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Redacted for Publication
OPINION AND AWARD
IN ARBITRATION PROCEEDINGS
PURSUANT TO A
COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between)
)
County of Santa Clara, Employer)
and) [Grievant] Overtime Grievance
Service Employees Int. Union Local 521, Union)

APPEARANCES:

For the Employer: Gregory Powell, Principal Labor Relations Representative
County of Santa Clara
70 W. Hedding St., 8th Floor
San Jose, CA 95110-1705

For the Union: Anthony Walters, Contract Enforcement Specialist
SEIU Local 521
2302 Zanker Rd.
San Jose, CA 95131

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 mutual agreement of the parties. The matter was heard on August 25, 2016 in San Jose, California.

The parties stipulated that the matter was properly before the arbitrator. The parties also stipulated that the arbitrator retains jurisdiction for the purpose of the implementation of the remedy in the event that the arbitrator grants in whole or in part the remedy sought by the union.

Both 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. The parties chose to conclude their presentations by oral closing statements, which were presented at the conclusion of the hearing. A transcript of the hearing was made, and a copy provided to the arbitrator on September 26, 2016.

ISSUES

The parties were unable to agree on a statement of the issue in this matter and ceded to the arbitrator the authority to formulate an issue statement. The Union proposed the issue as follows:

Did the denial of [Grievant]’s September 2, 2015 request for minimum four hours violate Section 8.8 of the memorandum of agreement between the parties; if so, what shall the remedy be?

The County did not propose an issue statement.

The arbitrator’s formulation of the issue statement in this matter is as follows:

Did the employer violate the CBA when it denied the grievant’s request for four hours’ overtime on September 2, 2015? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

**Memorandum of Understanding Between County of Santa Clara and Service Employees
International Union Local 521 – June 22, 2015 – June 16, 2019**

Article 8 – Hours of Work, Overtime, Premium Pay

Section 8.7 On-Call Pay

- a) Definition
On-call is defined as the requirement to remain immediately available to report for duty to perform an essential service when assigned by the appointing authority, subject to approval by the County Executive. On-call duty is in addition to and distinct from the normal workweek.
- c) Workers assigned to on-call duty shall receive, in addition to their regular salary, thirty five dollars (\$35) for each eight (8) hour shift, or substantial portion thereof, of assigned call duty...

Section 8.8 Non-Contiguous Overtime Guarantee

If overtime work does not immediately follow or precede the regular work shift, a minimum of four (4) hours overtime shall be credited to the worker.

A worker is credited with a guaranteed four (4) hour minimum under this section for each occurrence of non-contiguous overtime during a scheduled shift, except that a worker shall not be credited with an additional four (4) hour guaranteed minimum until the original four (4) hours has elapsed.

FACTS

The Grievant is an Animal Control Officer in the County’s Animal Care and Control

Department: The Grievant has served as an Animal Control Officer (ACO) in the County’s Animal Care and Control Department for eleven years. This is a uniformed classification. ACOs carry a badge and have powers of arrest, but do not carry firearms. Primarily working in the field, the Grievant is responsible for explaining and enforcing animal care and control laws. At the time of the incident in question, he was scheduled to work Mondays through Fridays 8 AM to 4:30 PM.

The Grievant lives in Merced County, and has a commute of approximately forty-five minutes to the facility at 80 West Highland Avenue (also known as “San Martin”) in San Jose. The County does not allow employees to take County vehicles home if they live outside of Santa Clara County. Therefore, the Grievant commutes in his personal vehicle. He also stores his uniform and equipment at the facility and puts them on when he arrives at San Martin.

The employer utilizes the on-call provision of the CBA to cover urgent animal control issues. ACOs volunteer to be on call under the above-cited Section 8.7. Typically, during the workweek, the Grievant is on call from the time he gets off work at 4:30 PM until his arrival at work the next morning.

This sixteen-hour period constitutes two on-call shifts. He is compensated \$35 for each of these eight-hour on-call periods, regardless of whether or not he receives any calls.

The County supplies the on-call ACO with a cell phone. The on-call ACO is required to respond to calls from the department or from County dispatchers and be prepared at all times while on-call to respond in person to those calls. The ACO operates under a set of guidelines on when to respond to a call. For example, if a dispatcher calls with a report of a dead animal, the ACO does not respond during the on-call period since the County does not consider that urgent enough to incur the cost of a four-hour overtime payment.

The Grievant testified that it takes him “two to three minutes” to change into his uniform once he arrives at the facility.

Evidence Was in the Record of Four Prior Occasions on Which the Grievant Received the Four Hour Minimum Overtime Credit When He Worked Less Than Four Hours Overtime: On June 15, 2013, the Grievant received a call at home from County Communications at 6:19 AM.¹ The call reported that the sheriff’s office was on the side of the road with an aggressive dog. The Grievant left for work to respond. At 7:16 AM, while on route to the facility in his personal vehicle, he received a call that the sheriff’s office would transport the dog to the kennel and that the Grievant could pick up the dog on his regular shift. The “code 2 response” was cancelled. The Grievant received four hours’ overtime for that day.

On May 5, 2014, the Grievant received a call at home from County Communications at 6:13 AM. The call reported that the sheriff’s office had two stray horses. The Grievant responded to the call by beginning to drive to work. At 6:45 AM, he received a second call that the owner had been located and the horses returned. The Grievant received four hours’ overtime for that day.

On September 25, 2014, the Grievant received a call at home from County Communications at 6:33 AM. The call reported that the Cal Fire and CHP had three loose horses. The Grievant responded to the call by beginning to drive to work. At 6:38 AM, he received a second call that the owner had been located and he could cancel. The Grievant received four hours’ overtime for that day.

On Saturday May 2, 2015, the Grievant received a call at home from County Communications at 7:35 AM. The call reported of a loose horse dragging a rope. The Grievant responded to the call by

¹ When asked about how he had precise times indicated in his activity reports, the Grievant indicated that he uses the “received call” function on his cell phone to pinpoint call times.

beginning to drive to work. At 7:43 AM, he received a second call that the owner had been located and he could cancel. The Grievant received four hours' overtime for that day.

The Incident of September 2, 2015: At 7:37 AM on Wednesday September 2, 2015, the Grievant received a call from the County Communications center on his work-issued cell phone. At 7:56 AM he wrote an Activity Report concerning the call and the incident. The report, in the "memo" section, reads as follows:

09/02/15 07:56 received call from County Comm at 0737 that there was an injured goose on the side of the road at 101 & 680. I advised that I was about 20 minutes from the office and then travel time from San Martin. County Comm called back at 0746 to say that the Goose flew off. [Grievant's initials] 30L13

The Grievant had worked the prior shift, on 9/1/15, and was in an on-call status at the time he received the phone call.

At the time of the call, the Grievant was in his vehicle. In his testimony, he stated that he was "on my way to meet with somebody before work." He testified as follows:

I was going to see somebody for about ten minutes before I went to work.

When he received the call, he began driving directly to the facility. At 7:46, while on route to the San Martin facility, he received a second call from County Comm. He pulled over to take the call. That second call cancelled the dispatch, as noted in the report above. He testified that, while driving and using the Bluetooth in his car, he called the person he was going to meet using his personal cell phone. He informed that person that he would not be able to meet them.

He testified that he arrived at the office "probably 7:50, 7:55, somewhere in there." He then "sat down at the computer, entered the call, and then got dressed to go for my regular day of work."

[Employee A] is the program manager for animal care and control. He is the Grievant's supervisor, and works at 80 West Highland. He recalls that, at about 7:50 or 7:55 on the morning of 9/2/15, he was driving from the animal shelter to the office and pulled in behind the Grievant in traffic. He followed the Grievant into the parking lot and they both parked. He testified as follows:

...we followed each other into work. Said our normal greetings, "Morning [Grievant's first name]," "Morning [Employee A's first name]," and proceeded on... We didn't discuss him getting called out that night at that point yet.

In regard to the four other overtime credit incidents with the Grievant noted above, [Employee A] was the Grievant’s supervisor in each of those instances. He approved the overtime in each case.

The Grievant Put in a Request for Four Hours Guaranteed Overtime and his Request Was Denied: At some time on 9/2/15 that was not identified for the record, the Grievant went in to the employer’s timekeeping system and put in a request for four hours guaranteed overtime for that date. [Employee A] received that request. He reviewed the “Activity Report” submitted by the Grievant that date. After conferring with labor relations, he decided to deny the overtime request. He testified as follows:

...when I looked at the times at 7:37, an injured goose, and then when I looked at the time it was cancelled, in my mind there was no deviation from his normal day and he was coming to work. So to me he hadn’t changed any of his plans. He was coming in to work normal. He was canceled before...seven minutes.

At 2:15 PM on that day, [Employee A] used the timekeeping system to deny the overtime request. This action generated an automatic email to the Grievant, with the subject: “Refused Overtime – enter reason in Note box request 09/02/15 7:37 AM.”

The Grievant responded at 2:43 PM with an email to [Employee A] that simply said “Why?”

[Employee A] responded at 3:07 with “After discussing with Labor Relations it has been determined that your \$35 on-call availability pay covers this call.”

At 3:19 PM, the Grievant responded, with a copy to a union representative, as follows:

So since I was already on the way in and not in a county truck, as I am not allowed to take one home, I get screwed over for the overtime. This has happened in the past many times. The \$35 is a standby pay not a response pay.

The Union Files a Grievance: On September 30, 2015, the Union filed a grievance at step 2 regarding the overtime denial. The grievance alleges a violation of Section 8.8 of the CBA. It asks that the Grievant be paid four hours of overtime for 9/2/15.

It is that grievance that is now the matter before the arbitrator.

UNION’S POSITION

The Union contends that it has established the existence of a consistent past practice in how Section 8.8. is applied to ACOs. The Union notes that there were no exceptions to the practice until this incident. The prior incidents spanned two contract cycles.

The Union argues that the Grievant’s testimony that he altered his route to work as a result of the call stands unrebutted.

The Union asks that the arbitrator sustain the grievance and order a make-whole remedy for the Grievant.

EMPLOYER’S POSITION

The Employer asserts that the credibility of the Grievant was undermined by him testifying to events on 9/2/15 that were not in his original written report.

The Employer argues that the Union did not raise the issue of past practice until arbitration, and it should therefore be dismissed.

[Employee A], the County contends, followed the same criteria on each request for overtime. In this instance, compensation was not warranted. Therefore, the supervisor properly denied the overtime request.

DISCUSSION

The Overtime Guarantee Cited by the Union Does Not Apply in the Instant Case: The CBA section provides strong guidance in determining the outcome of this grievance arbitration. It begins with “If overtime work does not immediately follow or precede the regular work shift” a four-hour minimum guarantee applies. The logical reverse of this can be inferred – that if the overtime does immediately follow or precede the shift, then the guarantee does not apply. In other words, contiguous overtime is paid for actual hours worked.

The parties agreed that merely receiving a phone call and conducting a phone conversation while in an on-call status does not constitute “work” under the definition of Section 8.8. The on-call pay received by the Grievant compensated him for receiving phone calls. Where the parties differ is whether the fact that the Grievant began driving directly to work after receiving a work call on 9/2/15 constitutes “work” and triggers the guarantee.

The Union contends that the guarantee was activated because the Grievant changed his off-duty conduct to benefit the County between the time he received the call at 7:37 and the time the call was cancelled at 7:46. This contention breaks down in the light of the Grievant’s own initial Activity Report. By his own estimate, the Grievant was twenty minutes from the office at 7:37 AM. This would have put his arrival time at 7:57 AM, even without any additional stops. Again by his own estimate, it takes him two to three minutes to change into his uniform. He would have been ready to respond to a call at precisely 8:00 AM, his regular starting time.

Given the timing of the call from County Communications, and the location of the Grievant at the time of the call, no non-contiguous overtime would have been involved had the call not been cancelled. In fact, no overtime of any kind, contiguous or non-contiguous, would have been involved. By the Grievant’s own report, he would have had to drive directly to work from where he was at 7:37, regardless of whether or not he received the “injured goose” call. He would have been ready to respond to the “goose” call after 8:00 AM, during his regular shift.

In light of his written report, the Grievant’s testimony that he had been planning to visit with a friend for ten minutes between 7:37 and 8:00 lacks credibility. By his own written report, he did not have ten minutes to spare. The argument that he was required to change his personal plans or alter his route to work due to the work-related call does not withstand scrutiny.

Even assuming that he could have arrived at the facility ten minutes before his starting time, it is not plausible that he could have completed any sort of call prior to his designated starting time. Any overtime he could have worked would have been contiguous overtime. It therefore would not have been subject to the four-hour guaranteed minimum.

Each of the Cited Comparison Incidents Can Be Distinguished from the Grievated Incident:

The Union cites four prior overtime guarantee approvals as evidence that a consistent practice has existed as to how Section 8.8 is applied to ACOs. Close examination of each of these incidents shows that, in fact, a consistent practice does exist. Analysis shows that each of the prior incidents can be distinguished from the grievated incident in a determinative manner.

The first such incident of approved overtime credit took place on 6/15/13. In that instance, the Grievant was called at home at 6:19 AM. Given that he lives forty-five minutes from work, the earliest he could have been at work to respond to the call would have been 7:04 AM. Non-contiguous overtime would likely have been worked. The County correctly applied the contract language and paid the guarantee.

On 5/5/14, the Grievant received a call at home at 6:13 AM. He headed for work. He received a second call at 6:45 indicating that the incident had been cleared. Again, the County correctly applied the contract language and paid the guaranteed four hours' overtime.

In the third cited incident, the Grievant received a call at 6:33 AM and began heading for work. Even though the call was cancelled just five minutes later at 6:38 AM, the County credited the statement from the Grievant that he had already begun driving to work during that five minutes. And, again, the County correctly applied the contract language and paid the guarantee.

The final incident took place on Saturday 5/2/15, not a regular work day for the Grievant. He received a call at 7:35 AM. The call was cancelled eight minutes later. Without question, this call triggered the four hour guaranteed minimum due to the fact that it occurred on his day off.

In sum, the record of the hearing established a consistent practice in the interpretation of Section 8.8. The manner in which the County handled the 9/2/15 incident was consistent with this practice.

The Union has not met its burden that the CBA was violated by the County's actions on 9/2/15. Therefore, the grievance is denied.

AWARD

1. The Employer did not violate the CBA when it denied the grievant's request for four hours' overtime on September 2, 2015.
2. The grievance is denied.



Paul D. Roose, Arbitrator

Date: October 17, 2016