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8 **SAN BERNARDINO COUNTY EMPLOYEES' RETIRMENT ASSOCIATION**
9 **BOARD OF RETIREMENT**

10 IN THE MATTER OF: *ALAMEDA*
11 ADMINISTRATIVE APPEAL OF))
12 CLINICAL LABORATORY
13 SCIENTISTS (FORMERLY KNOWN
AS PROFESSIONAL LAB
TECHNICIANS)

)
) **APPELLANT'S OBJECTIONS TO**
) **HEARING OFFICER'S FINDINGS**
) **FACTS AND RECOMMENDATIONS**

14 _____
Assigned to: Duane E. Bennett

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1 I. INTRODUCTION

2 This is not a matter where there was an easily discernable “right” answer as observed by
3 the Hearing Officer. “The issues presented were not clear nor straight forward in light of the type
4 of pay that the County has afforded the Applicants in juxtaposition to what the Board must
5 decide regarding compensation earnable.” (HO p. 1). However, the conclusion reached by the
6 Hearing Officer proves the adage, NO GOOD DEED GOES UNPUNISHED. The Hearing
7 Officer’s findings and recommendations state, “On the other hand, the Hearing Officer also finds
8 that if management were to mandate that CLSs perform Night Standby or staff the weekend shift,
9 the opposite would be true and the corresponding D06 Pay could be considered as compensation
10 earnable.” This suggests that if none of the Lab Techs had agreed to be available for the D06
11 shift and management was required to assign the Lab Techs to those very same shifts (as the
12 County indicated they would) then the Lab Techs would not have their retirement benefits
13 significantly reduced. Unfortunately, because the Lab Techs recognized the importance of
14 providing a vital service for the County and cooperated with management they are punished.
15 There is no dispute that the County could and would mandate D06 shift assignments should
16 insufficient coverage occur. Therefore, it is difficult to square the findings (voluntary shifts
17 outside of normal working hours) with the reality of the situation regarding the D06 shifts (shifts
18 that must be and will be mandatorily staffed).

19 II. OBJECTIONS

20 A. DO6 Shifts Are Mandatory

21 There is no dispute that the D06 shifts themselves are mandatory. Coverage for the D06
22 shifts is mandated by Title 22 of the California Code of Regulations that requires a Level One
23 Trauma Center provide emergency laboratory services 24 hours per day, seven days per week.
24 That failure to provide those services would jeopardize the hospital and the clinical laboratory
25 licensure for non-compliance. The duties and required staffing of the Lab Techs are exactly the
26 same for graveyard shifts every day of the week. Yet because the manner of assignment differs,
27 Sunday through Thursday graveyard shifts are to be considered compensation earnable but
28 Friday and Saturday D06 (graveyard) shifts are excluded. The Hearing Officer’s basis for this

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1 exclusion is that the Lab Techs “volunteer” for D06 shifts thus rendering them outside of normal
2 working hours. This leads to a potentially absurd result:

3
4 Two Lab Techs (A& B) work the same schedule during a pay period. Each Lab Tech works
5 on single (the same) D06 shift during that pay period.

6 Lab Tech A indicates his availability
7 (“volunteers”) for a D06 shift

The shift is not compensation earnable

8 Lab Tech B does not indicate his availability
9 (“volunteers”) for the D06 shift but is then
10 assigned to work the shift by management

The shift is compensation earnable

11
12 Under this framework it is clear that the Lab Techs will lose money unless they force
13 management to assign the D06 shifts which they clearly have the authority do. The County has
14 acknowledged that they will assign Lab Techs to the D06 shifts if there are no “volunteers.”
15 “D06 shifts are typically filled on a voluntary basis by eligible CLSs, although eligible CLSs
16 may be assigned by a supervisor to fill D06 shifts for which there are no volunteers.” (R. P.H.
17 Stmt. P. 13 ll. 23-24). Consequently, the Lab Techs are in the position of losing a significant
18 retirement benefit because they had some input into which D06 shifts they would or could work.
19 In essence, the County is saying “pick a shift or we will” and when the Lab Techs indicate their
20 availability the County says, “thanks for volunteering.”

21 **B. D06 Pay is a Differential**

22 The basis for the Hearing Officer’s conclusion that D06 is not a differential is that it is a
23 unique type of pay not like other differentials. The Hearing Officer notes that D06 functions as a
24 differential in that it is an incentive to work an undesirable shift but concludes that it cannot be a
25 differential because it is not an hourly increment. Essentially, the Hearing Officer concludes that
26 although intended for the same purpose as other differentials, D06 is not a differential because it
27 is paid unlike other differentials.

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1 Lab Techs receive differential pay for graveyard shifts Sunday through Thursday as an
2 incentive to work an undesirable shift. Yet because the D06 incentive is not directly tied to an
3 hourly rate, the Hearing Officer concludes this is not a differential. This conclusion is in no way
4 clearcut as the previous Hearing Officer to opine on this matter came to the opposite conclusion.
5 Again, if the D06 differential was \$10 per call in addition to the Lab Techs' regular hourly rate,
6 it would clearly be a differential under the criteria outlined by the Hearing Officer. The bottom
7 line is that D06 provides a mechanism to provide more pay for the Lab Techs working an
8 undesirable shift just as they receive an incentive to work afternoon and other graveyard shifts.

9 C. D06 Shifts Are Part of Regularly Scheduled or Normal Working Hours

10 D06 shifts are scheduled in the same manner as all other shifts worked by Lab Techs.
11 Management provides an updated schedule at least one month in advance for both D06 shifts and
12 all other shifts assigned to Lab Techs. It is undisputed that staffing levels are insufficient to staff
13 all of the shifts required by the hospital without Lab Techs working over 80 hours per pay period
14 on a regular basis. Therefore, the fact that D06 shifts result in Lab Techs working in excess of
15 80 hours per pay period does not establish that D06 shifts are outside of normal working hours.
16 As the Hearing Officer points out, if the Lab Techs stopped cooperating with management and
17 were assigned the D06 shifts without their input, then the D06 shifts would be compensation
18 earnable and clearly occur within the Lab Techs' normal working hours. Again, the Lab Techs
19 are punished for cooperating with the scheduling of shifts that must be staffed. It is a foregone
20 conclusion that if the Lab Techs would have been informed at any time that by cooperating with
21 management to schedule their D06 shifts they would lose a significant retirement benefit, there
22 would have been no "volunteers."

23 III. CONCLUSION

24 The Hearing Officer cites Appellants' closing statement in characterizing D06 as the
25 "real villain" in this story. Certainly, the D06 pay system is unusual and problematic and it may
26 or may not be the real villain. However, it is unquestionable that the real victims in this story are
27 the Lab Techs if the Hearing Officer's recommendation is adopted. The Board has the authority
28 to avoid this unjust result and Appellants respectfully request that the Board exercise this

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1 authority and prevent the loss of a retirement benefit earned doing hard work in unfavorable
2 circumstances.

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