LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

In the Matter of: LOS ANGELES COUNTY PROFESSIONAL PEACE OFFICERS ASSOCIATION, Charging Party, and SHERIFF'S DEPARTMENT, COUNTY OF LOS ANGELES, Respondent	UFC 9.3

DECISION AND ORDER

A hearing on the charge of unfair employee relations practice filed herein was regularly held on December 10, 1974 and, upon the evidence received and briefs of counsel, Hearing Officer Norman H. Greer duly rendered a report of his findings, conclusions and recommendations to the Employee Relations Commission. Exceptions thereto were filed by the Respondent through its attorneys, John H. Larson, County Counsel, and John M. Baskett, Deputy County Counsel. A brief in opposition to the exceptions was filed by the Charging Party through its attorney, Lester G. Ostrov, of Bodle,

Fogel, Julber, Reinhardt and Rothschild. Upon consideration of the report of the hearing officer together with all the evidence, exceptions and arguments presented in this proceeding, the Commission issues the following Decision and Order.

The unfair employee relations practice in this case was charged as follows:

> "On or about January 8, 1974, the Sheriff's Department of the County of Los Angeles instituted unilateral changes and reductions in the overtime compensation for deputies in the statewide transportation detail with respect to out-of-town work. These unilateral changes were made without prior notification to and without negotiations with Los Angeles County Professional Peace Officers Association, the certified representative of said employees."

The Answer of the Respondent admitted the facts as alleged in the charge and sought to justify its unilateral action on two grounds: (1) the old overtime pay rule was illegal, and (2) the union had waived or lost its right to negotiate by failing to demand it in the last negotiating period.

The method and amount of overtime compensation for deputies employed in the statewide transportation detail were changed on January 8, 1974. Prior thereto, the deputies were compensated "on the basis of their regular salary plus eight hours of overtime . . . for each night they were required to be away from the County of Los Angeles" (stipulation, Tr. p.15). On that date, the Sheriff's Department issued Temporary Departmental Order

143.1, in which it was provided that

> "On . . . trips lasting more than one day, members shall be considered on duty at the time they report to their Unit of Assignment or leave directly from their residence, as applicable. Actual time spent in traveling and in carrying out their business shall be considered as time worked. Time spent in eating, sleeping, or in recreation (free time) shall not be considered as time worked. However, on any day that the member is actually engaged with outside persons in the conduct of the Department's business, he shall be credited as working a full shift. If the member is unable to conduct business because it is a Saturday, Sunday, or legal holiday, such days shall be considered as free time and considered as a regular day off."

Thereafter, the deputies who transported prisoners on overnight trips were considered not working between the time they locked up the prisoners for the night and the next time they actually took custody of them. Instead of receiving compensation for a flat eight hours of overtime, they were compensated only for whatever hours in excess of the regular workday they actually had the prisoners in physical custody or performed some physical activity. The result was a reduction in the income of the deputies.

There can be no doubt, nor was it ever denied, that the subject matter of the departmental order falls within the scope of negotiation as defined by the Employee Relations Ordinance of the County of Los Angeles, namely, "wages, hours, and other terms and conditions of employment". In setting forth the rights of the

County to exercise control and discretion over its operations and to direct its employees, the Ordinance also expressly provides that the exercise of those rights shall "not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." A unilateral change and reduction in overtime compensation, made without prior notification to and without negotiation with the certified representative of the employees involved, is presumptively an unfair employee relations practice. Any affirmative defense carries the burden of proof that the facts were as claimed and that they were relevant or sufficiently significant to excuse performance of the basic statutory obligation to negotiate. That burden had to be met by the County.

1. The Defense of Payment Illegality

In attempting to establish the defense that the past practice in overtime compensation was prohibited by law, the County merely referred to and argued from an ordinance defining "overtime." That statute states:

> "'Overtime' means time spent in the performance of work . . . in excess of the number of hours regularly worked in the workweek or workday." (Salary Ordinance Section 140[4].)

The Sheriff's Department interpreted that to mean that it was unlawful to compensate statewide transportation deputies for time spent "in eating, sleeping, or in recreation" (except that when they were "actually engaged with outside persons in the conduct of the Department's business" they were to receive pay for at least a full shift, regardless of the number of hours so engaged). Further, the application of Temporary Departmental Order 143.1 apparently resulted in no compensation for the period between the time prisoners were locked up for the night and next picked up, even though the deputies were responsible for the prisoners and were on call throughout that period. That interpretation and application of the Salary Ordinance are not explicit in the quoted ordinance and do not necessarily flow from the language of the ordinance. Nor did the County present any court decision or evidence of legislative intent in support of its action.

The question of what constitutes "performance of work" under the Salary Ordinance is clearly subject to differing interpretations. The interpretation that had been made by the Sheriff's Department for years before January 8, 1974 was that when the deputies went away from home, held themselves in readiness, and responded to call when needed they were engaged in "performance of work". The evidence showed that the deputies were responsible for the prisoners all night, that they were required to keep

headquarters advised of where they could be reached, that on occasion they were awakened to take prisoners to emergency hospitals, and that they were on call all night. Obviously, they were required to be away from home for the entire duration of the trip, which ordinarily took three days and two nights.

Even if the past practice of the County had been mistakenly performed in ignorance of the law, the corrective action should have been dealt with as a subject for negotiation. Assuming arguendo that the law prohibits payment of public funds for a period of waiting or rest, there is room for negotiation on how the public agency might compensate the employee whose working time is necessarily broken by such periods without paying for waiting or rest. Negotiation cannot make legal that which is illegal; but it can determine the existence of circumstances on which illegality can be overcome or legality can be established. Given the opportunity to confer and to negotiate, circumstances can be clarified and, if necessary, adjustments can be made that will preserve both legality and fair terms of employment. The statewide transportation deputies and their certified representative had a vital interest therein and the purpose of the Employee Relations Ordinance of Los Angeles County was to provide for negotiations over such an interest, even when that involves the consideration of what is illegal and what is legal.

On the question of "what is legal," it may be significant to

note that the legislative intent of the Board of Supervisors to permit a consideration of such matters is indicated in part by the several provisions of the Salary Ordinance, namely, the provisions for standby pay (Section 106), call-back pay (Section 107), and an arbitrary setting of a short regular workweek (32 hours) for physicians and surgeons "subject to call twenty-four hours per day" (Section 111[e]). These the Board did authorize, and their legality has not been questioned in this proceeding.

2. The Defense of Waiver or Laches

The County maintained that it was justified in changing overtime compensation unilaterally because the employees and their certified representative had failed to request negotiation thereon either before the issuance of Temporary Departmental Order 143.1 on January 8, 1974, or within the following six months.

The County sought to base its defense of waiver or laches upon a provision in the Memorandum of Understanding with the Peace Officers, Unit 611, which said,

> "In the event either party hereto desires to negotiate a successor Memorandum of Understanding, such party shall serve upon the other during the period from January 1, 1974, through January 31, 1974, its written request to commence negotiations, as well as its full and entire writtten proposals for such successor Memorandum of Understanding with the exception of salary proposals which shall be presented no later than March 1, 1974."

The same Memorandum of Understanding also provides for the filing and processing of grievances. It does not require both negotiation and grievance procedure, nor does it create any priority between those avenues of dispute settlement. It states its purpose "to provide an orderly and equitable means of resolving any misunderstandings or differences which may arise under this Memorandum of Understanding." Nowhere does the Memorandum of Understanding state that an improper action, namely, a unilateral wage change, is legitimatized upon the failure to complain within a given time.

No demand for negotiating the disputed overtime rule was made in the period January 1 through January 31, nor during the subsequent negotiations. The unfair employee relations practice charge was filed on June 3, 1974; however, the intervening circumstances must be taken into account.

There was no announcement or notice of the proposed change embodied in TDO 143.1 prior to the time it was put into effect. In fact it was made operative on January 7, one day earlier than the date of the order; and the first time the order was received by a deputy was January 10. Within one or two days after receipt of the order, transportation deputies requested clarification from both a captain and a lieutenant. They received unfavorable replies and they filed a formal grievance the first part of April. The grievance was processed in accordance with the established

procedure and an official denial was not received until May.

The chairman of the Professional Peace Officers Association learned of the change in the department's policy between the fifteenth and thirtieth of January; but he was not personally involved in the grievance procedure or in collective bargaining negotiations. The chief negotiator for the unit, which included the statewide transportation deputies along with other transportation deputies, first learned of the change in the method of compensating the statewide transportation deputies in June or July; and negotiations for a new Memorandum of Understanding were completed by July 1.

When the TDO 143.1 was issued, no employee or certified representative had received prior notification; neither was aware of the intent of the Sheriff's Department to change the overtime compensation; and neither had an opportunity to file a grievance or demand negotiation. The deputies affected took recourse in the grievance remedy expressly made available to them. That was done in a timely manner and they may not be penalized for undertaking that course of action. The Professional Peace Officers Association then sought the other remedy available to it, namely, the filing of an unfair employee relations practice charge, which was filed on June 3, 1974.

The Employee Relations Ordinance of the County of Los Angeles does not provide a statute of limitations for the filing of an

unfair employee relations practice charge. A regulation of the Commission requires that an unfair employee relations practice charge be filed "within 180 days of occurrence or discovery of the alleged act or acts on which the charge is based." The time provision under this regulation was observed.

The Commission finds therefore that there was no waiver of the right to file an unfair employee relations practice charge, or any laches in pursuing that remedy.

The County took exception to the Hearing Officer's recommendation that TDO 143.1 be rescinded in its entirety because the TD Order deals with other matters as well as the overtime compensation of statewide transportation deputies. This objection is well-founded. Total recision of the order would be overly broad.

In light of the foregoing, the Commission makes the following findings of fact and conclusions of law.

1. By instituting unilateral changes and reductions in the overtime compensation for deputies in the statewide transportation detail with respect to out-of-town work, without prior notification to and without negotiations with the Los Angeles County Professional Peace Officers Association, the certified representative of said employees, the Sheriff's Department of the County of Los Angeles committed an unfair employee relations practice.

2. The previous practice of compensating said employees on the basis of their regular salary plus eight hours of overtime for each night they were required to be away from the County of Los Angeles was not proved to be unlawful.

3. The Charging Party did not waive its right to negotiate changes in overtime compensation and was not guilty of laches in requesting such negotiation.

On the basis of said findings and conclusions, the Commission hereby orders

1. The provisions of Temporary Departmental Order 143.1 dealing with the overtime compensation of deputies in the statewide transportation detail, namely, "time spent in eating, sleeping, or in recreation (free time) shall not be considered as time worked" shall be rescinded, and the prior practice of compensating said deputies on the basis of their regular salary plus eight hours of overtime for each night they are required to be away from the County of Los Angeles shall be reinstated.

2. Overtime benefits which have been affected by TDO 143.1 shall be recomputed in accordance with the prior existing practice and each member of the statewide transportation detail adversely affected by TDO 143.1 shall be made whole with respect to any benefits which he may have enjoyed prior thereto.

3. The Respondent shall negotiate with the Charging Party on any proposed change in the overtime compensation of deputies

in the statewide transportation detail.

Dated: August 25, 1975

Lloyd H. Bailer, Chairman

William Levin, Commissioner

David Ziskind, Commissioner