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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	)	
	)	
City of Los Angeles (Police Department), Employer	)	
	)	Emergency Services Division Overtime Grievance – ERB ARB No. 3482
and		
Los Angeles Police Protective League, Union	)	

APPEARANCES:

For the Employer: Detective Camille R. Armstead
Detective Theresa Hartter
Los Angeles Police Department
100 West First St., 9th Floor
Los Angeles, CA 90012

For the Union: Timothy Sands
Los Angeles Police Protective League
1308 West Eighth St., Suite 200
Los Angeles, CA 90017

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, from a list provided by the City of Los Angeles Employee Relations Board, by mutual agreement of the parties. The matter was heard on November 4, 2016 in Los Angeles, California.

The parties stipulated that the matter was properly before the arbitrator and that all steps of the grievance procedure had been met or waived.

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. At the conclusion of the hearing, the parties chose to conclude their presentations by written briefs. Briefs were received on December 21, 2016 and the matter was submitted for decision.

ISSUE

The parties did not agree on a statement of the issue in this matter, and ceded to the arbitrator the authority to formulate the issue. The Union proposed the issue as follows:

1. Did the Department violate MOU 24, dated July 1, 2011 – June 30, 2014, by forcing grievants at emergency services division (ESD) to use CTO time to keep their hours worked in a deployment period under or at 171 hours?

2. If so, what is the proper remedy?

The Employer proposed that the issue be stated as follows:

1. Did the Department force the grievants to use CTO in order to work LAX overtime in violation of MOU 24, 2011 – 2014?

2. If so, what is the remedy?

The arbitrator's statement of the issue is as follows:

1. Did the Department violate the CBA when, prior to July 1, 2014, it required unit members in the emergency services division to use compensatory time off in order to be eligible to work certain overtime shifts?

2. If so, what is the remedy?

RELEVANT CONTRACT PROVISIONS

Memorandum of Understanding No. 24 – Police Officers, Lieutenant and Below Representation Unit – July 1, 2011 – June 30, 2014 – City of Los Angeles and Los Angeles Police Protective League

Article 6.0 – OVERTIME

6.1 Overtime Provisions

D. Compensation for overtime shall be at the discretion of the Chief of Police by cash payment or by time off at the time-and-a-half rate of compensation for cash payment or one and one-half hours for each hour or portions thereof of overtime worked if time off is authorized.

6.1.1 Definitions

A. **FLSA**: As used herein, "FLSA" refers to the Fair Labor Standards Act of 1938, 29 U.S.C. §§201-219 and the Portal to Portal Act of 1947, 29 U.S.C. §§251-262

C. **FLSA Overtime**: As used herein, "FLSA overtime" refers to hours actually worked by a sworn employee of the LAPD during a 28-day work period (deployment period) which exceed 171 hours

D. **Non-FLSA Overtime:** As used herein, "non-FLSA overtime" refers to the compensation of a sworn employee with overtime pursuant to the current MOU for any hours worked or activities which are not FLSA overtime hours.

6.1.2 Cash Compensation of Overtime

A. It is understood that Management does not desire to compensate any FLSA overtime hours worked by sworn employees in the form of CTO. Management will use a method referred to as the FLSA Rule to ensure that all sworn employees receive only cash compensation and no CTO for any FLSA overtime hours worked.

The FLSA Rule is a payroll procedure which compensates all overtime for employees in cash once the specific FLSA threshold hours of overtime have been entered into the payroll system in a DP.

The purpose of this Rule is to ensure that no FLSA CTO is accrued by employees. There is no agreement to allow the payment of wages by way of FLSA CTO under 29 U.S.C. §207(o)(2) and there will be no FLSA CTO paid to employees. If CTO is credited to an employee in excess of the FLSA Rule, Management shall cash out those CTO hours upon discovery of this fact.

B. Beginning on the date this MOU is approved, Management shall provide monetary compensation for all overtime hours once an employee has accumulated eight-hundred (800) hours of CTO. If an employee is

credited with more than eight-hundred (800) hours of CTO in the current payroll system, Management shall buy back all CTO in excess of eight-hundred (800) hours for that employee within two pay periods following the pay period in which the overage is discovered by Management.

Article 6.2 Accumulated Overtime

B. Hours subsequent to date of MOU approval

3. Beginning on the date this MOU is approved, the Department may at its discretion require employees to use CTO time in excess of 600 hours in order to reduce the balance in an employee's CTO bank…The ability of the Department to require employees to use CTO time in accordance with this provision will sunset on June 30, 2014, unless specifically extended by the parties.

Article 7.0 BENEFITS

Article 7.1 Vacations and Vacation Pay

E. In the event any employee, after the completion of the employee's initial year of service, becomes separated from the service of the Department by reason of resignation, discharge, retirement, death, or for any other reason, cash payment of a sum equal to all earned, but unused vacation…shall be made at the salary rate current at the date of the separation of the employee…

Article 8.0 GRIEVANCES

Article 8.1 Definitions

B. A grievant is defined as any employee who is affected by a grievance, the grievant and representative, if any, or the League when the grievance affects a class or group of employees.

Article 8.6 PROCEDURES FOR GRIEVANCES AFFECTING A CLASS OR GROUP OF EMPLOYEES

D. The grievance procedure for a grievance affecting a class or group of employees covered by this MOU shall be as follows:

1. Step 1. Presentation of the Grievance

a. The League shall serve written notice of the grievance on a form provided by the Department upon the commanding officer or Employee Relations Administrator within 20 calendar days of which discovery of the grievance should reasonably have occurred. Said 20 days may be waived by mutual consent of the parties. The grievance shall be considered waived if not filed within 20 days.

FACTS

The Emergency Services Division, the Bomb Squad, and League-Represented Positions in that Section: The Grievants in this case are / were employed by the Hazardous Devices and Materials Section, otherwise known as the "bomb squad," of the Emergency Services Division of the Los Angeles Police Department. Lieutenant [Employee A] is the officer in charge of the bomb squad. He testified as follows:

> …the bomb squad is primarily populated with bomb technicians and technician supervisors, and they provide the response capability…on a citywide basis 24/7, 52 weeks a year. We staff detail at LAX [Los Angeles International Airport]. We provide support for outside entities, such as the United States Secret Service. We do protective sweeps for dignitaries. We staff LAX 18 or 19 hours a day to provide response to the terminals, a lot of bomb sweeps, a lot of standby details.
>
> We conduct post-blast investigations. We respond to calls involving military ordnance. We pick up fireworks…We also now have three bomb detection K-9 handlers.

The division's work at LAX is paid for by funds from Los Angeles World Airports, not the City of Los Angeles. The bomb squad consists of approximately sixteen technicians and six supervisors (at the rank of Detective II or above). All squad members are specially trained at "bomb school."

The Division Institutes a New Overtime Policy in 2010 as a Cost-Containment Measure: In 2010, the Division's management was asked to develop a strategy to curtail overtime costs. Lieutenant [Employee A] testified as follows:

> …one of the things we looked at, as directed by the Department, was the impact that overtime scheduling had on the 171-hour threshold, because my understanding was then and is now that if an employee exceeds 171 hours during a particular period of time in their deployment period, then all compensation must be paid in cash.

Additional testimony clarified that the trigger for payment of FLSA cash overtime was 171 hours actually worked, not just 171 hours paid during the deployment period.

Lieutenant [Employee A] and Sergeant [Employee B], officer in charge of the bomb squad at that time, led an effort to develop a system to avoid cash payments of overtime. Most squad employees worked four days a week, ten hours a day for their regular forty-hour weekly schedule. A deployment period is a four-week bloc of work time. During some deployment periods, each employee worked 160 hours at straight time. During other deployment periods that included holidays (the majority of deployment periods) each employee worked 150 hours.

Every fourth week on a rotating basis, the technicians and supervisors were scheduled for a "duty week." During that week, they were responsible for the weekend coverage at LAX. The key part of the overtime management strategy was to require that squad employees take one day of compensatory time off (CTO) during the deployment period in order to be eligible to work the overtime shifts during their duty week. Taking this CTO day would reduce their actual working hours for the deployment period to keep them under the 171-work hour cap. That way, hours worked over the cap could still be compensated with compensatory time off, rather than cash.

Testimony diverged on whether the overtime shifts at LAX were mandatory or voluntary. Lieutenant [Employee A] testified that the overtime was voluntary. However, Detective [Employee C] is a bomb squad supervisor and one of the Grievants in this case. He testified that the LAX shifts were "mandatory additional shifts because of limited personnel of the bomb squad." "No one else at the department," he stated, "whether you're SWAT, hazmat, or patrol, could man these shifts because they didn't graduate from bomb school."

The Grievants Are Required to Take Compensatory Time Off in Order to Be Eligible for Working Certain Overtime Shifts: Management and Union witnesses agreed that, in order to work the overtime shifts, employees were required to use CTO during the deployment period.

[Employee D] was a Detective in the bomb squad until he retired in 2015. He testified that he became a subject matter expert (SME) in the use of explosives to disburse chemical, biological and radiological items. He became an instructor for the Department on this subject, and worked overtime shifts in order to do so (in addition to working the LAX overtime shifts.) He did so under the auspices of the Counter Terrorism Training Unit (CTTU). Detective [Employee D], also a Grievant in the instant case, testified as follows:

> …for every eight to ten-hour day that I taught, I would give a ten-hour deduct…I was forced to take a ten-hour…compensatory time off.

Neither Detective [Employee C] nor Detective [Employee D] identified a particular date on which they were required to use compensatory time off in order to comply with the overtime policy.

On April 23, 2014, the Officer-in-Charge Rescinds the Overtime Policy: On April 16, 2014, the Board of Directors of the Union circulated a Membership Alert about "MOU negotiations update regarding 171-hours unfair practices."[1] The Alert called out the overtime management practice outlined

[1] No member of the League Board of Directors testified at the hearing.

above (while not identifying any particular division), characterized it as a violation of the MOU, and suggested that members subjected to this policy "contact the League to file a grievance." The Alert added:

> All parties must understand that this type of unfair practice and treatment of our members by the Department will lead to *irrevocable* change in our current positive relationship with the City during our MOU negotiations…

In an email sent on April 23, 2014, bomb squad officer in charge [Employee B][2] wrote under the "subject: LAX OT shifts" the following to all squad unit members (including the two Grievants):

> Effective immediately, the mandate to schedule a T/O(s) [a day of CTO] in order to work extra cash OT shifts (LAX, CTTU, etc.) prior to your duty has been rescinded.

The fact that the contested practice ended after this April 23 email was not in dispute at the hearing. The email was reinforced by a memo on July 14, 2014 from division Commanding Officer [Employee E].[3] The memo stated, in relevant part "…at the present time, supervisors should not require employees to use their compensatory time off to manage the 171-hour threshold."

On April 30, 2014, the League Files a Grievance Against the Rescinded Overtime Policy:

On April 30, 2014, the Union filed a class action grievance on behalf of all affected in the bomb squad. The grievance identified April 11, 2014 as the date of the grievable incident. The grievance stated as follows:

> There is a widespread practice by supervision and command staff at ESD affecting officers who are close to reaching 171 hours of time worked during a Deployment Period ("DP"). Supervision at this division routinely asks, directs, coerces and in some cases threatens those employees to involuntarily use accumulated time off ("CTO") from their banks regardless of their CTO balances to prevent those affected employees from reaching the 171-hour threshold. This is done to avoid having to pay in cash for overtime compensation over the 171 hours, as required by the MOU as well as applicable federal and state laws. Employees have also been told that unless they agree to keep their working hours below 171 hours, they will not be allowed to work details for cash payment at LAX.

The remedy sought by the League was as follows:

> Members whose CTO balance is not above 600 hours need not be required and should not agree to use their CTO hours to stay below 171 hours of work at any time. Affected employees need to be made whole. Their CTO banks need to be reimbursed and payment over 171 hours made where applicable.

[2] Sergeant [Employee B] did not testify at the hearing.
[3] Captain [Employee E] did not testify at the hearing.

The Grievance was processed through the various steps of the procedure, and appealed to arbitration after the grievance was denied by the Chief of Police.[4]

Detective [Employee D] testified that, in 2010, he contacted a League representative about filing a grievance against the new practice. "…the League didn't take a stance at that point in time," he stated, "and to be honest with you…unless the League supported us on this issue, then I was not going to go forward with it on my own."

Detective [Employee C] testified as to the reason the grievance was not filed earlier. "We were waiting for the Police Protective League to get on board, because…I'm not taking on command by myself."

UNION'S POSITION

The League argues that this dispute involves not only overtime worked at LAX, but also other overtime worked by unit members from July 1, 2011 through June 30, 2014. The Employer admitted the violation.

The Union rejects the argument by the Employer that the Union is seeking a remedy that is inappropriate. When the MOU is violated by the employer, there must be consequences. The value of CTO accumulated by the Grievants was much diminished since they were required to use it at a time not of their own choosing.

The Union contends that the relevant MOU allowed the department to mandate the use of CTO only when the employee's CTO bank exceeded 600 hours.

The Union asks that the arbitrator order the Employer to provide the necessary time records to establish the violation. The Union asks that the arbitrator make the Grievants whole for their loss of CTO resulting from the MOU violation.

EMPLOYER'S POSITION

The Employer contends that the employees voluntarily used their CTO in order to work LAX overtime. The overtime shifts at LAX were voluntary, and therefore the use of CTO was also voluntary.

[4] The Employer initially declined to arbitrate this issue, but as a result of a court decision, the matter is now before the arbitrator.

The Department asserts that it would be a "gift of taxpayers' funds" to restore CTO that has already been used by the employee. The employees were properly paid for their overtime, and performed no duties while on CTO.

No injunctive relief is required since the Department ceased the disputed practice in 2014. The Employer asks the arbitrator to deny the grievance.

DISCUSSION

The Requirement That Unit Members Take Time Off in Order to Be Eligible to Work Overtime Shifts Violated the CBA: The contract language applicable to this dispute is not explicit. Therefore, it is understandable that the parties were unable to resolve this matter short of arbitration.

Two rights are involved: the right to work overtime, and the right to use accumulated CTO. Each will be addressed in this section.

While the parties did not point to a specific right to work overtime, testimony from management and union witnesses alike indicated that qualified unit members were entitled to work overtime. Testimony differed on whether the LAX overtime was mandatory or voluntary. But all sides agreed that qualified employees (in this case bomb technicians and their supervisors) were rotated through the available overtime. The clear inference was that qualified employees were entitled to their share of available overtime shifts.

The case of Detective [Employee D], who also did CTTU training on overtime shifts, was less clear. However, his testimony that his overtime was necessary for the department stood unrebutted.

The second right, the right for employees to initiate requests for CTO use based on their own preferences, is also not explicitly delineated in the CBA. However, Article 6.2B3 is highly relevant in this regard. This section, sunsetted at the end of the agreement on June 30, 2014, allowed the Employer to require employees to use CTO when their balance exceeded 600 hours. Presumably, this provision was included in order to limit the CTO available for cash out when employees left the service.

When a contract limits a benefit under certain specified circumstances, then the presumption is that under other circumstances that benefit is not limited. The undersigned reads the MOU in this fashion. The requirement of CTO use when a threshold is reached is spelled out. The corollary is that employees are not required to use accumulated CTO when that threshold has not been reached.

The Employer argues that they did not require the use of CTO because they did not require the employee to work the overtime shifts. Whether they required the employees to work the LAX and CTTU overtime shifts is a disputed fact in the record. That disagreement does not need to be resolved in order to reach a determination in this case. What is not disputed is that the Employer conditioned the right to work the overtime shifts on the employee using CTO hours during that same deployment period.

It is improper for the Employer to condition the use of a contractual benefit, the right to work a fair share of overtime shifts, on forfeiting another benefit – i.e., the benefit of using CTO in a manner convenient or beneficial to the employee. The requirement that unit members use CTO in order to be eligible to work overtime shifts violated the MOU.

The Employer had a legitimate business reason to condition overtime eligibility on the use of CTO. This practice was implemented as a cost-saving measure to avoid the payment of FLSA overtime. However well-intentioned, the practice violated the CBA.

The Appropriate Remedy is Restoration of CTO to the Leave Balances of Unit Members When Required to Take CTO in Order to Be Eligible to Work Overtime Shifts: The Employer has argued that, even if the arbitrator finds that the CBA was violated, any remedy that restored CTO or granted additional pay would be a "gift of taxpayers' funds." This is not the case.

It is well-established in labor relations that arbitrators, unless explicitly prohibited by contract or statute, may fashion an appropriate remedy for contract violations. Doing so is not a gift – rather, it is proper compensation by the employer to an employee who incurred a loss due to a violation of the CBA.

The undersigned subscribes to the view that remedies in contract violation grievances, when sustained, should approximate a "make whole" adjustment. Obviously, the clock cannot be rewound to undo the original violation, the required use of a CTO day not of the employee's choice. The closest remedial match available is to restore the CTO used to the CTO bank of each affected employee. In the case of affected employees who have retired or otherwise left service, appropriate payment should be made to them to augment whatever cash payment was made at the time of their departure.

The Grievance Procedure Allows Only for a Remedy Beginning Twenty Calendar Days Before the Grievance and Continuing for the Duration of the Violation: The Union has asked that the period of the violation be considered the dates encompassing MOU No. 24 – July 1, 2011 through June 30, 2014. It may be that violations took place throughout the duration of that agreement. However, the

grievance procedure does not allow for a remedy stretching back months and years prior to the filing of a grievance.

The grievance was filed on April 30, 2014. The grievance procedure clearly states that the Union "shall serve written notice of the grievance on a form provided by the Department upon the commanding officer or Employee Relations Administrator within 20 calendar days of which discovery of the grievance should reasonably have occurred."

The Employer did not claim that the grievance was untimely. It was indeed timely, since the violation was ongoing. The violation (presumably) occurred every deployment period during the life of the MOU. It stopped (again presumably) only after Sergeant [Employee B] sent out his email on April 23, 2014. Twenty days prior to April 30 was April 10, 2014. This then is the beginning date for the application of this award.

Backdating the remedy to 2011, as requested by the Union, could create a destabilizing precedent and undermine the purpose of the grievance procedure. The grievance procedure is meant to resolve problems at the lowest possible level and at the earliest opportunity. For the Union to allow a known violation to continue for months or years, then file a grievance and expect a retroactive remedy, would defeat the purpose of the process. It would not allow the Employer to receive notice of a potential violation before significant liability is accrued.

It is notable that the Employer moved relatively quickly in the instant case to remedy the violations once it was put on notice by the League. It would not serve the cause of just labor relations to penalize the Employer by ordering a lengthy back remedy.

The arbitrator is sympathetic to the testimony of the Grievants that they did not want to file the grievance until they knew they had the support of the League. But this is the precise point – according to the contract, the League is the "grievant" in the instance of a class grievance. For whatever reason (not part of the record of this hearing) the League chose not to file the grievance until April 30, 2014. It is the League's grievance. The remedy will be crafted to reflect the date when the League filed the grievance.

The Employer Must Now Provide Relevant Information Requested by the Union in Order to Determine the Required Remedy: During the processing of the grievance, the Union requested necessary and relevant information. The Employer declined to provide it. The Employer has a basic legal and contractual obligation to provide information to the Union that is relevant to the grievance. It should have been provided at the time of the request.

Time records of the Grievants and the all-affected class for the cited time period are certainly relevant and necessary information. Documentation of any requests for time off made by the affected employees during the relevant time period is also relevant and necessary.

Given the limited scope of the remedy awarded in this decision, the Employer is now required to provide those time and attendance records for a relatively brief period of time. That time frame begins with the deployment period that includes April 10, 2014. Although the practice was apparently discontinued on April 23, 2014, the parties are also ordered to examine the time and attendance records through June 30, 2014 (the end date of the remedy sought by the Union). This is in order to establish for certain that the practice indeed ceased as of the date of Sergeant [Employee B]'s email.

Once the parties have the necessary records, they are to meet and agree on the application of this award. Any affected ESD employees required to use CTO during specified deployment periods as a condition for working overtime shifts during those deployment periods are to be provided with the ordered remedy. The deployment periods are those including the date April 10, 2014, or any deployment period thereafter. As outlined above, class members who have subsequently left the service are to be compensated for the CTO as if it had been available to them upon leaving the service.

AWARD

1. The Department violated the CBA when it required ESD unit members to use CTO during a deployment period to be eligible to work certain overtime shifts during that deployment period.

2. The Department is ordered to restore to the CTO balances of affected ESD unit members the number of CTO hours they used in order to be eligible to work overtime shifts. Such restoration shall only cover CTO used beginning with the deployment period that included April 10, 2014 and through the discontinuation of the violation, but no later than the deployment period that included June 30, 2014.

3. ESD class members who left the Department after June 30, 2014 are to be compensated as if they had not used CTO under the conditions cited in number two above and instead had cashed out that CTO when leaving the service.

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Paul D. Roose, Arbitrator

Date: January 18, 2017