr. Garrett testified that the State did not factor in a reduction of the extra duty pay as a cost savings measure. Tr. p. 129-130. He further testified that he was unsure of how the State came up with the 3% reduction or 5.2 hours. Tr. p. 118. Mr. Garrett couldn't recall if the reduction was first proposed as a 15 minute a day reduction. Tr. p. 119. Mr. Garrett admitted that overtime exempt employees receive time and one-half when working on a holiday - but the State avoids calling any such compensation overtime for overtime exempt employees. Tr. p. 120.

### **ARBITRATOR'S DISCUSSION AND DECISION**

It is the Arbitrator's opinion based on the testimony of Dr. Henry that the original contract negotiations for extra duty pay was a term used for overtime pay. This was pay paid at a straight time rate for work performed over 40 hours and outside the core responsibilities of the physicians. This extra duty pay was a euphemism for overtime

based on Dr. Henry's testimony. This term, "extra duty pay" was used based on the testimony of Dr. Henry to get around the overtime exempt provisions for salaried employees. The arbitrator looks at the bargaining history to find the intent of the parties when they negotiated extra duty pay. Based on the testimony of Dr. Henry which was uncontroverted, extra duty pay was a term the parties agreed to use for overtime performed by physicians that met the requirements of 7.9 (C)(2) of the CBA.

Additionally, Dr. Henry and Dr. Steinwender's testimony, that they both understood the 3% salary reduction was to be applied only to base salary, is supported by Mr. Johnson's testimony and the Memo from Glen Christopherson, Senior Director of DSHS Human Resources Division, entitled temporary salary reduction/compensation reduction leave, in which he states in the first sentence that the 3% salary reduction is to the *base salaries* for most DSHS employees. (Union Exhibit 9).

Additionally, the State's said its intent was that this 3% salary reduction be equitably distributed throughout all employees and this intent could not have occurred if the State also reduced extra duty pay, which is additional pay above their base salary.

Further, Mr. Garrett testified that to his knowledge the State did not factor in a reduction of the extra duty pay as a cost savings measure to meet the 3% salary reduction. In the opinion of the Arbitrator, as the chief negotiator for the State, it was Mr. Garrett's responsibility to know if the State needed to factor in reducing extra duty pay to meet its cost savings measure. If Mr. Garrett did not know it is the opinion of the arbitrator it was not factored in as a cost savings measure to meet the State's financial needs.

In response to a question from the Employer's attorney, Dr. Henry and Steinwender testified they did not propose a provision to exempt extra duty pay because

we were reassured in those meetings that extra duty pay would not be affected. We were of the understanding that extra duty pay was actually overtime and the 3% reduction would only apply to base salary.

The fact that the Employer negotiated with the Union, a new Article 41.28 for 5.2 hours of temporary salary reduction leave per month, which equates to 3% of a normal employees base hours, strongly suggest to the Arbitrator that the intent of the parties was to apply the 3% salary reduction to base salary, not other forms of additional salary, like extra duty pay.

In the opinion of the Arbitrator the testimony of Wayne Johnson shows specialty pay was exempted from the 3% salary reduction even though it is not specifically exempted in the CBA. Additionally, based on the testimony of Dr. Steinwender, pharmacist and managers standby pay was not reduced by 3% salary reduction even though it is not specifically exempted in the CBA. There was not any testimony offered by the Employer to counter or rebut Mr. Johnson's testimony or Dr Steinwender's testimony.

The MOU, A-37 states that if the Employer gives more favorable treatment regarding the across-the board salary reductions ...standby .. whether management staff or employees covered by RCW 41.870, then the Employer will apply such treatment to employees covered by this agreement. In the opinion of the Arbitrator, the Employer did give more favorable treatment to sergeants in the Fish and Wildlife group for specialty pay, and to pharmacist and managers, for standby pay, than to the physicians performing extra duty work, by exempting there pay from the 3% salary reduction even though it is not exempted in the CBA. The point is that Standby pay, specialty pay and extra duty pay

are all pay above the base salary, and none are specifically listed as exemptions to the 3% salary reduction. Additionally, based on the testimony of Mr. Garrett, it appears that none of these forms of compensation were considered by the Employer it meeting the intent and objective of the 3% salary reduction. They were not factored into the cost savings needed by the State to meet its financial situation based on the knowledge of Mr. Garrett who was the State's chief negotiator.

After reviewing all the evidence to include testimony and documents submitted into evidence, and for the reasons I stated above, it is the Arbitrator's opinion that the State violated articles 7.9C2, 41.1, 41.28 and the MOU A37. Therefore, the grievance is sustained.

#### **AWARD**

1. The State of Washington will repay all physicians for the 3% salary reduction the Employer has taken from "extra duty pay". This repayment will be completed within four weeks after receiving this decision and award.
2. The Arbitrator shall retain jurisdiction for the sole purpose of resolving any dispute about the remedy addressed in the Award.

11/4/12

Dated

Walter Kawecki, Jr.

Walter Kawecki, Jr. Arbitrator