Arbitration Decisions

Labor Arbitration Decision, Bay Area Hosp., 2021 BL 506786, 2021 BNA LA 425

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Paul D. Roose
Arbitrator / Mediator
Golden Gate Dispute Resolution
510-466-6323
paul.roose@ggdr.net
www.ggdr.net
July 12, 2021

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS
PURSUANT TO A
COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

Bay Area Hospital, Employer

and

United Food and Commercial Workers Union

Local 555, Union

Certification Pay

July 12, 2021

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LABOR ARBITRATION

SUMMARY

[1] Wages - Certification pay ►100.4801 ►100.0235 ►24.101 [Show Topic Path]
Arbitrator Paul D. Roose ruled that Bay Area Hospital did not violate its CBA when it failed to pay "certification pay" to unit members, because the parties never reached "mutual agreement" on the three contractually required components for payment of additional compensation as certification pay, in part owing to the onset of the Covid-19 pandemic. Although progress had been made, the hospital and UFCW Local 555 never reached agreement on which of the numerous unit job classifications will receive premium pay for a national or state certification, "the amount of such additional compensation," and the "start date of such certification pay." Roose declined to address both parties' allegations of unfair bargaining, because they didn't fully present evidence of unfair practices, and the parties had a pending hearing before the Oregon Employment Relations Board, which is a superior forum for such charges and countercharges.

APPEARANCES:

For the Employer: Richard J. Alli, Jr., Attorney

Bullard Law

200 SW Market St., Suite 1900

Portland, OR 97201

For the Union: Noah Barish, Attorney

McKanna Bishop Joffe

1635 NW Johnson St.

Portland, OR 97213

John Bishop, General Counsel

UFCW Local 555

7095 SW Sandburg St.

Tigard, OR 97223

PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was selected as the arbitrator by agreement of the parties. The matter was heard on April 13 and 14, 2021, via videoconference on the Zoom platform.

The parties stipulated that the matter was properly before the arbitrator. The parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. At the close of the hearing, the parties concluded their presentations with written briefs. Briefs were received by the arbitrator on June 28, 2021, and the matter was submitted for decision.

ISSUE

The parties were unable to agree on a statement of the issue. The Union formulated the issue as follows:

> Whether Bay Area Hospital violated Article 6.08 of the parties' collective bargaining agreement, the Preamble of the parties' collective bargaining agreement, and/or the implied duty of good faith and fair dealing inherent in the collective bargaining agreement, by cancelling agreed-upon certification bonuses for bargaining unit members in the Admitting, Pharmacy, IT, and Rehabilitation departments scheduled to be paid by the end of the 2020 calendar year. If so, what is the appropriate remedy?

The Employer, in closing brief, stated the issues as follows:

1. Pursuant to the provisions of Article 6.08, did union and hospital representatives ever reach a mutual agreement on which UFCW represented classifications should receive additional compensation as certification pay?
2. Pursuant to the provisions of Article 6.08, did union and hospital representatives ever reach a mutual agreement on the amount of such additional compensation to be paid as

certification pay to certain UFCW represented job classifications?
3. Pursuant to the provisions of Article 6.08, did union and hospital representatives ever reach a mutual agreement on the date on which certification pay would begin for certain classifications represented by UFCW Local 555?
4. Did the union violate the covenant of good faith and fair dealing when it refused to bargain with Bay Area Hospital over the surprise pension surcharge which was implemented by the pension trust as of [sic] on or about June 1, 2020. If so, what is the appropriate remedy?
5. Did UFCW Local 555 representatives violate the Preamble of the parties' labor agreement when they refused to bargain over the surprise pension surcharge which was to begin[*2] on or about June 1, 2020.[*2] If so, what is the appropriate remedy?

The parties ceded to the arbitrator the authority to formulate the issue as part of the opinion and award. Accordingly, the following is the issue statement:

> Did the Employer violate the CBA on or before October 21, 2020, when it did not pay certification pay to unit members? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

Agreement between Bay Area Hospital and United Food and Commercial Workers Union, Local 555: July 1, 2018 — June 30, 2022

Preamble

It is the intent and purpose of the Employer and Union to promote and improve labor management relations between them and to set forth herein the basic terms of Agreement covering wages, hours and conditions of employment to be observed by the Employer and the Union.

Therefore, in consideration of the mutual promises and agreements between the parties hereto, and in consideration of their mutual desires in promoting the efficient conduct of business and patient care and providing for the orderly settlement of disputes between them, the parties to the Agreement agree as follows: …

Article 6 — Premium Pay

Section 6.08. CERTIFICATION PAY. The Union and the Hospital agree to form a subcommittee with an equal number of representatives for the purpose of reviewing and determining which certifications for jobs within the bargaining unit will be eligible to receive certification pay. The union committee members may change at the discretion of the union based on which job classifications are being reviewed. Once mutual agreement is reached on the certifications that will receive additional compensation and the amount of such additional compensation the union and Hospital representatives shall agree on the start date of such certification pay.

Article 16 — Grievance Procedure and Arbitration

Section 16.01. DEFINITION. "Grievance" shall mean a complaint relating to the application, enforcement or interpretation of the terms and conditions of this Agreement.

D. Arbitration.

> 2. LOSER PAYS ARBITRATOR'S FEE. Costs of arbitration, including the arbitrator's fee, shall be borne by the loser as determined by the arbitrator, but each party shall be responsible for the costs of presenting its case to arbitration.
>
> 3. LIMIT ON ARBITRATOR'S AUTHORITY. No questions, issue or matter shall be considered or decided in arbitration except those contained in the written grievance submitted to the Chief Human Resources Officer or designee, or those contained in a written stipulation between the parties. The arbitrator shall have no authority to add to, modify, or detract from this Agreement and may only consider the claim based upon the specific provisions of this Agreement.

FACTS

The Union Represents Employees in Dozens of Classifications in This Public Hospital: Approximately 500 employees work in positions represented by the Union. Classifications include those in environmental service, food service, clerical, and information[*3] technology. Medical technical classes include[*3] pharmacists, lab assistants, surgical technicians, and certified nursing assistants.

The Employer is a public acute care facility located on Oregon's central coast. Labor relations disputes fall under the jurisdiction of the Oregon Employment Relations Board (OERB). The Employer also has contracts with two other unions. The Oregon Nurses Association (ONA) represents registered nurses, and the Teamsters represents security guards.

In Bargaining Leading to the Current Agreement, the Union Proposed a New Category Under Premium Pay Termed Certification Pay: Prior to 2018 negotiations, "certification pay" did not exist in the parties' CBA. The Union made a proposal at the bargaining table to add a new section as follows:[1]

> Section 6.08. CERTIFICATION PAY. Upon written request, employees who obtain and maintain an additional nationally or statewide recognized certification associated with their primary assigned unit, shall receive an additional one-dollar ($1.00) per hour premium added to the employee's straight-tie [sic] hourly rate of pay. Proof of certification must be provided to the Hospital upon request.
>
> The Union and the Hospital agree to form a committee that will review and determine which certifications will be eligible to receive this certification pay. The committee shall consist of three members appoint [sic] by the Union and three representatives of the Hospital. Union members of the committee may change at the discretion of the Union based on which job classifications are being reviewed.

Megan Starks is a full-time union representative for the Union. She represents unit members who work for the Employer. She testified that she entered the 2018 bargaining process "at the tail end." But her understanding from speaking with the Union's bargaining committee members is that the members were seeking a certification pay provision like one that had already been negotiated between the Employer and the ONA for registered nurses.

On June 22, 2018, the parties reached a tentative agreement on a new Section 6.08 with the language cited in the introduction to this arbitration award. The provision for a $1.00 per hour premium was dropped, and the committee process was modified. The new section was incorporated into the final agreement ratified and adopted by the parties.[2]

The parties had a history of establishing ground rules for collective bargaining. The following exchange took place on cross-examination of Ms. Starks:

> Q: While you were representing Bay Area Hospital [employees], you participated in the collective bargaining process, did you not?
> A: I did.
> Q: And at the beginning of the collective bargaining process, it was common for the parties to talk about ground rules; was it not?
> A: Yes.
> Q: And one of the ground rules that the hospital always communicated to the union was that it had the authority to bargain to a tentative recommended agreement, but they still[*4] needed approval from the hospital management and the board of trustees for[*4] the hospital before the agreement could, in fact, go into effect.
> A: Yes. For the collective bargaining purposes, yep.
> Q: Every round of bargaining leading to a new contract, that was the common hospital ground rule; was it not?
> A: Yes.

The Parties Established the Subcommittee Required by Section 6.08 and Began Meeting in January 2019: Ms. Starks participated in all the Certification Pay Subcommittee meetings germane to this dispute. She testified as follows:

> We would meet typically monthly, sometimes more often, sometimes a little bit later. The meetings roughly went about an hour, give or take some time, depending on the topics that day. It was intended to be half union, half employer, which in most cases it was. At times we would invite different groups of people from other departments that were specifically… discussing their types of certifications.
>
> …it was definitely…a team effort, a group approach to trying to establish certifications that would qualify under the parameters

> that we created by creating an application and a policy process that would then be followed thereafter.

The first subcommittee meeting was in January 2019. A hospital representative was assigned to take minutes. Copies of the minutes from each prior meeting were provided to participants.

The committee reviewed the RN certification pay details at the Hospital as well as certification pay programs from other hospitals. The committee gathered information from various departments at the Hospital about what certifications were available and obtained by unit members.

A point of contention between the Union members and the management members of the committee was the issue of whether the pay would be a one-time bonus or a per hour pay supplement. Hospital representatives were insistent that it be paid as a bonus, while the Union wanted an hourly supplement.

The Hospital's human resources director in 2019 was Suzie McDaniel.[3] She prepared a draft policy dated 9/25/19 titled "Specialty Certification Bonus." The draft policy did not indicate the amount of the certification pay or the classifications to be granted certification pay. It outlined a process for departments to apply for certification pay status. Minutes from the meeting indicate that union participants, including representative Starks, expressed opposition to the idea of a bonus.

The committee started to focus on four departments — IT, Lab, Pharmacy, and Patient Access (also known as Admitting) — for certification pay consideration. By the end of 2019, according to Ms. Starks, the committee had "done what we needed to create the parameters and the documentation. We created the documents that were going to be utilized in order for somebody to get paid."

The December 2019 committee meeting was the last one prior to the onset of COVID-19 and its impact on the capability of the parties to conduct labor relations activities.**[*5]** Committee meetings were suspended because of health-related barriers to holding in-person meetings.**[*5]** The parties were also dealing with pressing labor-management issues brought on by COVID.

The Parties Made Significant Progress Toward Reaching an Agreement on Certification Pay at Their September 2020 Meeting: Clay England took over from Ms. McDaniel as chief human resources office for the Hospital in 2020. He sat in on the last two subcommittee meetings of 2019 when he was transitioning into the chief human resources position.

Mr. England and Ms. Starks facilitated the resumption of subcommittee meetings in September 2020. Mr. England was eager to move the process forward. "[T]he committee had been meeting for some time now, and…really hadn't advanced," he stated.

In preparation for the September 15 meeting, Mr. England met with the Hospital's Chief Financial Officer, Sam Patterson.[4] Mr. England testified that Mr. Patterson gave Mr. England a figure of $160,000 to work with. Mr. England then told the committee at the meeting that the Hospital was budgeting $160,000 for certification pay, as follows:

> I came to the [subcommittee] meeting after talking to Sam about the $160 [thousand] as a starting point to start building a model around how this all would work.

He also testified that he learned that the certifications that were to be compensated had not yet been set by the committee, as follows:

> …I was under the assumption that certifications had already been decided on, approved, everything was all set. I later found out …that wasn't the case. There were a lot of questions on whether certifications were actually approved or not…there were certifications on the list that were also required as part of the job description.

Mr. England testified that no agreements were reached about the implementation of Article 6.08 at the September 15, 2020, meeting.

Ms. Starks testified that the parties did reach agreement at that September meeting, as follows:

> I believe we came to an amount, which was $160,000, to be utilized within the bargaining unit of those that would qualify under the parameters we created for the certification work group. And I believe that we had a date, knowing it was by the

> end of the 2020 year. So no later than December 31st was the understanding of the group. And I believe that that was an annual amount that was to be paid to the members that qualified.

On direct examination, the following exchange with Ms. Starks took place:

> Q: Was there any agreement developed about which groups would receive payment first?
> A: Yes. The four groups that I referenced earlier, which were IT, pharmacy, admitting, and rehab. There was a fifth group mentioned, but it was not necessarily agreed to in this group. But any group that was not included in the four, there was an understanding that the committee would still have to meet to discuss any new certifications that came through, and that way it wasn't[*6] like rejecting any members, per se, that didn't…meet the first cutoff for time.

Ms. Starks also testified that Mr. England did not indicate any limit on his authority to reach[*6] an agreement. She assumed that, as the "top in HR," he had the authority to make a deal.

Kayla Land is Mr. England's executive assistant. She was assigned the role of note-taker at the subcommittee meetings. She described her assignment as follows:

> …these minutes were not needed to be verbatim, so they were summarized.

She took minutes of the September 15, 2020, meeting and distributed them to the subcommittee members after the meeting. In relevant part, the minutes read as follows:

> Clay: We looked at spending about 160K
>
> We are proposing a bonus to help remedy it right away — and then let them see what it looks like in their pay check. We can continue to develop this as we go but we want to look at doing something soon.
>
> UFCW: So would the bonus be for the remainder of the year and then do the pay for the next contract?
>
> Clay: Yes
>
> UFCW: Philip and Verissa are not in favor of bonuses[5]
>
> Verissa: Our levels are different tech levels so bonuses shouldn't be the same across the board
>
> Clay: I looked at what's current — it came out about 1500 a year for those that get the bonus (with ONA). We don't have a good grasp on how many people will take advantage of [sic] and it's a hard variable to see what the cost and hours worked will be.
>
> …
>
> Clay mentioned levels like A, B, C, etc. for compensation levels
>
> …
>
> Clay: I want to get it moving with whatever agreement we have and get it going. Let's take the 4 departments we have, Rehab, Pharm, IT and Admitting and try to get it in place…
>
> Next couple weeks we will work with Philip, Bryce, Rehab, and Admitting — get us some feedback and determine the levels.
>
> Megan asked about a date we could agree on for payment and retro for November
>
> Set amount based upon the level for the first year bonus — We need to decide what the tiers are and meet again to work from there.
>
> Set amount — Tier A, B, C
>
> Then umbrella based on part time, full time

Union representative Starks also took her own personal hand-written notes at the September 2020 meeting. The notes were in the arbitration hearing record and do not differ substantively from Ms. Land's minutes. At the end of Ms. Stark's notes was the following:

- What are the tiers?
- What amount per person?

The Parties' Dispute Over Unit Member Pensions Derailed the Certification Pay Negotiations: As per their CBA, unit members are enrolled in the Oregon Retail Employees Pension Trust (OREPT). OREPT's Board of Trustees sent a letter to all contributing employers dated April 29, 2020. The letter informed the employers that, due to funding problems, OREPT needed to assess a 5% surcharge commencing July 2020.

A second letter from OREPT was sent to the Employer, dated June 15, 2020. The letter states as follows, in relevant part:

> The parties to each bargaining agreement that expires after the Trust entered critical status…must bargain over adopting one of the schedules contained in[*7] the Rehabilitation Plan… Until such time as a bargaining agreement is in place that contains a Rehabilitation Plan Schedule, employers contributing to the Plan are[*7] subject to a surcharge. For hours worked from June 1 through December 31, 2020, the surcharge will be five percent of the total contributions payable to the Pension Trust. Effective with hours worked January 1, 2021 or after, the surcharge will be ten percent of the total contributions payable to the Pension Trust.

By letter dated August 14, 2020, the Employer wrote to the Union asking to reopen the CBA immediately and bargain a version of the OREPT's Rehabilitation Plans. In exchange, the Employer proposed to delete a 401(k) program from the CBA. The Union declined to reopen the CBA.

On September 4, 2020, HR director Clay and CFO Patterson wrote a letter to all members of the Union's bargaining unit. The letter explained the Hospital's point of view on the pension dispute and asked unit members to contact their Union representatives, as follows:

> If you agree that offsetting retirement costs against future wage and/or benefit increases is a bad idea, then we would ask that you reach out to your UFCW leaders and let them know.

On October 18, 2020, Mr. England and Mr. Patterson sent a second letter to the Union's unit members, reiterating the Hospitals' viewpoint about pensions. The letter also referenced the certification pay negotiations, as follows:

> We discussed many options that could be used to compensate for the additional rehabilitation fee. Since your Union leadership refuses to bargain in good faith with us, unfortunately, we have decided the offset will need to come out of our $160,000 budgeted UFCW certification pay plan that was scheduled to start this year. We had hoped that our letter would have encouraged UFCW leadership to change their approach and consider eliminating the 401(k), which at the time had no participants. But this wasn't the case and we are left with having to take this unfortunate action.
>
> If you would like your Union to bargain over this issue to find the best solution for you, please feel free to let them know by contacting them. Contact information is below.

On October 20, 2020, Mr. Clay's assistant Ms. Land emailed Union representatives Starks that the October meeting of the certification pay subcommittee was being "put on hold." Ms. Starks replied, asking why the meeting was being cancelled, and insisting that the Hospital honor the agreement. Ms. Land replied that she should have used the phrase "slowing it down." Mr. England replied by email to Ms. Starks, copying committee members, as follows:

> By no means do we intend to not honor our agreement. Kayla will reschedule the meeting. Today was bad timing to meet. My intention is that we continue down the path that were [sic] have been on, but perhaps a little slower. The realities are that Bay Area Hospital is[*8] saddled with a cost that was outside the contract and those costs have to be accounted for and covered. We would not be a wise fiduciary of Bay Area Hospital if we took on unforeseen costs and not find an

> offset…It[*8] would be unfair for us to offset this added expense with monies from other employees outside of UFCW. We also did not want to take it out of future salary increases. Since your leadership refuses to find an agreeable win-win approach, we were left with the certification pay funding.
>
> By no means am I happy with this approach, but it was the best out of a lot of bad choices that we were forced to unilaterally make. I hope that when we get back together we can continue to corroborate [sic] on an agreeable process and structure for certification pay.

The October 20 subcommittee meeting was rescheduled for November 17, 2020.

The Union Filed a Grievance on October 21, 2020: The grievance was in the form of a letter from Union Representative Starks to HR Officer England. The caption was "UFCW Membership Class Action / Pension, 401K, Certification Pay." It alleged a violation of the CBA preamble, Section 6.08, and "all other relevant provisions of the working agreement."

The letter calls out the Employer for "attempting to direct deal with bargaining unit members." It also alleges a violation by the Employer for telling unit members "they were going to refuse to pay certification pay as negotiated." Finally, the letter alleges the "Employer violated the intent of the CBA to promote and improve labor management relations, and maintain harmonious relations with its employees."

The Employer denied the grievance on all counts on October 29, 2020. It is that grievance that is now before the arbitrator.

Both Parties Filed Complaints with the Oregon Employment Relations Board: The dates of the filed charges were not in the arbitration record. In the record was a letter to the parties from Jennifer Kaufman, Administrative Law Judge for the OERB. The March 24, 2021, letter identified two case numbers, ERB Case No. UP-045-20 and UP-004-21. The letter, in relevant part, reads as follows:

> I have carefully reviewed the complaints and I conclude that there are issues of fact or law that require a hearing. Once a hearing date is set, the complaints will be formally served, after which the Respondent will be required to file an answer.
>
> My reading of the filings leads me to conclude that the following issues need to be addressed and resolved by a hearing…
>
> 1. By communicating directly with United Food and Commercial Workers (UFCW) members regarding the underfunding of their pension plan, did Bay Area Hospital (the Hospital):
>
> a. Interfere with, restrain, or coerce members in or because of their protected rights to access and enforce their collectively bargained benefits, in violation of ORS 243.672(1)(a)?
> b. Dominate or interfere with the administration of UFCW by directly dealing with UFCW members, in violation of ORS 243.672(1)(b)?
> c. Refuse to[*9] bargain collectively in good faith with UFCW by directly dealing with UFCW members, in violation of ORS 243.672(1)(e)?
> d. Utilize public funds to deter union organizing in violation of ORS 243.670(2) and ORS 243.672(1)(i)?
>
> 2. Did the Hospital cancel a[*9] planned disbursement of certification pay to UFCW members, and thereby:
>
> a. Rescind members' certification pay in response to their protected activities in seeking to maintain and access their collectively bargained 401(k) benefits, in violation of ORS 243.672(1)(a)?
> b. Discriminatorily rescind members' certification pay to penalize them for exercising their contractual rights, and/or to discourage them from participating in UFCW activities or supporting UFCW, in violation of ORS 243.672(1)(c)?
>
> 3. Did the Hospital utilize public funds to assist and/or encourage members to pursue decertification of the Union, in violation of ORS 243.670(2) and ORS 243.672(1)(i)?
> 4. Did UFCW refuse to bargain in good faith with the Hospital by refusing to bargain over the increased costs and financial impacts assigned to the Hospital as a result of underfunding of the UFCW pension plan, in violation of ORS 243.672(2)(b)?
> 5. Should the Hospital or UFCW be required to pay a civil penalty pursuant to ORS 243.676(4)?
> 6. Should the Hospital or UFCW be required to post and distribute a notice of any violations found?

Ms. Kaufman, in her letter, offered hearing dates for the parties beginning in April 2021 and ending in August 2021. The dates of any OERB hearings on this matter were not in the record.

UNION'S POSITION

The Union argues that "the language of the CBA's preamble and Article 6.08 is clear and unambiguous," and the Hospital did not follow it. "The evidence clearly shows that the hospital and the Union came to mutual agreement on each of the components laid out in Article 6.08."

The Union contends that the employees to receive pay — Pharmacy, IT, Admitting, and Rehabilitation — had been agreed to by the parties. The specific certifications were agreed upon. "The fact that the hospital accepted and was supposed to have processed applications from eligible members indicates that there was an agreement on who would qualify," the Union writes in its brief.

The Union further contends that the amount of compensation had been agreed upon - $160,000 to eligible bargaining unit members in the four departments. "Mr. England's email cancelling certification pay affirms that $160,000 had been budgeted for this purpose," the Union argues.

Article 6.08 does not require a per employee amount, the Union asserts. The CBA only requires agreement on "the amount of such additional compensation…The article uses compensation as a word to indicate the sum total of funds for the amount of additional compensation," the Union posits in its brief. "The exact sum of money owed to each member, at this juncture, is a remedy issue," the Union argues.

Alternatively, the arbitrator may find that "the parties did not agree to an exact dollar amount,**[*10]** [and] the hospital was still required to engage in the certification pay workgroup and abide by the agreement that had been reached," the Union argues in its brief.

The Union also contends that a date of implementation has been set, as referenced in Mr. England's**[*10]** email about the "certification pay plan that was scheduled to start this year."

The Union contends that the "certification pay agreement is an enforceable contract, even though not reduced to writing." Mr. England's "cancellation" of the agreement is an indication of the fact that he believed that an agreement existed. The Union further argues that Mr. England had the "actual and apparent authority to bind the hospital to the certification pay agreement."

The Hospital has violated the CBA preamble, the Union contends, with its "petty and retaliatory behavior." The Employer violated the provision requiring an "orderly settlement" of the dispute. And the Hospital violated the "implied duty of good faith and fair dealing," in the way in which it handled the pension issues, the Union asserts in its brief. "Even if the arbitrator finds the certification pay contract to be incompletely formed, in some manner, the duty of good faith and fair dealing still applies," the Union argues.

As a remedy, the Union asks for the certification pay program to be restarted. The Hospital should "grant certification pay to Rehabilitation, IT, Admitting, and Pharmacy bargaining unit members, identifying payment amounts using the tier system agreed upon by the parties." The Hospital should "continue identifying certification for all other eligible bargaining unit members, and pay them accordingly." And, finally, the Hospital must be required to "continue participating in the identified certification pay program, using the money that was identified ($160,000) on an annual basis."

EMPLOYER'S POSITION

The Employer argues that the Union has the burden of proving that the Employer violated the CBA. The Employer contends in its brief that "the Union and Hospital representatives never reached a mutual agreement on which UFCW represented job classifications should receive additional compensation as certification pay, how much certification pay was to be and when it started." The parties were "still trying to develop a tier system to determine which job classifications should receive certification pay and at what amount," the Employer writes. "There was in fact no agreement or meeting of the minds."

The Employer asserts that the Union's failure to produce any written and signed agreement at the hearing proves there was no violation. The fact that the Union could not show any communication was made to its membership indicating an agreement was reached is further confirmation of the absence of agreement.

The Employer further contends in its brief that "Union and Hospital representatives never reached mutual agreement because among other reasons the Hospital's human resources representatives[*11] do not have ultimate authority to adopt certification pay without the approval of the Hospital's Executive Committee." This view of authority is based on "standard practice for 30 years at the Hospital," the Employer writes.

The Employer argues in its brief that the "Union violated[*11] the covenant of good faith and fair dealing, the preamble to the parties' contract, and PECBA, when it refused to bargain with Bay Area Hospital over the surprise pension surcharge." The "Hospital also respectfully request the Arbitrator find that it is the Union that is in breach of the parties' contract and the covenant of good faith, due to this continued refusal to bargain, and provide an appropriate remedy," the Employer writes.

The "Arbitrator's role is limited to determining if there is a violation of the contract," the Employer argues. The arbitrator cannot "create an agreement or force an agreement upon the parties." The arbitrator must not "permit the Union to achieve through arbitration what the Union did not accomplish in bargaining,"

The Hospital asks the arbitrator to "find the Union to be the losing party as described in Section 16.04.D.2 of the CBA and order the Union to pay the arbitrator's cost and fees and the cost of the transcript." The Employer further asks the arbitrator to dismiss the grievance.

DISCUSSION

This Arbitration Decision Solely Addresses the Issue of Whether an Agreement Was Reached on Certification Pay: The parties' CBA contains a narrow definition of a grievance. It is a "complaint relating to the application, enforcement or interpretation of the terms and conditions of this Agreement." By inference, a grievance cannot be solely based on an alleged violation of laws or policies.

Also implied in the grievance procedure is that only the Union, or to a limited extent an employee, may process a grievance. The Employer does not have access to the grievance procedure to address concerns about Union conduct. These restrictions on the scope of the grievance mechanism in the CBA are the foundation for the arbitrator's narrow crafting of the issue in this matter.

Both parties have suggested a broader statement of the issues. The Union asks that this opinion and award encompass the issue of whether the Employer violated its "implied duty of good faith and fair dealing inherent in the collective bargaining agreement." The Union cites the CBA Preamble in supporting this approach.

The Preamble, with its mandate to the parties to "promote and improve labor management relations" does open the door to an arbitrator evaluating bargaining conduct issues. It also permits scrutiny of bargaining mid-contract with the phrase requiring "the orderly settlement of disputes between them."

However, these contract terms in the Preamble are so general that they give little guidance to a rights arbitrator. One could argue, and some arbitrators do, that these type of CBA terms permit the arbitrator to consider the[*12] entire body of external law and case law that has risen around the interpretation and enforcement of collective bargaining statutes. In the instant case, those statutes and case law precedents are primarily derived from proceedings at the OERB.

Under some circumstances, this[*12] arbitrator would allow external statute and case law to guide his decision in a matter where grievance overlapped with unfair practice charge. In the instant case, this opinion and award does not address those allegations of unfair bargaining, for two reasons.

First, the parties did not fully present evidence of unfair practices. Key documents in the parties' negotiations were presumably not in evidence, and key participants in negotiations did not testify.

The second reason for narrowing the scope of this decision is that the parties have a pending hearing before an OERB administrative law judge on these very issues. That is a superior forum for the parties to present their charges and countercharges. The entire relevant body of OERB case law can be the yardstick against which the parties' claims are measured.

The Employer, like the Union, asks for a broader statement of the issues in this matter. Items four and five on the Employer's list of issues are not being addressed in this decision. Like the Union's issue statement, the Employer's statement asks the arbitrator to decide matters best left to OERB. Additionally, the proposed statement asks the arbitrator to find the Union in

violation of the CBA. As noted above, the parties' grievance procedure does not accommodate an Employer-initiated grievance.

Accordingly, this opinion and award addresses the narrow issue of whether the Employer violated the CBA on or before October 21, 2020, when it did not pay certification pay to unit members. Whether the Employer did violate the CBA depends on an analysis of the parties' certification pay subcommittee process. Whether the parties reached an agreement on certification pay is the sole focus of this award.

The Context of the Dispute is the Bargaining that Resulted in the Language in Section 6.08 of the CBA: When the parties' contract was open for negotiation in 2018, the Union sought a new pay provision. Modeling it after a provision in the contract between the Hospital and the ONA, the Union proposed a $1 per hour supplement for unit members with certifications granted by outside agencies.

The Employer rejected this proposal. No one from either side of the table testified about why the Employer did so. But the record is clear that a modified provision was agreed to and incorporated into the CBA. That provision is Section 6.08 of the current agreement.

Section 6.08 is, in the common parlance of labor relations, a contract "reopener." A reopener is a section of the agreement that is left open for future negotiations during the term of the CBA. In the experience of the undersigned arbitrator, Section 6.08 has some unusual characteristics.[*13] First, it has no deadline for beginning or completing negotiations.

Second, Section 6.08 has a challengingly broad subject matter, encompassing certification pay for the entire bargaining unit consisting of dozens of Union-represented classifications. Section 6.08 has no list[*13] of classifications to be considered. It provides no guidance to the parties on whether certification pay would be a one-time occurrence or an ongoing pay supplement. It does not commit to a total dollar amount cost, nor to a percentage of salary.

Finally, 6.08 creates ambiguity because it does not give the parties a dispute resolution mechanism if no agreement on certification pay is reached.

The undersigned is not judging the parties' certification pay negotiations and deeming them a failure. Sometimes, a vague agreement is the only agreement the parties can reach. The parties often decide that an incomplete agreement is better than none and want to move on. Other issues, like overall compensation, are pressing.

The general nature of the 6.08 agreement may also be a testament to the parties' beliefs in each other's ability to craft agreements with good faith and creativity. The arbitration hearing record had no testimony to clarify the parties' stated intentions at the bargaining table regarding implementation of Section 6.08.

While Section 6.08 includes no deadlines, a neutral observer would likely conclude that the parties intended a certification pay agreement to be completed and implemented prior to the expiration of the CBA on June 30, 2022. Failure to complete an agreement by that date would place the onus of explanation on the Employer as to why the reopener was not executed.

Section 6.08 Requires Mutual Agreement on Key Components of a Certification Pay Program Prior to Implementation: The scope of the contract section is broad. It encompasses many potential variations and permutations. The section's language, however, is clear and unambiguous. The parties "agree to form a subcommittee." No dispute exists that such a subcommittee was, indeed, constituted.

The next required step is "mutual agreement is reached on the certifications that will receive additional compensation." Implied in this phrase is that the parties will agree on the job classifications to receive certification pay, and then on the certifications for each of those classifications that will qualify for additional pay.

After that, the parties are to decide "the amount of such additional compensation." The implication of this phrase is that all certification pay could be identical or it could vary from class to class and/or certification to certification.

The Union has argued that "the amount" could also refer to a lump sum committed by the Employer for certification pay. The contract language, indeed, could encompass this lump sum model. But, for it to be implemented, an explicit agreement would have to be in place indicating how the lump sum was to[*14] be divided. The agreement would also have to explicitly state whether the lump sum was onetime or was to be repeated each year.

Finally, Section 6.08 instructed the parties to "agree on the start date of such certification pay." This explicitly requires a "start date," not a more[*14] general concept of a calendar or fiscal year within which to start paying certification pay.

The Preponderance of the Evidence is that No Agreement Was Reached on the Certifications to Be Compensated and on the Compensation Amounts: The parties made considerable progress toward agreement, after many months of discussions, at their September 2020 meeting. The Employer came to the meeting with a budgeted amount, authorized by the CFO, that it could spend on certification pay. The Union softened its position that the pay must be ongoing rather than a lump sum.

The parties identified four departments to target. They began discussing certification pay tiers, based on the nature of the certification obtained. They drilled down into data they had collected from departments and determined that certain certifications that were a job requirement would be excluded from compensation. Discussion took place that the budgeted amount could be spent soon, and that the Employer wanted to "get it going."

"Progress," however, is not the same as "agreement." The three key elements required in Section 6.08 — certifications, amounts, and implementation date — had not been finalized. Union representative Starks' personal notes at the end of the September meeting summarized some of the work left to do: "What are the tiers?" and "What amount per person?" she wrote.

The most compelling evidence of agreement the Union produced at the hearing was the letter from HR officer England and CFO Patterson to the unit members. Asking the unit members to contact Union leaders, the letters referred to "our $160,000 budgeted UFCW certification pay plan that was scheduled to start this year."

This was a disingenuous statement by management representatives that mischaracterized how close the parties had come to reaching agreement. The undersigned arbitrator believes that the letter's authors were exaggerating for effect in support of the Employer's efforts to mobilize the unit members to pressure Union leadership to bargain over pensions. Whether this is an unfair labor practice will be decided in another forum. For the purposes of this opinion and award, this letter from management directed to unit members does not alter the core finding — no agreement had been reached between the parties on implementing Section 6.08.

A reopener is an extension of the parties' collective bargaining process. It is presumed to be governed by the same processes that apply to negotiations of the whole agreement. Tentative agreements are written out and signed by both parties. The undersigned arbitrator would assume, based on many years' experience negotiating and mediating**[*15]** collective bargaining disputes, that agreements are then ratified by Union members and the Employer's governing board. The above-cited exchange between Employer's counsel and Union representative Starks confirms that these parties had (at least on the management side) a process of reaching**[*15]** tentative agreements that are subject to ratification.

For a reopener, the parties could decide to bypass this ratification step, but such a bypass agreement would generally be made explicit in ground rules. No evidence was in the hearing that the parties had ever discussed how the Section 6.08 implementation would be finalized once the parties reached agreement. Absent contrary evidence, the undersigned assumes that, at the very least, agreements would have to be written up and signed by both parties.

The Employer has made the argument that HR officer England did not have authority to make an agreement. That may have been the case, but the Union was correct to operate under the assumption that the HR officer did have the authority to make a tentative agreement subject to ratification. Absent explicit ground rules detailing the Employer's claim that the "Executive Committee" must approve agreements, Mr. England could have reached tentative agreements. However, the weight of the evidence in the record is that no agreements were reached.

The Union has correctly pointed out that not all agreements are in writing. Oral agreements can indeed be binding agreements and have been upheld by many arbitrators and judges as such. To qualify as an oral agreement, however, an agreement must be clear, unequivocal, and mutually understood. The instant dispute has nothing in the record of an oral agreement on the three elements of Section 6.08 — certifications by classification, amounts, and implementation date.

Evidence was introduced at the hearing about further negotiations between the parties about Section 6.08 after the filing of the grievance. This evidence is not relevant to the grievance at hand. The undersigned arbitrator is only considering the events that transpired prior to the filing of the grievance on October 21, 2020.

No agreement was reached on the implementation of Section 6.08 prior to the filing of the Union's grievance on October 21, 2020. Therefore, the undersigned concludes that the Employer did not violate the CBA when it did not pay certification pay to unit members.

The CBA Grants the Arbitrator the Authority to Determine a "Loser" in the Grievance, but in This Instance Neither Party Was the "Loser": The parties' agreement allows the arbitrator to make a judgment on payment of arbitration costs. Those costs, including

the fees of the arbitrator and transcription fees (and any other fees such as conference room rental) are traditionally split equally between parties to a grievance arbitration procedure.

The parties' CBA states that arbitration costs "shall be borne by the loser as determined by the[*16] arbitrator." The undersigned arbitrator interprets this authority broadly. It gives the arbitrator the authority to determine the "loser" and also to determine that there was no "loser."

In the instant case, the Employer is not the "loser" on the question of whether an agreement was reached on the implementation of Section 6.08. The[*16] Union is not the "loser" on the question of whether it failed to engage in "good faith and fair dealing" in negotiations with the Employer, as claimed by the Employer. This opinion and award did not reach a finding on that broader issue.

Therefore, the undersigned arbitrator determines that no overall "loser" can be identified in this proceeding. The parties are ordered to divide the costs of arbitration equally.

AWARD

1. The Employer did not violate the CBA on or before October 21, 2020, when it did not pay certification pay to unit members.
2. The parties are ordered to split evenly the costs of arbitration, including the arbitrator's fee.

Paul D. Roose, Arbitrator
Date: July 12, 2021

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fn 1 No one from either the Employer or the Union who participated in this stage of the 2018 negotiations testified at the hearing. This summary is derived from documents admitted into the arbitration hearing record.

fn 2 The agreement was not signed by the Hospital CEO and the Union President until April 2019. Why a tentative agreement was reached in July 2018 and final sign-off delayed until nine months later was not in the record of the arbitration hearing.

fn 3 Ms. McDaniel did not testify at the hearing.

fn 4 Mr. Patterson did not testify at the hearing.

fn 5 Philip and Verissa were subcommittee members appointed by the Union. They did not testify at the hearing.