



JONES & MAYER

ATTORNEYS AT LAW

3777 NORTH HARBOR BOULEVARD • FULLERTON, CALIFORNIA 92835
(714) 446-1400 • (562) 697-1751 • FAX (714) 446-1448

Richard D. Jones*
Partners
Martin J. Mayer
Kimberly Hall Barlow
James R. Touchstone

Richard L. Adams II
Jamaar Boyd-Weatherby
Baron J. Bettenhausen
Christian L. Bettenhausen
Paul R. Coble
Keith F. Collins

Michael Q. Do
Thomas P. Duarte
Kathya M. Firlik
Elena Q. Gerli
Krista MacNevin Jee
Ryan R. Jones

Robert Khuu
Gary S. Kranker
Gregory P. Palmer
Harold W. Potter
Denise L. Rocawich
Yolanda M. Summerhill

G. Ross Trindle, III
Ivy M. Tsai
Emily Y. Wada

*a Professional Law Corporation

Of Counsel
Michael R. Capizzi
Deborah Pernice-Knefel
Dean J. Pucci
Steven N. Skolnik
Peter E. Tracy

Consultant
Mervin D. Feinstein

MEMORANDUM

CONFIDENTIAL ATTORNEY - CLIENT COMMUNICATION

TO: Dan Dow, District Attorney, County of San Luis Obispo
FROM: Martin J. Mayer and Paul R. Coble, Law Offices of Jones & Mayer
DATE: June 16, 2015
SUBJECT: Time Off For Deputy District Attorneys Who Serve On-Call Law Enforcement Assistance

QUESTION POSED

You seek our legal opinion and advice as to whether in your capacity as District Attorney you have authority to continue providing the described time off as a quid pro quo for DDAs serving the important public safety duty to provide on-call assistance to law enforcement agencies (search warrant review, investigative assistance, etc.)?

SHORT ANSWER

You have the authority as a department head, pursuant to County Code § 2.44.110, to arrange individual employee's workdays or workweeks so as to provide for the proper function of your department at such hours and times as may be deemed necessary.

As the described on-call procedure, including the provision of offsetting time off, did not alter the fixed compensation of the concerned DDAs, it can fairly be seen as an adjustment or rearrangement of workdays and workweeks as set forth in § 2.44.110.

FACTS

We understand the relevant facts to be as follows. Please let us know immediately if we have misstated or omitted any relevant fact as a change in the facts could alter the legal conclusion. For some 30+ years the Office of the District Attorney has followed a practice whereby tenured deputy district attorneys (DDA) have been assigned on a rotating basis to be on call to provide off hours assistance to local law enforcement, principally pertaining to urgent search or arrest warrants.

DDAs are salaried employees and have no provision in their labor agreement for receipt of compensatory equivalent time off (CETO) for working extra hours. This is codified in Article 8, §8.1 of their Memorandum of Understanding (MOU) as follows:

8.1. The parties acknowledge that Unit members are professional attorneys who, in the course of their duties, are not subject to defined working hours. It is expressly acknowledged that management may determine the days and hours during which Unit members shall be required to work and notwithstanding any other provisions of law, Unit members shall be deemed to work 40 hours per week, if certified by the District Attorney. As Fair Labor Standards Act (FLSA) Regulations state, the special public-sector rule based on 'principles of public accountability' involves the concept that 'the use of public funds should always be in the public, interest' and that 'public employees should not be paid for time they do not work', unless it is time otherwise guaranteed to unit members such as vacation, administrative, or personal leave.

However, the long standing practice, codified in the Office handbook is as follows:

COMPENSATORY TIME OFF

Attorneys who have successfully completed probation shall be placed on the Search Warrant Duty list, a rotation consisting of a two (2) week period of 24 hour on-call availability to law enforcement for legal advice. In exchange for participating on Search Warrant Duty, the attorney shall receive a compensatory day off every 6 weeks.

It is our understanding that this accrued time must be used or lost; it is not subject to being cashed out or otherwise converted to compensation in the form of dollars paid.

The County Auditor received an anonymous "Whistle Blower Hotline" report of this practice. By memorandum dated April 8, 2015, the Auditor issued a report to the County Administrative Officer (CAO), County Counsel, and the County Human Resources Director, concluding that as this practice was not part of any compensation scheme approved by the Board of Supervisors (Board), it was unauthorized and should cease.

ANALYSIS

It is well settled that the Board of Supervisors “. . . shall provide for the number, compensation, tenure, appointment and conditions of employment of county employees.”¹ It is, in all likelihood, this statute upon which the County Auditor relied for the conclusion expressed in the April 8, 2015 memorandum.

Were a district attorney to have, for example, decided to provide, without approval of the board of supervisors, some bonus pay to certain DDAs over and above board provided compensation, this would be an *ultra vires* act on the part of this hypothetical district attorney. But this is not what is happening in San Luis Obispo County with this actual District Attorney.

What is occurring here is an adjustment of working days or working weeks to account for work performed at any another time. As such, this does not result in any extra pay for the concerned DDAs; their salaried compensation remains unchanged. Nor does it detract from the objective, as set forth in §8.1 of their MOU, that as public servants they work at least 40 hours a week. Instead, because they work off hours limiting their activities so as to be ready and fit to provide the described law enforcement assistance, their working hours are adjusted in an amount equivalent to one eight hour day for every six weeks. This is a ratio of one hour adjustment for every 5.25 hours of on-call service.

As a consequence of providing this public service, the compensation of the concerned DDAs, as provided by the Board, does not change.

DA's Action Authorized by County Code

After reviewing the MOUs and other correspondence, as well as conducting our own legal research, we noted the provisions of County Code § 2.44.110. This section reads as follows:

- (a) Eight hours shall constitute a workday for all full-time employees.
- (b) Forty hours shall constitute a workweek for all full-time employees.
- (c) Nothing contained in this chapter shall be construed to prevent the board of supervisors or **department heads** from so arranging individual employee's workdays or workweeks so as to provide for the proper function of departments at such hours and times as may be deemed necessary; provided, that the provisions of subsections (a) and (b) of this section and Sections 2.44.030 and 2.48.050 are fully complied with, except as provided in subsections (d), (e), and (f) below. (Emphasis added.)
- (d) Subsections (a) and (b) of this section shall not apply to employees who have been designated as salary basis employees within the meaning of the Fair Labor Standards Act to the extent that such employees are not subject to defined working hours.

¹Govt. Code §25300

(e) Subsections (a) and (b) of this section shall not apply to employees who are fire personnel or to employees on approved flexible workweeks.

(f) Those county employees in employee organizations with executed MOU's authorizing flexible workweeks, may request their department head to schedule them to work a flexible workweek. Such a request, and any department head approval, shall be made on such forms as may be provided by the county; and if approved, shall be forwarded to the personnel department and auditor's office. A flexible workweek shall be defined as any workweek other than as provided in subsections (a) and (b) of this section.

Nothing contained in this section shall be construed as granting a right to a flexible workweek. Department heads shall retain the discretionary authority to arrange an individual employee's workday and workweek, as authorized by this code, and to approve requests for flexible workweeks, as well as to terminate a flexible workweek schedule. Department heads shall also have the authority to schedule an employee to work a flexible workweek; provided, that any advance notice required by an MOU is first given.

We note in particular subdivision (c), which authorizes a department head, here the District Attorney, to adjust working days and working weeks as operationally necessary, provided that overtime procedures (§2.44.030) and payroll periods (§2.44.050) are respected. We further note that the requirement of subdivision (a) of §2.44.110 that a work day comprise eight hours of service if offset by the reference with subdivision (c) to the exclusion of salaried employees found in subdivision (f). And, we note the provisions of subdivision (b) that a work week is comprised of 40 hours worked, but find this also offset by the reference to subdivision (f).

Thus, §2.44.110(c) provides the authority for a department head such as the District Attorney to ' . . . so [arrange] individual employee's workdays or workweeks so as to provide for the proper function of departments at such hours and times as may be deemed necessary.' That is precisely what the current District Attorney and his predecessors over the past three decades have been doing.

Past Practice

There is also a legitimate question of the existence here of a past practice as that term is used in labor relations. "To be binding a past practice . . . must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. The California Public Employment Relations Board has . . . described a valid past practice as one that is 'regular and consistent' or 'historic and accepted.' . . ."² And, a change in the status quo through a departure from established past practice triggers the duty to first meet and confer in good faith with the concerning employee organization.³

Here, we are given to understand that the procedure has been in place for over thirty years, and that it has even been codified in a Department or Office handbook. It thus is "readily

² (California State Employees Association, SEIU Local 1000, (2002) PERB Dec. No. SA-CO-237-S).

³ Riverside Sheriff's Assn. v. County of Riverside, (2003) 106 Cal.App.4th 1285, 1290.

ascertainable over a reasonable period of time” and is “regular and consistent’ or ‘historic and accepted.”⁴

Of course, one might argue that the “parties” to such a past practice must be officials or entities with the authority to implement the practice in question and since compensation is a Board prerogative and the Board does not appear to have been party to the instant past practice, it cannot be bound to this practice. However, while the Board may not have been aware of this practice until lately informed of it, the Board had exercised its authority by delegating to department heads the authority under County Code §2.44.110 to engage in the now challenged practice of “. . . so arranging individual employee's workdays or workweeks so as to provide for the proper function of departments at such hours and times as may be deemed necessary.”

Thus, a department head, here the District Attorney, would have been a party with the authority to establish this past practice.

CONCLUSION

We find that the described practice was within the authority of this District Attorney and his predecessors over the past three decades. Still, that the practice is authorized by the County Code does not necessarily mean that there might not now be an opportunity to clarify the authority of a Department Head to take such action when circumstances, such as those with DDA’s on call, exist.

Therefore, although it is not necessary, it would not be inappropriate for the Board, the District Attorney, and the San Luis Obispo County Government Attorney's Union to work together to ratify this process by side letter or as an element of the MOU. In that way, going forward for all concerned will be fully informed as to this very sensible operational procedure.

⁴ California State Employees Association, *supra*.