

*Arbitration Office
of
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**IN BINDING HEARING PROCEEDINGS IN ACCORDANCE WITH THE COLLECTIVE
BARGAINING AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Dispute)	
)	
-between-)	
)	
Service Employees International)	
Union, Local 521)	Arbitrator's Opinion
)	&
vs)	Award
)	
The County of Monterey, California)	
)	
Subject of Appeal: Alleged Contract)	
Violation in Payment of Overtime)	
Wages)	

This hearing arises pursuant to the Collective Bargaining Agreement between Service Employees International Union, Local 521; hereinafter, the Union, and the County of Monterey, California; hereinafter, the County or the Employer. Under the controlling language of the Collective Bargaining Agreement the Arbitrator's function is to consider Union grievances filed on behalf of bargaining unit members in SEIU Unit F, Unit H, Unit J, and Unit K. The essence of the grievances are to protest an alleged contract violation of the Employer in the computation of overtime payment for Bargaining Unit Members.

✓ KLH
DECISIONS
DONE

DOCKET

The record reflects that on August 28, 2010, the County implemented a new payroll system called Advantage in which the overtime rate of pay was devised by a formula different from that used prior to August 28, 2010. Prior to August 28, 2010 the County, when calculating overtime pay for bargaining unit members, included all time for holidays, vacation, compensatory time off, and paid time off as hours worked for the purposes of determining overtime at the rate of 1.5 hours for each hour of qualified overtime worked.

Subsequent to August 28, 2010, with the implementation of the new payroll system, the overtime rate was calculated using a different formula excluding pay for "*non-productive time*." The new procedure required that the amount of "*productive*" time only was divided into the total number of hours for both nonproductive time and productive time, the results multiplied by 1.5 to arrive at the overtime rate - which results in less paid to Bargaining Unit members who worked overtime.

It is relevant that subsequent to filing of the grievances, various meetings were held between the Union and Management continuing until September 18, 2011. The Employer recognizing a mistake was made, corrected the system so that employees were paid under the original provisions of the Memorandum of Understanding (MOU), using all compensable time to compute the overtime rate. The fact record reflects the

County represented to the Union that it would pay employees back pay for overtime miscalculated between August 28, 2010 and September 8, 2011, by early 2011. However, when due, the County represented it could not meet that date, but promised on back-pay compensation and pay to Bargaining Unit employees by April 2011, then again by November 24, 2011, and then by December 31, 2011.

Back pay was not issued for two years and so, the Union instigated arbitration proceedings in order to seek an appropriate remedy for payment of the monies owed bargaining unit members by a reasonable deadline set for the County by the Arbitrator.

John D. Perone was appointed by the parties and a full evidentiary Hearing was held on September 25, 2012, at the County Government Center in Salinas, California. All witnesses testified under oath administered by the Arbitrator who issued this report with a binding award.

REPRESENTING THE PARTIES

Representing the Union

Anne I. Yen, Esq.
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Representing the County

Janet Holmes, Esq.
Deputy County Counsel,
County of Monterey
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Salinas, CA 93901-2653

ISSUES

At the hearing, the Parties were unable to stipulate as to an Issues statement. They did agree that the Arbitrator would

have the authority to frame an Issues statement after consideration of the evidence presented and the position of the two Parties. The Issues statement, as presented by the Union, is as follows:

"What is the appropriate remedy for the County's failure to include vacation, compensatory time, and holidays in computing overtime pay for bargaining unit employees?"

The County's version of an Issues statement is as follows:

"Are the grievances presented arbitrable under the applicable MOUs? Did the County violate applicable MOU provisions in calculating overtime pay after transition to the new payroll system?"

After consideration of the evidence and argument submitted, the Arbitrator hereby frames the Issue statement as follows.

1. *Are the grievances arbitrable?*
2. *If so, did the County violate applicable MOU provisions in calculating overtime pay after transition to the new payroll system? If so, what is the proper remedy?*

POSITION OF THE PARTIES

Position of the Union

It was the position of Counsel for the Union in her closing argument brief, in essence, that effective August 28, 2010, upon implementation of the new payroll system called Advantage, the County unilaterally devised a different formula for computation of the overtime rate for bargaining unit members. The Union contends that prior to August 28, 2010, overtime pay was computed simply by multiplying 1.5 by the number of overtime hours worked. As of August 28, 2010, the new

system devised a formula by which employees were paid an overtime pay rate for "productive" time divided into the total number of hours of both productive and nonproductive time, the resulting hours were then multiplied by 1.5 to arrive at the overtime rate. Union asserts this violates Section 10 of the MOU.

Counsel for the Union notes after discussion between the Union and Management concessions, the system was corrected going back and implementing the pre-Advantage system rate, effective September 18, 2011, however, the County did not honor its promise to compensate employees for back pay between August 28, 2010 and September 18, 2011, for any overtime incorrectly compensated. Counsel notes an agreement dated November 5, 2010 between the Parties (Union Exhibit E) specified that the past practice be reinstated and employees receive back pay for any incorrect calculations of overtime rate prior to September 18, 2011.

Counsel for the Union maintains the evidence reflects the miscalculation in the Advantage system was in violation of the Memorandum of Understanding and, in spite of many promises for dates by which back pay would be provided bargaining unit members, the County has not complied and kept its word. Counsel maintains the Union has the right to seek remedy in these arbitration proceedings and provides evidence and citation to support that point of view.

Counsel maintains the Union seeks appropriate remedy in the matter, including ten percent interest on amounts owed and additional interest charges to the County if it does not comply with the Arbitrator's deadline for submission of the remedy.

Position of the County

Counsel for the County's closing argument brief concedes the question of arbitrability to the Union's position. However, Counsel for the County maintains the Union failed to meet its burden to demonstrate that the County violated the MOUs in transitioning to the new payroll system. Counsel notes the pay stubs submitted into evidence are impossible to interpret and are of no value to the grievance. Counsel also claims the MOU language in this matter is ambiguous, and therefore should not be applied. Counsel reviews the testimonial evidence to claim the Union's witnesses provided either hearsay or irrelevant testimony. Counsel maintains the Union did not specify the specific articles claimed in the grievance and therefore it cannot be supported.

In conclusion, Counsel for the County maintains the County at all times proceeded in good faith to comply with the MOU system while converting to a new payroll system in 2010. Counsel for the County classifies the Union's request for additional interest and double damages as inappropriate in this matter.

RELEVANT PROVISIONS OF THE MOU

Section 10 Overtime . . .

"For the purposes of this section, paid hours associated with a County holiday (whether actually worked or not), vacation and compensatory time off, shall be considered in hours worked for the purpose of determining overtime."

Exhibit A, page 13 (Unit F)

Section 10 Overtime . . .

"For the purposes of this section, paid holiday, vacation, paid time off (except for the first day of unscheduled PTO) used for personal and family illness)and compensatory time off shall be considered as hours worked for the purposes of determining overtime."

Exhibit B, page 15 (Unit H)

Section 10 Overtime . . .

"For the purposes of this section, paid hours associated with a County holiday (whether actually worked or not), vacation and compensatory time off shall be considered as hours worked for the purposes of determining overtime"

Exhibit C, page 16 (Unit J)

Section 8.11 Overtime Work . . .

"For the purposes of this article, paid holiday, vacation and compensatory time off hours shall be considered as hours worked for the purposes in determining overtime."

ARBITRATOR'S FINDINGS AND CONCLUSIONS

After review of the complete record of this case, the hearing evidence, and closing argument briefs, the Arbitrator finds that the Union satisfactorily carried its burden to show the County violated the Memorandum of Understanding and the matter is arbitrable. The grievances remedy agreed upon by the parties providing back pay must be sustained. Further remedy is hereby issued to require the Employer pay the penalties it previously agreed upon and additional penalty through this

award because of their failure to honor previous agreements, for whatever reason.

The Arbitrator notes the record is clear that a unilateral move by Management deprived bargaining unit workers of part of their pay for overtime. County Management agreed to change the County system to correct the error, but for the subsequent two years has, in essence, put off back payment of overtime pay for the approximately thirteen months the rate was miscalculated.

Counsel for the Employer is found to fail when she argues such as there was no specific contract article listed in the grievance. The grievances admitted into evidence show alleged violation of overtime sections of the MOU. The County also ignored repeated promises to make these back payments. The evidence in this case dissuades the Arbitrator from the position of the Employer.

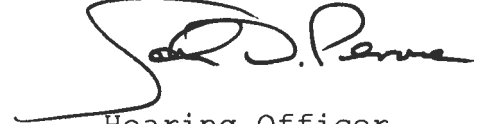
The Arbitrator herein provides increased remedy to the previously agreed upon penalties and interest rates approved by the Parties. The penalty rate will now total ten percent (10%) of all back pay due and paid by March 1, 2013. If the County does not pay employees included in the grievances, all back pay that is due to them by March 1, 2013, the total penalty percent figure will increase to twenty percent (20%) of wages owed.

The grievances are found to be arbitrable and are sustained.

AWARD

Remedies will include payment by the County of the amount of back pay due bargaining unit members for the period of time they were underpaid, plus ten percent (10%) of the amount due to each employee, if the County pays all Grievants due by March 1, 2013. If all employees are not provided compensation for back pay by March 1, 2013, the ten percent figure will increase to twenty percent (20%), which basically provides for double the penalties amount. The Arbitrator hereby retains jurisdiction in this matter for six months from the date of the issuance of this award.

John D. Perone

A handwritten signature in black ink, appearing to read "John D. Perone", written over a horizontal line.

Hearing Officer

December 7, 2012