

**SUBMITTAL TO THE BOARD OF SUPERVISORS  
COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

319



**FROM:** Human Resources Department

**SUBMITTAL DATE:**  
April 16, 2014

**SUBJECT:** Action on an advisory arbitration opinion in accordance with the Memorandum of Understanding ("MOU") Between the County of Riverside and the Riverside Sheriff's Association (RSA) Law Enforcement Unit (LEU). [District - All] [Total Cost - \$0]

**RECOMMENDED MOTION:** That the Board of Supervisors:

1. Accept Arbitrator John Steinberg's proposed decision in the County's favor regarding Grievance No. R1213-001.

**BACKGROUND:**

Summary

The MOU between the parties contains a clause that provides for advisory arbitration as part of the grievance resolution procedure. After receipt of an advisory arbitration opinion the Board is empowered to accept, reject, or accept part of a decision and reject the rest. Per the MOU, both parties shall be given a minimum of fifteen minutes to present oral argument in favor of their respective positions; however, no additional testimony will be taken.

Departmental Concurrence

Michael T. Stock  
Asst. County Executive Officer/  
Human Resources Director

FINANCIAL DATA	Current Fiscal Year:	Next Fiscal Year:	Total Cost:	Ongoing Cost:	POLICY/CONSENT (per Exec. Office)
COST	\$ 0	\$ 0	\$ 0	\$ 0	Consent <input type="checkbox"/> Policy <input checked="" type="checkbox"/>
NET COUNTY COST	\$ 0	\$ 0	\$ 0	\$ 0	

**SOURCE OF FUNDS:**

Budget Adjustment: No  
For Fiscal Year: 2013/14

**C.E.O. RECOMMENDATION:**

**APPROVE**

BY: Samuel Wong 4/21/14  
**Samuel Wong**

County Executive Office Signature

**MINUTES OF THE BOARD OF SUPERVISORS**

- A-30
- Positions Added
- 4/5 Vote
- Change Order

**Prev. Agn. Ref.:**

**District: All**

**Agenda Number:**

**9-7**

REC'D APR 21 11:47

APPROVE

BY: Samuel [Signature]

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CLERK / BOARD OF SUPERVISORS  
2014 APR 22 PM 1:59

9-7

**SUBMITTAL TO THE BOARD OF SUPERVISORS, COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**

**FORM 11:** Action on an advisory arbitration opinion in accordance with the Memorandum of Understanding ("MOU") Between the County of Riverside and the Riverside Sheriff's Association (RSA) Law Enforcement Unit (LEU). [District - All] [Total Cost - \$0]

**DATE: April 16, 2014**

**PAGE: 2 of 3**

**BACKGROUND:**

**Summary (continued)**

The RSA filed a grievance alleging that the County failed to pay each member of the SWAT team and Aviation Unit "standby pay", which would be equivalent to one hour's wages for every eight hours of off duty time. The RSA argued that SWAT and Aviation deputies are in perpetual standby status ("standby De Facto") while off duty and are therefore entitled to standby pay whenever they are off work. The arbitrator denied the RSA's grievance as he determined that in order to be considered in a standby status the Department would have had to specifically and affirmatively place the SWAT/Aviation deputies in that status, which had not occurred.

Standby pay is only available on a limited basis under Article IV, Section 3 of the MOU. For example, to qualify deputies must be specifically placed in standby status by the Department Head or designee. When this occurs, the deputies are required to severely restrict their off duty activities (e.g., with respect to alcohol use, distance of travel from home/station, etc.), to render them immediately available for duty. Failure to comply with these requirements can result in discipline. SWAT/Aviation deputies on the other hand when not specifically placed in standby status by the Department are not required to severely restrict their off duty activities. Further, under these circumstances they are not subject to discipline for failing to respond to a call during off duty hours. SWAT/Aviation deputies are only expected as a courtesy to notify their supervisor when they know ahead of time they are not going to be available so the supervisor can save valuable time by instead contacting deputies who have not made that notification.

Further, SWAT/Aviation deputies are already compensated for the demands of their assignments. SWAT deputies earn a premium of \$1.85/hour for all hours worked. Aviation deputies earn a premium of \$3.85/hour, \$3.10/hour or \$1.55/hour depending on whether their classification is Chief Pilot, Pilot, or Tactical Flight Officer. In addition, when deputies respond to emergencies during off-duty hours they generally receive overtime at one and one half times their regular rate. If the SWAT/Aviation deputies were found to be on standby for all of their off-duty hours, as the RSA asserts, they would be entitled to fifty-six hours of pay for every forty hours worked, which would be an approximately 40% increase in pay for each of the over thirty deputies assigned to SWAT/Aviation.

The County having to pay all SWAT/Aviation deputies standby pay on a De Facto basis would be an unreasonable outcome, and the arbitrator determined that "A fair reading of the MOU language at issue is that an affirmative act by the Department head or designee specific to a deputy is required before the deputy becomes eligible for standby pay", and that the County did not violate the MOU by failing to pay standby pay to members of the SWAT team and Aviation Unit. Thus, the arbitrator's advisory opinion was in favor of the County as to this grievance.

Recommended Motion: Accept the arbitrator's proposed decision in favor of the County.

**Impact on Residents and Businesses**

No Impact.

**SUPPLEMENTAL:**

**Additional Fiscal Information**

Adoption of the recommended motion as proposed would result in \$0 additional net county costs. However, a decision by the Board to reject the advisory opinion of arbitrator John Steinberg would result in increased costs for the standby pay payments to SWAT/Aviation deputies retroactive to June 14, 2012, and payment of standby pay going forward, which would be equivalent to an approximately 40% increase in their salaries.



**SUBMITTAL TO THE BOARD OF SUPERVISORS, COUNTY OF RIVERSIDE, STATE OF CALIFORNIA**  
**FORM 11: Action on an advisory arbitration opinion in accordance with the Memorandum of Understanding ("MOU") Between the County of Riverside and the Riverside Sheriff's Association (RSA) Law Enforcement Unit (LEU). [District - All] [Total Cost - \$0]**

**DATE: April 16, 2014**

**PAGE: 3 of 3**

**Contract History and Price Reasonableness**

N/A

**ATTACHMENTS:**

- A. The Arbitrator's Advisory Opinion and Award related to Grievance No. R1213-001
- B. RSA's appeal of the Arbitrator's Opinion/Award
- C. County's Opposition Brief to RSA's appeal



# ATTACHMENT A

In the Matter of Arbitration Between:

COUNTY OF RIVERSIDE  
(SHERIFF'S DEPARTMENT),

Employer,

and

RIVERSIDE SHERIFF'S  
ASSOCIATION,

Union.

(Stand-By Duty Premium Pay)

OPINION AND AWARD

The above-captioned matter was litigated before the undersigned, mutually-selected arbitrator on June 6 and 20, and November 14, 2013. The Union (RSA) was originally represented by Raquel Ortega, Esq., Hayes & Cunningham, and since November 14, 2013 by Adam Chakin, Esq., Oline & Riviere, Coates & Bagula, LLP. The County/Department was represented by Paul D. Knothe, Esq., (with J. Scott Tidemann, Esq., on the brief), Liebert Cassidy Whitmore. All relevant evidence, testimonial and documentary was received, with the proceedings reported by Haley Vergilio, CSR of Esquire Solutions. Both parties argued their respective positions and the evidence record was perfected with the timely receipt of post-hearing briefs.



## ISSUES

The following issues were stipulated to be properly before me for advisory award:

1. Did the County violate Article IV, Section 3 of the parties' MOU by failing to pay standby pay to the members of the SWAT Team and Aviation Unit ?
2. If so, what is the recommended remedy?

## BACKGROUND

While the Department has, for years assigned deputies to Special Weapons and Tactics duties, it was not until 2005 that a formalized Special Enforcement Bureau (SEB) was established, consisting of the Hazardous Device Team, Emergency Services Team (SWAT) and the Aviation Unit. Within SWAT there is a Fugitive Warrant Team, a Vehicle Enforcement Team (ROVE) and three situation squads. Since 2008 the following material provision has been part of the parties' Memorandum of Understanding (MOU):

Article IV, Section 3.A: Standby Duty. "Whenever placed by the Department Head specifically on duty, an employee otherwise off-duty shall be compensated for such duty by an additional payment of one (1) hour straight time pay for each eight (8) hours of standby duty. Said compensation shall be in addition to the employee's regular salary entitlement. Standby duty compensation shall cease when the employee reports to work."

At the time the hearing commenced there were 44 sworn personnel assigned to SWAT-Aviation. Of these, the only deputies receiving standby pay (In addition to a Community Service Officer) are those on the Hazardous Device Team. The failure of the other non-supervisory personnel to receive standby pay was grieved by RSA on July 20, 2012. At all times since the County has denied the grievances, which has led to this advisory arbitration. The underlying facts are not in dispute and will be referenced in the parties' respective arguments and/or the Discussion portion of this award.

#### SUMMARY OF PARTY POSITIONS<sup>1</sup>

RSA: The term "standby duty" is not a word of art and is understood by Department personnel, including management, to be synonymous with "on call" and "subject to call." That SWAT/Aviation deputies are on call, or standby, is evidenced by the Department's attesting to the County, in order for SWAT team members and similarly-situated deputies in the Department to take County vehicles home, that those deputies are on call 24 hours per day, 7 days a week (24/7).

The essential nature of the Special Enforcement assignment is additional evidence of the deputies' "on call" or "standby" status. Deputies must remain immediately available for service and be able to respond to call-outs within 30 minutes. They must be in physical condition to respond and therefore can only

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<sup>1</sup> All arguments of the parties, as well as their citations, have been considered whether or not specifically referenced hereinafter.

consume limited amounts of alcohol when off the clock. They must notify supervision in advance when unable to respond, and if they do this too often they will be removed from their desired position. They must carry a cell phone with them at all times so as to be contacted. When they go anywhere with family they must take two vehicles so the deputies can respond as soon as possible.

The Department's attempt to distinguish between being "on call" and "standby" is artificial, or superficial at best. By virtue of their job requirements as well as by written documentation there is every reason to find Special Enforcement Bureau (SEB) deputies are on stand-by duty as set forth in the MOU. SEB deputies are entitled to the contractual benefit of stand-by pay.

County/Department: The clear meaning of "standby" duty under the parties' MOU is that the extra benefit of being on such status is provided for the limited few who have been specifically assigned to or placed in this category. None of the SWAT/Aviation deputies have been so placed.

The Association cannot prove that deputies have been placed on *de facto* standby as alleged. Unlike true standby employees, SWAT/Aviation deputies can consume alcohol and engage in distant travel when off duty. They are not required to request or to receive permission from the assigning sergeant when unavailable for call-out, but are merely requested to so advise so as not to waste valuable time when it is necessary to call in deputies in case of emergency. There are no

disciplinary consequences attached to removing oneself from call.<sup>2</sup>

It is irrelevant that by County policy deputies are allowed to take vehicles home while off duty on the condition they are on call 24/7. The requirements stated in such policy apply County-wide and are not germane as to whether a deputy is on standby duty within the terms of the parties' MOU, an application unique to the Department.

Special Enforcement assignment is a desired one with additional benefits already attaching thereto, and deputies covet that assignment knowing they would not be receiving standby pay. RSA cannot secure this additional compensation for SWAT/Aviation deputies via arbitration as contrasted with negotiations. These deputies are not entitled to the 40% increase they are seeking herein, where SBC rollouts are very limited.

#### DISCUSSION

As the vast majority of deputies involved are members of SWAT, that is how the affected class will be referenced hereinafter, with the understanding that the class includes Aviation deputies. Being a member of SWAT is a sought-after, voluntary assignment to which deputies have strived without any necessary understanding they would be entitled to an additional 16 hours of straight-time paid per week for being on call.<sup>3</sup> Such payments have not been made pursuant to the

<sup>2</sup> Although recognizing a SWAT deputy does risk reassignment if he/she is unavailable too often.

<sup>3</sup> Assuming a 40-hour week.

parties' MOU although the current standby pay provision has been in effect since 2008, if not earlier. The alleged failure to pay standby pay to SWAT deputies was not grieved until July, 2012.

The Association is charged with the burden of proving SWAT deputies have been placed on standby duty notwithstanding the absence of any written or otherwise direct assignment to that effect. In order to prevail, RSA must convincingly demonstrate the contractual requirement of being placed . . . "specifically" . . . on such status "by the "Department Head," or his designee, does not require an affirmative oral or written assignment to that status, but may be satisfied if the duties and obligations attendant to the SWAT assignment meet, *de facto*, the necessary conditions of being on standby.

That is a difficult burden to meet in light of there being no evidence of a negotiating history signifying such an application was the mutual intent of the parties, and given the fact that there is no practice of a binding nature to that effect. In fact, the practice has been contrary . . . one of non-payment. Accordingly, to prevail, the Association must demonstrate every facet of the SWAT deputies' off-duty requirements are virtually identical to those deputies the Department has specifically placed on standby duty.

As compared with a deputy on standby, a SWAT deputy, or others who are merely subject to call, according to the evidence as a whole, may travel beyond a one-half hour range and can consume alcohol (with the understanding the deputy

may not be impaired). Where a standby deputy is subject to discipline if unable to respond, and must first have been granted permission to remove himself/herself from call, the deputy merely being subject to call will not face discipline if he/she cannot respond. Their giving advance notice of unavailability to the Department is not a necessity, but is merely an expected courtesy. Potential removal from one's voluntary SWAT position for continued unavailability is different from a disciplinary performance failure. In volunteering for SWAT duty deputies are aware of the limitations placed upon them by virtue of their being on on-call status and they have been accepting thereof.

Notwithstanding any intermingling of terms by supervision or management as to "on-call", "subject to call", or "standby", and even though the Department signified to the County that a deputy is required to respond to call-outs 24/7, that is not sufficient to convincingly demonstrate the parties either mutually intended to add an additional one hour premium pay for each 16 hours of deputies' off-duty time on the chance that some of them, rarely all, would be called in for unexpected or emergency services.<sup>4</sup>

A fair reading of the MOU language at issue is that an affirmative act by the Department head or designee specific to a deputy is required before the deputy becomes eligible for standby pay. Without passing judgment as to whether the

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<sup>4</sup> In the 29-month period between 1/1/11-5/3/13, there were 51 SWAT activations of which 36 were high-risk search warrants.

affected class is deserving of this benefit, it is for the parties to make that decision by virtue of the collective bargaining process, and not for the arbitrator to impose by quasi-judicial fiat or to even suggest, based on this evidence record, that be the case.

AWARD

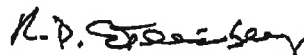
Having fully reviewed the evidence record, upon due deliberation and for the reasons set forth above, the undersigned arbitrator hereby renders the following Award:

The County did not violate Article IV, Section 3 of the parties' MOU by failing to pay standby pay to the members of the SWAT Team and Aviation Unit.

Accordingly, it is recommended that the denial of the grievance by the County/Department be affirmed.

Dated this 18<sup>th</sup> day of March, 2014.

Respectfully,



Robert D. Steinberg  
Arbitrator





# **ATTACHMENT B**



1 DOUGLAS F. OLINS, ESQ. [SBN 55977]  
2 ADAM E. CHAIKIN, ESQ. [SBN 199458]  
3 OLINS RIVIERE COATES and BAGULA, LLP  
4 2214 Second Avenue  
5 San Diego, CA 92101  
6 (619) 272-4235  
7 (619) 272-4309  
8 Attorneys for RIVERSIDE SHERIFFS' ASSOCIATION

9  
10 **BEFORE RIVERSIDE COUNTY BOARD OF SUPERVISORS**

11 RIVERSIDE SHERIFFS' ASSOCIATION,

12 Union,

13 and

14 COUNTY OF RIVERSIDE,

15 Employer.

Re: SEB STANDBY PAY

Grievance No. R1213-001

RSA APPEAL OF HEARING OFFICER  
ROBERT STEINBERG'S OPINION AND  
AWARD

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1 I. APPEAL.

2 The Riverside Sheriffs' Association ("RSA") hereby submits its appeal of the opinion and award  
3 of Hearing Officer Robert Steinberg in a timely fashion as permitted by the Law Enforcement Unit  
4 Memorandum of Understanding ("LEU MOU"), Article XI, Section 12(J).<sup>1</sup>

5 The issue before the Riverside County Board of Supervisors ("Board") is straight forward:  
6 whether the County violated Article IV, Section 3 of the parties' LEU MOU by failing to pay standby  
7 pay to members of the Special Weapons and Tactics Team ("SWAT") aka Emergency Services Team  
8 ("EST") and Aviation since June 14, 2012.<sup>2</sup>

9 By way of background, the Special Enforcement Bureau ("SEB") of the Sheriff's Department  
10 consists of the: Hazardous Device Team; SWAT/EST; and Aviation. (Court Reporter's Transcript  
11 ("RT") Berry 36:2-8.)<sup>3</sup> Within SWAT, there are five different squads: fugitive warrant enforcement  
12 team; Regional Off-Highway Vehicle Enforcement Team ("ROVE"); and three saturation squads. (RT  
13 Berry 36-37.)

14 When on standby duty, the MOU requires that SWAT and Aviation members are paid premium  
15 pay. In particular, the MOU provides: "Standby Duty. Whenever placed by the Department Head  
16 specifically on duty, an employee otherwise off duty shall be compensated for such duty by an  
17 additional payment equal to one (1) hour straight time pay for each eight (8) hours of standby duty. Said  
18 compensation shall be in addition to the employee's regular salary entitlement. Standby duty  
19 compensation shall cease when the employee reports to work." (Joint Exhibit 1, Article IV, Section 3A,  
20 page 15.)

21 In a grievance petition dated July 20, 2012, RSA sought pursuant to the parties' MOU, Article  
22 IV, Section 3, to compel the County to pay "standby pay" premium pay to SEB members assigned to  
23 SWAT and Aviation. (Joint Exhibit 3.) The County denied the grievance. (Joint Exhibit 4.)

24 As discussed below in more detail, the SWAT and Aviation members were placed on standby  
25 duty by the Sheriff's Department, and the members should have been paid the premium pay, as required

26 \_\_\_\_\_  
27 <sup>1</sup> A true and correct copy of the opinion and award is attached hereto as Exhibit A.

28 <sup>2</sup> A more expansive brief of the arguments in support of RSA's position is attached hereto as Exhibit B, which is  
incorporated herein in its entirety.

<sup>3</sup> As the court reporter's transcript and exhibits are voluminous, they have not been attached hereto (other than a few  
select exhibits). However, should the Board wish to review them, they are available upon request.

1 by the MOU. The Hearing Officer's contention that the members were not on standby duty is incorrect  
2 for the following reasons.

3 **A. The County's Board Policy D-10 Demonstrates That SWAT and Aviation Were**  
4 **Specifically Placed on Standby Duty.**

5 Board Policy D-10 ("D-10") establishes that SEB members were placed on standby duty. D-10  
6 sets forth the County's purpose, policy, and criteria for overnight retention of County vehicles.<sup>4</sup> (RSA  
7 Exhibit 3.)

8 In order for the Sheriff's Department and SEB to obtain overnight county vehicles for SWAT  
9 and Aviation members, they were required to (and did) submit a written request to the County,  
10 representing that the criteria of D-10 were met, including that the SEB members were "assigned job  
11 duties [which] placed them on call continuously, 24 hours a day, 7 days a week, year-round (24x7)."  
12 (RSA Exhibit 3, page 3; see also County Exhibits 14, 15, and 16, and RSA Exhibits 4, 5, 6, 7, and 8.)  
13 The Hearing Officer found that "the Department signified to the County that a deputy is required  
14 to respond to call-outs 24/7." (Opinion and Award, p. 7, lines 11-12.) In other words, the Sheriff's  
15 Department represented to the County that SWAT and Aviation members were on standby duty, which  
16 is why they were entitled to retention of overnight county vehicles. By submitting the request for  
17 overnight retention of county vehicles, the Sheriff's Department and SEB specifically placed the SEB  
18 members on standby duty.

19 At the hearing, the County argued that "standby" was different than "on call." The County's  
20 own internal documents prove otherwise. Joint Exhibit 7 contains several department directives wherein  
21 the terms "standby" and "on call" are used interchangeably.<sup>5</sup> Sheriff's Captain Berry and Lieutenant  
22 Kondrit also used the terms "standby" and "on call" interchangeably during their testimony. (RT Berry  
23 59:12-18; 132:6; Kondrit 363:8-20; 368:11-16.) The Hearing Officer found that SWAT and Aviation  
24 members were on call. (Opinion and Award, p. 7, line 8 ("by virtue of their being on on-call status").)  
25

26 <sup>4</sup> A true and correct copy of Board policy D-10 is attached hereto as Exhibit C (though it is labeled Exhibit 3 in the  
27 Hearing Officer's administrative record and will be referenced as Exhibit 3 throughout the instant brief for purposes of clarity  
and consistency).

28 <sup>5</sup> A true and correct copy of the applicable departmental directives are attached hereto as Exhibit D (though it is  
labeled Exhibit 7 in the Hearing Officer's administrative record and will be referenced as Exhibit 7 throughout the instant  
brief for purposes of clarity and consistency).

1  
2 **B. The Evidence At The Hearing Proved That The Conditions Placed Upon SWAT And**  
3 **Aviation Resulted In Them Having Been Placed On Standby De Facto.**

4 The actions of the County and Sheriff's Department resulted in the SEB members having been  
5 placed on standby de facto. "Standby" is defined by the County as: An employee on standby or on-call  
6 status shall remain immediately available to respond to an emergency during off-duty hours and shall be  
7 subject to the following restrictions:

- 8 1. Remain available for immediate contact via telephone and/or pager.  
9 2. Refrain from consuming alcoholic beverages and/or medication to the extent that they would  
10 interfere with responding to or performing their duties.  
11 3. Remain in the general vicinity of their home or duty station during the on-call period.  
12 4. Arrange their personal affairs to ensure their immediate response to a call out; employees are  
13 expected to be en route to the scene within thirty (30) minutes of notification.

14 (Joint Exhibit 7.)

15 The evidence at the hearing proved that SWAT and Aviation members met the County's  
16 definition of "standby" as follows:

- 17 • The members of SWAT and Aviation must remain immediately available to respond to  
18 an emergency during off-duty hours. SWAT and Aviation are not free to spend their off  
19 duty hours as they please. Instead, the SEB expected SWAT members that were off duty  
20 to participate in all activations. (RT Penning 270:3-4.) In addition, there was an  
21 expectation that SWAT members would let their sergeant know in advance if they would  
22 be unavailable for a call out during their off duty hours. (RT Berry 179:23-25; 180:1-5;  
23 181:4-12; Penning 270:1-3; Kondrit 366:16-19; Lelevier 377:5-8.) Consistent therewith,  
24 in the checklist of expectations for new members on the SWAT squad drafted by  
25 Sergeant Walsh, he notes "Expected to respond unless I was previously briefed." (RT  
26 Walsh 80:7-20; RSA Exhibit 1.)  
27 • Captain Berry conceded that whether a SWAT member remained available during his  
28 off-duty hours was one attribute looked at by the department when determining whether

1 the member was dedicated to SWAT. (RT Berry 247:4-8.) Further, performance  
2 evaluations for SWAT members expressly indicated whether the members remained  
3 available during their off-duty hours. (RT Berry 247:17-25; Walsh 86:1-4; Kondrit  
4 367:14-23.) If members remained available during their off-duty hours, then it was  
5 mentioned under the loyalty section of the performance evaluation, as the members were  
6 given "exceeds standard performance" in that category. (RT Walsh 86:7-10.)

7 • If a SWAT member did not remain available too often during off duty hours, then it was  
8 "addressed" by the department. (RT Penning 270:9-11.) For example, if Mr. Penning  
9 was unavailable during his off-duty hours, it was passed up the chain of command and  
10 reflected negatively on his loyalty to the team. (RT Penning 274:16-19.) Mr. Penning  
11 was told by the department that he could not be unavailable during his off-duty hours.  
12 (RT Penning 273:13-22.) Being unavailable too often during off duty hours would get a  
13 member thrown off the team. (RT Penning 270:14-19.) The Hearing Officer determined  
14 that SWAT members risked reassignment if they were unavailable too often. (Opinion  
15 and Award, p. 5, fn 2.)

16 • If a deputy was routinely unavailable during off-duty hours, then that would be  
17 problematic, and it would be frowned upon. (RT Lelevier 378:5-14.) If a deputy was  
18 unavailable or if they missed a call and they had not let the sergeant know in advance, it  
19 was a problem, and they would be counseled on it. (RT Lelevier 378:1-3.) At least one  
20 deputy was counseled (disciplined) for not answering his phone during his off-duty  
21 hours. (RT Lelevier 380:5-20.)

22 • SWAT and Aviation members during off-duty hours were required to refrain from  
23 consuming alcoholic beverages and/or medication to the extent that they would interfere  
24 with responding to or performing their duties. The Sheriff's Department did not want all  
25 SEB members to be out drinking during their off-duty hours at the same time. (RT  
26 Lelevier 375:16-24.) This was because the Department needed people available during  
27 their off-duty hours in the event of a call out. (RT Lelevier 376 1-2.) It was expected  
28 that SEB members would remain sober during their off-duty hours unless a member



1 specifically stated that he/she would be unavailable during off-duty hours. (RT Lelevier  
2 376:11-13.) The Hearing Officer determined that based on the evidence, SWAT  
3 members may not be impaired during their off-duty hours. (Opinion and Award, p. 6,  
4 last line, and p. 7 first line.)

5 • SWAT and Aviation members would remain available for immediate contact via  
6 telephone and/or pager during their off-duty hours. All SWAT members were provided  
7 with a County-issued Sprint telephone. (RT Berry 146:25; 147:1.) The County-issued  
8 phone was used to call the SWAT team members to come in to work during their off-duty  
9 hours. (RT Berry 147:4:17; Kondrit 366:12-15.) It was unacceptable for a SWAT  
10 member to not answer his county-issued phone during off-duty hours. (RT Penning  
11 281:23-25; 282:1-2.) At least one deputy was counseled (disciplined) for not answering  
12 his phone during his off-duty hours. (RT Lelevier 380:5-20.)

13 • SWAT and Aviation members were required to remain in the general vicinity of their  
14 home or duty station during their off-duty hours and arrange their personal affairs to  
15 ensure their immediate response to a call out (expected to be en route to the scene within  
16 thirty (30) minutes of notification). The Department expected the SEB members to be  
17 ready when called during their off-duty hours. (RT Lelevier 375:16-24.) During off-duty  
18 hours, SEB members needed to answer their sergeant when called and ready to respond  
19 on a moment's notice. (RT Lelevier 377:1-4.) Off-duty SWAT members were expected  
20 to be on the road and en route to the emergency within 30 minutes of being called in.  
21 (RT Berry 153:10-19.) See also RSA Exhibit 3, which provides that the members were  
22 required to respond within 30 minutes of notification in order to be eligible for retention  
23 of an overnight county vehicle.

24 These facts establish that SWAT and Aviation members were on standby duty during their off-  
25 duty hours, and the County breached the MOU by failing to pay them premium pay.

26 **II. TIMELINESS OF APPEAL.**

27 The LEU MOU, Article XI, Section 12(J) provides that RSA may appeal the Hearing Officer's  
28 opinion and award to the Board within 15 calendar days of the date of the award. The opinion and

1 award was issued on March 18, 2014. As such, the appeal was filed in a timely fashion.

2 The Board may either accept or reject the Hearing Officer's opinion and award, or accept part  
3 and reject the rest. If RSA is dissatisfied with the Board's decision, it may bring an action in the  
4 Superior Court to enforce the LEU MOU.

5 Alternatively, if the Board fails to rule on the appeal within 45 days, RSA will have exhausted its  
6 administrative remedies and may bring an action in the Superior Court to enforce the LEU MOU.

7 **VII. CONCLUSION.**

8 For the foregoing reasons, RSA respectfully requests that the Board: reject the Hearing Officer's  
9 opinion and award; sustain the grievance; determine that the County violated Article IV, Section 3A of  
10 the parties' MOU by failing to pay standby pay to members of SWAT and Aviation since June 14, 2012;  
11 order the County to comply with Article IV, Section 3 of the parties' MOU going forward; and order the  
12 County to make RSA and its members whole from June 14, 2012, going forward.

13 *Respectfully submitted,*

14 Dated: March 27, 2014

**OLINS RIVIERE COATES AND BAGULA**



Adam E. Chaikin, Esq.  
Attorney for RIVERSIDE SHERIFFS'  
ASSOCIATION

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**EXHIBIT "A"**

1. The following information is being provided to you for your information only. It is not intended to constitute an offer of insurance or any other financial product. Please read this information carefully and do not rely on it as a basis for any investment decision. The information is provided for your information only and is not intended to constitute an offer of insurance or any other financial product. Please read this information carefully and do not rely on it as a basis for any investment decision.

2. The information is provided for your information only and is not intended to constitute an offer of insurance or any other financial product. Please read this information carefully and do not rely on it as a basis for any investment decision.

In the Matter of Arbitration Between:

COUNTY OF RIVERSIDE  
(SHERIFF'S DEPARTMENT),

Employer,

and

RIVERSIDE SHERIFF'S  
ASSOCIATION,

Union.

(Stand-By Duty Premium Pay)

OPINION AND AWARD

The above-captioned matter was litigated before the undersigned, mutually-selected arbitrator on June 6 and 20, and November 14, 2013. The Union (RSA) was originally represented by Raquel Ortega, Esq., Hayes & Cunningham, and since November 14, 2013 by Adam Chakin, Esq., Olins & Riviere, Coates & Bagula, LLP. The County/Department was represented by Paul D. Knothe, Esq., (with J. Scott Tidemann, Esq., on the brief), Liebert Cassidy Whitmore. All relevant evidence, testimonial and documentary was received, with the proceedings reported by Haley Vergillo, CSR of Esquire Solutions. Both parties argued their respective positions and the evidence record was perfected with the timely receipt of post-hearing briefs.

## ISSUES

The following issues were stipulated to be properly before me for advisory award:

1. Did the County violate Article IV, Section 3 of the parties' MOU by failing to pay standby pay to the members of the SWAT Team and Aviation Unit ?
2. If so, what is the recommended remedy?

## BACKGROUND

While the Department has, for years assigned deputies to Special Weapons and Tactics duties, it was not until 2005 that a formalized Special Enforcement Bureau (SEB) was established, consisting of the Hazardous Device Team, Emergency Services Team (SWAT) and the Aviation Unit. Within SWAT there is a Fugitive Warrant Team, a Vehicle Enforcement Team (ROVE) and three situation squads. Since 2008 the following material provision has been part of the parties' Memorandum of Understanding (MOU):

Article IV, Section 3.A: Standby Duty. "Whenever placed by the Department Head specifically on duty, an employee otherwise off-duty shall be compensated for such duty by an additional payment of one (1) hour straight time pay for each eight (8) hours of standby duty. Said compensation shall be in addition to the employee's regular salary entitlement. Standby duty compensation shall cease when the employee reports to work."

At the time the hearing commenced there were 44 sworn personnel assigned to SWAT-Aviation. Of these, the only deputies receiving standby pay (in addition to a Community Service Officer) are those on the Hazardous Device Team. The failure of the other non-supervisory personnel to receive standby pay was grieved by RSA on July 20, 2012. At all times since the County has denied the grievances, which has led to this advisory arbitration. The underlying facts are not in dispute and will be referenced in the parties' respective arguments and/or the Discussion portion of this award.

#### SUMMARY OF PARTY POSITIONS<sup>1</sup>

RSA: The term "standby duty" is not a word of art and is understood by Department personnel, including management, to be synonymous with "on call" and "subject to call." That SWAT/Aviation deputies are on call, or standby, is evidenced by the Department's attesting to the County, in order for SWAT team members and similarly-situated deputies in the Department to take County vehicles home, that those deputies are on call 24 hours per day, 7 days a week (24/7).

The essential nature of the Special Enforcement assignment is additional evidence of the deputies' "on call" or "standby" status. Deputies must remain immediately available for service and be able to respond to call-outs within 30 minutes. They must be in physical condition to respond and therefore can only

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<sup>1</sup> All arguments of the parties, as well as their citations, have been considered whether or not specifically referenced hereinafter.

consume limited amounts of alcohol when off the clock. They must notify supervision in advance when unable to respond, and if they do this too often they will be removed from their desired position. They must carry a cell phone with them at all times so as to be contacted. When they go anywhere with family they must take two vehicles so the deputies can respond as soon as possible.

The Department's attempt to distinguish between being "on call" and "standby" is artificial, or superficial at best. By virtue of their job requirements as well as by written documentation there is every reason to find Special Enforcement Bureau (SEB) deputies are on stand-by duty as set forth in the MOU. SEB deputies are entitled to the contractual benefit of stand-by pay.

County/Department: The clear meaning of "standby" duty under the parties' MOU is that the extra benefit of being on such status is provided for the limited few who have been specifically assigned to or placed in this category. None of the SWAT/Aviation deputies have been so placed.

The Association cannot prove that deputies have been placed on *de facto* standby as alleged. Unlike true standby employees, SWAT/Aviation deputies can consume alcohol and engage in distant travel when off duty. They are not required to request or to receive permission from the assigning sergeant when unavailable for call-out, but are merely requested to so advise so as not to waste valuable time when it is necessary to call in deputies in case of emergency. There are no

disciplinary consequences attached to removing oneself from call.<sup>2</sup>

It is irrelevant that by County policy deputies are allowed to take vehicles home while off duty on the condition they are on call 24/7. The requirements stated in such policy apply County-wide and are not germane as to whether a deputy is on standby duty within the terms of the parties' MOU, an application unique to the Department.

Special Enforcement assignment is a desired one with additional benefits already attaching thereto, and deputies covet that assignment knowing they would not be receiving standby pay. RSA cannot secure this additional compensation for SWAT/Aviation deputies via arbitration as contrasted with negotiations. These deputies are not entitled to the 40% increase they are seeking herein, where SBC rollouts are very limited.

#### DISCUSSION

As the vast majority of deputies involved are members of SWAT, that is how the affected class will be referenced hereinafter, with the understanding that the class includes Aviation deputies. Being a member of SWAT is a sought-after, voluntary assignment to which deputies have strived without any necessary understanding they would be entitled to an additional 16 hours of straight-time paid per week for being on call.<sup>3</sup> Such payments have not been made pursuant to the

<sup>2</sup> Although recognizing a SWAT deputy does risk reassignment if he/she is unavailable too often.

<sup>3</sup> Assuming a 40-hour week.



parties' MOU although the current standby pay provision has been in effect since 2008, if not earlier. The alleged failure to pay standby pay to SWAT deputies was not grieved until July, 2012.

The Association is charged with the burden of proving SWAT deputies have been placed on standby duty notwithstanding the absence of any written or otherwise direct assignment to that effect. In order to prevail, RSA must convincingly demonstrate the contractual requirement of being placed . . . "specifically" . . . on such status "by the "Department Head," or his designee, does not require an affirmative oral or written assignment to that status, but may be satisfied if the duties and obligations attendant to the SWAT assignment meet, *de facto*, the necessary conditions of being on standby.

That is a difficult burden to meet in light of there being no evidence of a negotiating history signifying such an application was the mutual intent of the parties, and given the fact that there is no practice of a binding nature to that effect. In fact, the practice has been contrary . . . one of non-payment. Accordingly, to prevail, the Association must demonstrate every facet of the SWAT deputies' off-duty requirements are virtually identical to those deputies the Department has specifically placed on standby duty.

As compared with a deputy on standby, a SWAT deputy, or others who are merely subject to call, according to the evidence as a whole, may travel beyond a one-half hour range and can consume alcohol (with the understanding the deputy

may not be impaired). Where a standby deputy is subject to discipline if unable to respond, and must first have been granted permission to remove himself/herself from call, the deputy merely being subject to call will not face discipline if he/she cannot respond. Their giving advance notice of unavailability to the Department is not a necessity, but is merely an expected courtesy. Potential removal from one's voluntary SWAT position for continued unavailability is different from a disciplinary performance failure. In volunteering for SWAT duty deputies are aware of the limitations placed upon them by virtue of their being on on-call status and they have been accepting thereof.

Notwithstanding any intermingling of terms by supervision or management as to "on-call", "subject to call", or "standby", and even though the Department signified to the County that a deputy is required to respond to call-outs 24/7, that is not sufficient to convincingly demonstrate the parties either mutually intended to add an additional one hour premium pay for each 16 hours of deputies' off-duty time on the chance that some of them, rarely all, would be called in for unexpected or emergency services.<sup>4</sup>

A fair reading of the MOU language at issue is that an affirmative act by the Department head or designee specific to a deputy is required before the deputy becomes eligible for standby pay. Without passing judgment as to whether the

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<sup>4</sup> In the 29-month period between 1/1/11-5/3/13, there were 51 SWAT activations of which 36 were high-risk search warrants.

affected class is deserving of this benefit, it is for the parties to make that decision by virtue of the collective bargaining process, and not for the arbitrator to impose by quasi-judicial fiat or to even suggest, based on this evidence record, that be the case.

AWARD

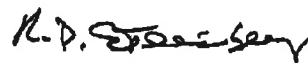
Having fully reviewed the evidence record, upon due deliberation and for the reasons set forth above, the undersigned arbitrator hereby renders the following Award:

The County did not violate Article IV, Section 3 of the parties' MOU by failing to pay standby pay to the members of the SWAT Team and Aviation Unit.

Accordingly, it is recommended that the denial of the grievance by the County/Department be affirmed.

Dated this 18<sup>th</sup> day of March, 2014.

Respectfully,



Robert D. Steinberg  
Arbitrator

**EXHIBIT "B"**

1 DOUGLAS F. OLINS, ESQ. [SBN 55977]  
2 ADAM B. CHAIKIN, ESQ. [SBN 199458]  
3 OLINS RIVIERE COATES and BAGULA  
4 2214 Second Avenue  
5 San Diego, CA 92101  
6 (619) 272-4235  
7 (619) 272-4309  
8 Attorneys for RIVERSIDE SHERIFFS' ASSOCIATION

9  
10 **BEFORE IMPARTIAL HEARING OFFICER ROBERT STEINBERG**

11 IN THE MATTER OF ARBITRATION  
12 BETWEEN,  
13 RIVERSIDE SHERIFFS' ASSOCIATION,  
14 Union,  
15 and  
16 COUNTY OF RIVERSIDE,  
17 Employer.

Re: SEB STANDBY PAY  
Grievance No. R1213-001  
RSA POST HEARING BRIEF

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        3. Remain Available for Immediate Contact. .... 14

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*Cal. Gov. Code § 25303* .....

1 **I. INTRODUCTION**

2 The issue before the Hearing Officer is straight forward: whether the County violated Article IV,  
3 Section 3 of the parties' Law Enforcement Unit Memorandum of Understanding 2008-2011 and 2012-  
4 2016 Tentative Agreement ("MOU") by failing to pay standby pay to members of the Special Weapons  
5 and Tactics Team ("SWAT") aka Emergency Services Team ("EST") and Aviation since June 14, 2012.

6 By way of background, the Special Enforcement Bureau ("SEB") of the Sheriff's Department  
7 consists of the: Hazardous Device Team; SWAT/EST; and Aviation. (Court Reporter's Transcript  
8 ("RT") Berry 36:2-8.) Within SWAT, there are five different squads: fugitive warrant enforcement  
9 team; Regional Off-Highway Vehicle Enforcement Team ("ROVE"); and three saturation squads. (RT  
10 Berry 36-37.)

11 When on standby duty, the MOU requires that SWAT and Aviation members are paid premium  
12 pay. In particular, the MOU provides: "Standby Duty. Whenever placed by the Department Head  
13 specifically on duty, an employee otherwise off duty shall be compensated for such duty by an  
14 additional payment equal to one (1) hour straight time pay for each eight (8) hours of standby duty. Said  
15 compensation shall be in addition to the employee's regular salary entitlement. Standby duty  
16 compensation shall cease when the employee reports to work." (Joint Exhibit 1, Article IV, Section 3A,  
17 page 15.)

18 In a grievance petition dated July 20, 2012, RSA sought pursuant to the parties' MOU, Article  
19 IV, Section 3, to compel the County to pay "standby pay" premium pay to SEB members assigned to  
20 EST/SWAT and Aviation. (Joint Exhibit 3.) The County denied the grievance. (Joint Exhibit 4.)

21 As discussed below in more detail, the SWAT and Aviation members were placed on standby  
22 duty by the Sheriff's Department, and the members should have been paid the premium pay, as required  
23 by the MOU. The County's contention that the members were not on standby duty is incorrect for the  
24 following reasons.

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1 First, although the County would have the Hearing Officer believe that the SEB was not  
2 specifically placed on standby by a department head, the County's own internal documents prove  
3 otherwise. In particular, Board Policy D-10 ("D-10") establishes that SEB members were placed on  
4 standby duty. D-10 sets forth the County's purpose, policy, and criteria for overnight retention of  
5 County vehicles. (RSA Exhibit 3.)

6 In order for the Sheriff's Department and SEB to obtain overnight county vehicles for SWAT  
7 and Aviation members, they were required to (and did) submit a written request to the County,  
8 representing that the criteria of D-10 were met, including that the SEB members were "assigned job  
9 duties [which] placed them on call continuously, 24 hours a day, 7 days a week, year-round (24x7)." (RSA Exhibit 3, page 3; see also County Exhibits 14, 15, and 16, and RSA Exhibits 4, 5, 6, 7, and 8.) In  
10 other words, the Sheriff's Department represented to the County that SWAT and Aviation members  
11 were on standby duty, which is why they were entitled to retention of overnight county vehicles.  
12

13 Request forms for overnight retention of county vehicles were filled out quarterly for SWAT and  
14 Aviation team members, and the Sheriff's Department and SEB have always represented that the criteria  
15 of D-10 were met. (RT Walsh 114:1-25.) The written requests made by the Sheriff's Department and  
16 SEB for overnight retention of county vehicles were consistent with D-10, otherwise the County would  
17 not have authorized the overnight retention of county vehicles for SWAT and Aviation. (RT Berry  
18 153:1-6; 156:1-5.) *By submitting the request for overnight retention of county vehicles, the Sheriff's*  
19 *Department and SEB specifically placed the SEB members on standby duty.*

20 At the hearing, the County tried to confuse things by arguing that "standby" was somehow  
21 different than "on call" which was somehow different than "subject to call." Once again, the County's  
22 own internal documents prove otherwise. Joint Exhibit 7 contains several department directives wherein  
23 the terms "standby" and "on call" are used interchangeably. Notably, Sheriff's Captain Berry also used  
24 the terms "standby" and "on call" interchangeably during his testimony. (RT Berry 59:12-18; 132:6.)  
25 So did Lieutenant Kondrit. (RT Kondrit 363:8-20; 368:11-16.)

26 Second, even if the Hearing Officer determines that the SEB members were not specifically  
27 placed on standby by the Sheriff's Department and SEB by way of the written request for retention of  
28 overnight county vehicles, the actions of the County, Sheriff's Department, and SEB placed the SEB

1 members on standby de facto. The County's "department directives" give a definition of standby/on-  
2 call (Joint Exhibit 7), which the SWAT and Aviation members met:

3 • The members of SWAT and Aviation must remain immediately available to respond to  
4 an emergency during off-duty hours. SWAT and Aviation are not free to spend their off  
5 duty hours as they please. Instead, the SEB expected SWAT members that were off duty  
6 to participate in all activations. (RT Penning 270:3-4.) In addition, there was an  
7 expectation that SWAT members would let their sergeant know in advance if they would  
8 be unavailable for a call out during their off duty hours. (RT Berry 179:23-25; 180:1-5;  
9 181:4-12; Penning 270:1-3; Kondrit 366:16-19; Lelevier 377:5-8.) Consistent therewith,  
10 in the checklist of expectations for new members on the SWAT squad drafted by  
11 Sergeant Walsh, he notes "Expected to respond unless I was previously briefed." (RT  
12 Walsh 80:7-20; RSA Exhibit 1.)

13 • Captain Berry conceded that whether a SWAT member remained available during his  
14 off-duty hours was one attribute looked at by the department when determining whether  
15 the member was dedicated to SWAT. (RT Berry 247:4-8.) Further, performance  
16 evaluations for SWAT members expressly indicated whether the members remained  
17 available during their off-duty hours. (RT Berry 247:17-25; Walsh 86:1-4; Kondrit  
18 367:14-23.) If members remained available during their off-duty hours, then it was  
19 mentioned under the loyalty section of the performance evaluation, as the members were  
20 given "exceeds standard performance" in that category. (RT Walsh 86:7-10.)

21 • If a SWAT member did not remain available too often during off duty hours, then it was  
22 "addressed" by the department. (RT Penning 270:9-11.) For example, if Mr. Penning  
23 was unavailable during his off-duty hours, it was passed up the chain of command and  
24 reflected negatively on his loyalty to the team. (RT Penning 274:16-19.) Being  
25 unavailable too often during off duty hours would get a member thrown of the team. (RT  
26 Penning 270:14-19.) Mr. Penning was told by the department that he could not be  
27 unavailable during his off-duty hours. (RT Penning 273:13-22.)

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- 1 • If a deputy was routinely unavailable during off-duty hours, then that would be  
2 problematic, and it would be frowned upon. (RT Lelevier 378:5-14.) If a deputy was  
3 unavailable of if they missed a call and they had not let the sergeant know in advance, it  
4 was a problem, and they would be counseled on it. (RT Lelevier 378:1-3.) At least one  
5 deputy was counseled for not answering his phone during his off-duty hours. (RT  
6 Lelevier 380:5-20.)
- 7 • SWAT and Aviation members during off-duty hours were required to refrain from  
8 consuming alcoholic beverages and/or medication to the extent that they would interfere  
9 with responding to or performing their duties. The Sheriff's Department did not want all  
10 SEB members to be out drinking during their off-duty hours at the same time. (RT  
11 Lelevier 375:16-24.) This was because the department needed people available during  
12 their off-duty hours in the event of a call out. (RT Lelevier 376 1-2.) It was expected  
13 that SEB members would remain sober during their off-duty hours unless a member  
14 specifically stated that he/she would be unavailable during off-duty hours. (RT Lelevier  
15 376:11-13.)
- 16 • SWAT and Aviation members would remain available for immediate contact via  
17 telephone and/or pager during their off-duty hours. All SWAT members were provided  
18 with a county-issued Sprint telephone. (RT Berry 146:25; 147:1.) The county-issued  
19 phone was used to call the SWAT team members to come in to work during their off-duty  
20 hours. (RT Berry 147:4:17; Kondrit 366:12-15.) It was unacceptable for a SWAT  
21 member to not answer his county-issued phone during off-duty hours. (RT Penning  
22 281:23-25; 282:1-2.) At least one deputy was counseled for not answering his phone  
23 during his off-duty hours. (RT Lelevier 380:5-20.)
- 24 • SWAT and Aviation members were required to remain in the general vicinity of their  
25 home or duty station during their off-duty hours and arrange their personal affairs to  
26 ensure their immediate response to a call out (expected to be en route to the scene within  
27 thirty (30) minutes of notification). The department expected the SEB members to be  
28 ready when called during their off-duty hours. (RT Lelevier 375:16-24.) During off-duty

1 hours, SEB members needed to answer their sergeant when called and ready to respond  
2 on a moment's notice. (RT Lelevier 377:1-4.) Off-duty SWAT members were expected  
3 to be on the road and en route to the emergency within 30 minutes of being called in.  
4 (RT Berry 153:10-19.) See also RSA Exhibit 3, which provides that the members were  
5 required to respond within 30 minutes of notification in order to be eligible for retention  
6 of an overnight county vehicle.

7 Under either scenario, SWAT and Aviation members were on standby duty during their off-duty  
8 hours, and the County breached the MOU by failing to pay them premium pay.

9 **II. FACTS**

10 **A. Procedural Facts.**

11 In a grievance petition dated July 20, 2012, RSA sought pursuant to the parties' MOU, Article  
12 IV, Section 3A, to compel the County to pay "standby pay" premium pay to some members of the SEB,  
13 specifically those members assigned to the EST/SWAT and Aviation. (Joint Exhibit 3.)

14 The County denied the grievance. (Joint Exhibit 4.) On August 31, 2012, RSA demanded a  
15 hearing on the grievance. (Joint Exhibit 5.) Thereafter, the parties selected Hearing Officer Robert  
16 Steinberg.

17 The hearing took place on June 6, June 20, and November 14, 2013. At the hearing held in  
18 Riverside, California, RSA was represented by Raquel Ortega on June 6 and 20, 2013, and by Adam  
19 Chaikin on November 14, 2013. The County was represented by Paul Knoth. Hayley Virgilio acted as  
20 the CSR.

21 RSA submitted 13 exhibits, all of which were admitted. The County submitted 17 exhibits, all of  
22 which were admitted. In addition, the parties submitted 8 joint exhibits, all of which were admitted.

23 The parties agreed to submit post hearing briefs in lieu of closing argument. (RT 402:20-25.)  
24 As such, RSA now submits its post hearing brief in a timely fashion.

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1           **B. Substantive Facts.**

2           The SEB of the Sheriff's Department consists of the: Hazardous Device Team; SWAT aka EST;  
3 and Aviation. (RT Berry 36:2-8.) Within SWAT, there are five different squads: fugitive warrant  
4 enforcement team; Regional Off-Highway Vehicle Enforcement Team ("ROVE"); and three saturation  
5 squads. (RT Berry 36-37.)

6           In order to become a member of the SWAT team, a deputy sheriff must have: been on the job for  
7 at least two years; satisfactory or meets standard performance evaluation; a written recommendation  
8 from their current commander; pass a basic physical fitness test; complete a firearms qualification and  
9 proficiency course; complete an oral interview; participate in an 80 hour state approved basic SWAT  
10 school; and get selected from a pool of eligible candidates. (RT Berry 40-41.) An Aviation team  
11 member also goes through a process to become eligible to be selected as a tactical flight officer. (RT  
12 Berry 12:20.)

13           As of the first day of the hearing, SWAT had 31 deputy positions, 5 corporal positions, 5  
14 sergeant positions, 2 lieutenant positions, and Captain Berry, though not all of the positions were filled.  
15 (RT Berry 143:21-25; 144:1-2.)

16           The SWAT deputies work a 4/10 schedule: two squads work Sunday through Monday, and three  
17 squads work Wednesday through Saturday. (RT Berry 145:2-9.) All SWAT members are usually off  
18 duty between 1:00 am and 7:00 am. (RT Berry 146:10:23.)

19 A SWAT team member may be removed at the discretion of the division chief. (RT Berry 239:11-14.)  
20 A SWAT member has no right to challenge the removal. (RT Berry 250:18-20.)

21 **III. STIPULATED STATEMENT OF THE ISSUE**

22           The parties stipulated that the issue is:

23           1. Did the County violate Article IV, Section 3 of the parties' MOU by failing to pay  
24 standby pay to members of the SWAT team and Aviation unit since June 14, 2012?

25           2. If so, what is the recommended remedy?

26 (RT 8:4-16.)

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1 **IV. RELEVANT SECTIONS OF THE MEMORANDUM OF UNDERSTANDING "MOU"**

2 Law Enforcement Unit Memorandum of Understanding 2008-2011 and 2012-2016 Tentative  
3 Agreement:

4 1: Article IV, Section 3.A: "Standby Duty. Whenever placed by the Department Head  
5 specifically on duty, an employee otherwise off duty shall be compensated for such duty  
6 by an additional payment equal to one (1) hour straight time pay for each eight (8) hours  
7 of standby duty. Said compensation shall be in addition to the employee's regular salary  
8 entitlement. Standby duty compensation shall cease when the employee reports to work."

9 **V. ARGUMENT**

10 **A. The SEB was Specifically Placed on Standby, and the County is Estopped from**  
11 **Arguing Otherwise.**

12 Although the County would have the Hearing Officer believe that the SEB was not specifically  
13 placed on standby by a department head, the County's own internal documents prove otherwise. In  
14 particular, Board Policy D-10 ("D-10") establishes that SEB members were placed on standby duty. *By*  
15 *submitting the request for overnight retention of county vehicles, the Sheriff's Department and SEB*  
16 *specifically placed the SEB members on standby duty.*

17 D-10 sets forth the County's purpose, policy, and criteria for overnight retention of County  
18 vehicles. (RSA Exhibit 3.) D-10 applies to all departments, including the Sheriff's Department. (RT  
19 Berry 151:4-9; RSA Exhibit 3, page 4.) Oversight-retention of county vehicles is only authorized when  
20 the criteria of D-10 are met. (RT Johnson 393:20-25; 394:1-4; Chow 400:20-22.)

21 Pursuant to the first criterion, overnight retention of county vehicles is not authorized, per D-10,  
22 unless the "department head" has submitted a written request for the department's use of overnight  
23 vehicles. (RSA Exhibit 3, pages 1-2; emphasis in original.) Among other things, the written request  
24 must include:

25 The number of county vehicles that need to be authorized for overnight retention during  
26 the year. The number of vehicles requested should be consistent with the maximum  
27 number of off-duty emergency responses received during any consecutive 24-hour period  
28 during the last fiscal year. Off-duty emergency responses are sudden, unexpected events  
between the hours of 5 p.m. and 7:00 a.m. that pose a clear and imminent danger  
requiring action within 30 minutes to prevent or mitigate the loss or impairment of life,  
health, or property.

1 (RSA Exhibit 3, page 2.)

2 Pursuant to the second criterion, the "department head" must submit a written request to  
3 authorize employees for overnight retention of county vehicles each year. (RSA Exhibit 3, page 3;  
4 emphasis in original.) To qualify for overnight vehicle retention, the department head must represent  
5 that:

6 The employee must have job duties that regularly require an off-duty emergency  
7 response to an event where there is imminent danger to life, health, or property. More  
8 specifically, the employee would reasonably expect to respond to an off-duty emergency,  
9 while on-call, at least twice a week on average and must respond within 30-minutes to  
10 preserve life, health, and/or property...

11 Overnight retention of vehicles shall only be authorized for individuals whose  
12 assigned job duties place them on call continuously, 24 hours a day, 7 days a week, year-  
13 round (24x7) ...

14 (RSA Exhibit 3, page 3; emphasis added.)

15 In the instant matter, the Sheriff's Department and SEB represented to the County year after year  
16 that the criteria were met. SEB members have been authorized by way of D-10 for overnight retention  
17 of County vehicles for years. (RT Kondrit 369:15-17.) County Exhibits 14, 15, and 16, and RSA  
18 Exhibits 4, 5, 6, 7, and 8, establish that the Sheriff's Department and SEB took the necessary actions  
19 under D-10 to authorize the SEB and its members for overnight retention of county vehicles between  
20 2007 and 2013. (See also testimony of Lieutenant Kondrit beginning at RT 343:9 et. seq. for foundation  
21 of the exhibits, such as that expressed at RT 352:1-25 and 353:1-21.)

22 Of course, for the Sheriff's Department and SEB to obtain that authorization, they were required  
23 to (and did) submit a written request to the County, representing that the criteria of D-10 were met,  
24 including that the SEB members were "assigned job duties [which] placed them on call continuously, 24  
25 hours a day, 7 days a week, year-round (24x7)." (RSA Exhibit 3, page 3.) Request forms for overnight  
26 retention of county vehicles were filled out quarterly for SWAT team members, and the Sheriff's  
27 Department and SEB always represented that the criteria of D-10 were met. (RT Walsh 114:1-25.) The  
28 written requests made by the Sheriff's Department and SEB for overnight retention of county vehicles  
29 were consistent with D-10, otherwise the County would not have authorized the overnight retention of  
30 county vehicles for SWAT and Aviation. (RT Berry 153:1-6; 156:1-5.)

///

1           At the hearing, the County made a number of arguments which can and should be disregarded.  
2           First, the County argued that the SEB members were not specifically placed on standby by a department  
3           head. This self-serving argument is defeated by the representations made by the Sheriff's Department  
4           and SEB department head (as part of the process of getting authorization for overnight retention of  
5           county vehicles) that the SEB members were assigned job duties which placed them on call  
6           continuously, 24 hours a day, 7 days a week, year-round (24x7). Captain Berry and the management of  
7           the Sheriff's Department should be held accountable for their representations made in obtaining  
8           overnight county vehicles.

9           In any event, Captain Berry's credibility is suspect, due to his self-serving change in position.  
10          When he wanted retention of overnight county vehicles for SWAT and Aviation members, he took the  
11          position that the members were on call 24/7 (aka standby). However, when faced with the instant  
12          litigation, Captain Berry did an about face and claimed that the members were not on standby (aka on  
13          call). The Hearing Officer, in determining a witness's credibility, may consider any matter that has any  
14          tendency in reason to prove or disprove the truthfulness of the witness's testimony, including: the  
15          witness's character for honesty or veracity, or their opposites; and a statement previously made by the  
16          witness that is inconsistent with any part of his or her testimony. (*Evid. Code* § 780(e), (h)) Due to  
17          Captain Berry's inconsistent statements, the Hearing Officer should determine that Captain Berry is not  
18          credible as a witness in the instant litigation.

19          Second, the County attempted to pass the buck. Basically, the County argued that it (the County)  
20          created D-10, not the Sheriff's Department, and as such, the Sheriff's Department should not be held  
21          accountable for the representations that the Sheriff's Department made in applying for overnight  
22          retention of county vehicles for SWAT and Aviation. Again, the Sheriff's Department should be held  
23          accountable for its representations, regardless of who created D-10. It is inappropriate for the County,  
24          Sheriff's Department, and SEB to take a position in the instant litigation, contrary to their previous  
25          position, in order to further their interests.

26          Further, the County's argument, that the County and the Sheriff's Department are separate  
27          entities, is a fiction. The truth is that the Sheriff's Department is an arm of the County; it is not a  
28          separate legal entity. By statute, the Sheriff is an officer of the County. (*Cal Gov Code* § 24000(b)) A



1 county may exercise its powers only through the board of supervisors or through agents and officers  
2 acting under authority of the board or authority conferred by law. (*Cal. Gov. Code* § 23005) In  
3 addition, the board of supervisors shall supervise the official conduct of all county officers. (*Cal. Gov.*  
4 *Code* § 25303) As such, the board of supervisors is responsible for supervising the Sheriff, as a County  
5 officer.

6 Still further, the actions of the County may be attributed to the Sheriff's Department and vice  
7 versa. The Sheriff works for the County, and as such, there is an agent/principal relationship. As  
8 against a principal, both principal and agent are deemed to have notice of whatever either has notice of  
9 and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.  
10 (*Civ. Code* § 2332) This rule recognizes an agent's duty to communicate with his or her principal, but  
11 does not depend on the agent's exercise of that duty. The rule is not a presumption that may be rebutted,  
12 or even a presumption at all, but rather a finding that in dealings with third parties, the agent acts in  
13 place of the principal. (*Columbia Pictures Corp. v. DeToth* (1948) 87 *Cal. App. 2d* 620, 630) In other  
14 words, it does not matter whether D-10 was created by the County or instead by the Sheriff's  
15 Department because both principal and agent are deemed to have notice of whatever either has notice of  
16 and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

17 Third, the County tried to confuse things by arguing that "standby" was somehow different than  
18 "on call" which was somehow different than "subject to call." Once again, the County's own internal  
19 documents prove otherwise. Joint Exhibit 7 contains several department directives wherein the terms  
20 "standby" and "on call" are used interchangeably. Notably, Sheriff's Captain Berry also used the terms  
21 "standby" and "on call" interchangeably during his testimony. (RT 59:12-18; 132:6.) So did Lieutenant  
22 Kondrit. (RT 363:8-20; 368:11-16.)

23 **B. The SEB Members were Placed on Standby De Facto with a Wink and a Nod of the**  
24 **County.**

25 Even if the Hearing Officer determines that the SEB members were not specifically placed on  
26 standby by the department head by way of the written request for retention of overnight county vehicles,  
27 the actions of the County, Sheriff's Department, and SEB placed the SEB members on standby de facto.  
28 The County's "department directives" give a definition of standby/on-call status as:

1 An employee on standby or on-call status shall remain immediately available to respond to an  
2 emergency during off-duty hours and shall be subject to the following restrictions:

- 3 • Remain available for immediate contact via telephone and/or pager.
- 4 • Refrain from consuming alcoholic beverages and/or medication to the extent that they  
5 would interfere with responding to or performing their duties.
- 6 • Remain in the general vicinity of their home or duty station during the on-call period.
- 7 • Arrange their personal affairs to ensure their immediate response to a call out; employees  
8 are expected to be en route to the scene within thirty (30) minutes of notification.

9 (Joint Exhibit 7.)

10 As discussed below, the SEB members met each of these elements, which demonstrates that they  
11 were on standby during their off-duty hours. By requiring SWAT and Aviation members to meet the  
12 elements of standby and treating them as if they were on standby, the members were placed on standby  
13 de facto. As a result, the County and Sheriff's Department received the benefit of the members being on  
14 standby but failed to pay them accordingly. As stated by the Maxims of Jurisprudence: "He who takes  
15 the benefit must bear the burden." (*Cal. Civ. Code* § 3521) The County should be made to bear that  
16 burden.

17 **1. Remain Immediately Available to Respond to an Emergency During Off-**  
18 **Duty Hours.**

19 If the Sheriff's Department is held accountable for its prior representations, there should be no  
20 dispute that the members of SWAT and Aviation must remain immediately available to respond to an  
21 emergency during off-duty hours. As discussed in more detail in Section A above, the Sheriff's  
22 Department repeatedly represented over the last several years (in connection with overnight retention of  
23 county vehicles) that SWAT members are "assigned job duties [which] placed them on call  
24 continuously, 24 hours a day, 7 days a week, year-round (24x7)." (County Exhibits 14, 15, and 16, and  
25 RSA Exhibits 3 (at page 3), 4, 5, 6, 7, and 8.) In connection therewith, the Sheriff's Department also  
26 represented that as to SWAT and Aviation, "The employee is a sworn law enforcement employee  
27 assigned job responsibilities that routinely require him/her to respond immediately to emergency public  
28 safety situations." (RT Kondrit 349:1-6; RSA Exhibit 3, last page.)

1 In addition thereto, the testimony at the hearing established that the members of SWAT and  
2 Aviation must remain immediately available to respond to an emergency during off-duty hours. SWAT  
3 and Aviation are not free to spend their off duty hours as they please. Instead, the SEB expected SWAT  
4 members that were off duty to participate in all activations. (RT Penning 270:3-4.) In addition, there  
5 was an expectation that SWAT members would let their sergeant know in advance if they would be  
6 unavailable for a call out during their off duty hours. (RT Berry 179:23-25; 180:1-5; 181:4-12; Penning  
7 270:1-3; Kondrit 366:16-19; Lelevier 377:5-8.) Consistent therewith, in the checklist of expectations for  
8 new members on the SWAT squad drafted by Sergeant Walsh, he notes "Expected to respond unless I  
9 was previously briefed." (RT Walsh 80:7-20; RSA Exhibit 1.)

10 Further evidence that deputies were not free to spend their off-duty hours as they pleased was the  
11 opportunity for career advancement, garnered as a result of remaining immediately available to respond  
12 to an emergency during off-duty hours. Captain Berry conceded that whether a SWAT member  
13 remained available during his off-duty hours was one attribute looked at by the department when  
14 determining whether the member was dedicated to SWAT. (RT Berry 247:4-8.) Further, performance  
15 evaluations for SWAT members expressly indicated whether the members remained available during  
16 their off-duty hours. (RT Berry 247:17-25; Walsh 86:1-4; Kondrit 367:14-23.) If members remained  
17 available during their off-duty hours, then it was mentioned under the loyalty section of the performance  
18 evaluation, as the members were given "exceeds standard performance" in that category. (RT Walsh  
19 86:7-10.)

20 For example, Mr. Penning's performance evaluation, under the loyalty section, stated that Mr.  
21 Penning exceeded standards, and the evaluation commented that the majority of the time, Mr. Penning  
22 was able to respond during his off-duty hours to participate in SWAT activations. (RT 382:7-17.) In  
23 addition, performance evaluations for the years 2007, 2008, 2009, 2010, 2011, and 2012, made the same  
24 comments for other deputies with SWAT. (RT 383:11-21; 384:8-19; 384:23-25; 385:1-3; 385:5-13.)  
25 The bottom line was that SWAT and Aviation members that remained available were rewarded with  
26 praise and good performance evaluations, which common sense dictates might turn into opportunities  
27 for career advancement.

28 ///

1 On the other hand, if a SWAT member did not remain available too often during off duty hours,  
2 then it was "addressed" by the department. (RT Penning 270:9-11.) For example, if Mr. Penning was  
3 unavailable during his off-duty hours, it was passed up the chain of command and reflected negatively  
4 on his loyalty to the team. (RT Penning 274:16-19.) Being unavailable too often during off duty hours  
5 would get a member thrown of the team. (RT Penning 270:14-19.) Mr. Penning was told by the  
6 department that he could not be unavallable during his off-duty hours. (RT Penning 273:13-22.)

7 Mr. Penning was not the only one. If a deputy was routinely unavallable during off-duty hours,  
8 then that would be problematio, and it would be frowned upon. (RT Lelevier 378:5-14.) If a deputy was  
9 unavailable or if they missed a call and they had not let the sergeant know in advance, it was a problem,  
10 and they would be counseled on it. (RT Lelevier 378:1-3.) At least one deputy was counseled for not  
11 answering his phone during his off-duty hours. (RT Lelevier 380:5-20.)

12 **2. Refrain from Consuming Alcoholic Beverages.**

13 The evidence established that SWAT and Aviation members during off-duty hours were required  
14 to refrain from consuming alcoholic beverages and/or medication to the extent that they would interfere  
15 with responding to or performing their duties.

16 The testimony at the hearing was that the department did not want all SEB members to be out  
17 drinking during their off-duty hours at the same time. (RT Lelevier 375:16-24.) This was because the  
18 department needed people available during their off-duty hours in the event of a call out. (RT Lelevier  
19 376 1-2.) It was expected that SEB members would remain sober during their off-duty hours unless a  
20 member specifically stated that he/she would be unavailable during off-duty hours. (RT Lelevier  
21 376:11-13.) For example, Mr. Penning refrained from alcohol during his off-duty hours when he was  
22 told by his supervisor that there was a high likelihood that he would be activated and called in. (RT  
23 Penning 289:10-14.)

24 ///

25 ///

26 ///

27 ///

28 ///

1                   **3.     Remain Available for Immediate Contact.**

2                   The evidence established that SWAT and Aviation members would remain available for  
3 immediate contact via telephone and/or pager during their off-duty hours. All SWAT members were  
4 provided with a county-issued Sprint telephone. (RT Berry 146:25; 147:1.) The county-issued phone  
5 was used to call the SWAT team members to come in to work during their off-duty hours. (RT Berry  
6 147:4:17; Kondrit 366:12-15.)

7                   As a SWAT member, Mr. Penning was issued a county phone, and it was expected that he would  
8 keep the phone in close proximity to him during his off-duty hours. (RT Penning 281:20-25.) It was  
9 unacceptable for a SWAT member to not answer his county-issued phone during off-duty hours. (RT  
10 Penning 281:23-25; 282:1-2.) At least one deputy was counseled for not answering his phone during his  
11 off-duty hours. (RT Lelevier 380:5-20.)

12                   **4.     Remain in the General Vicinity and Arrange their Personal Affairs to Ensure**  
13                   **their Immediate Response to a Call Out.**

14                   The evidence established that SWAT and Aviation members would remain in the general  
15 vicinity of their home or duty station during their off-duty hours and arrange their personal affairs to  
16 ensure their immediate response to a call out (expected to be en route to the scene within thirty (30)  
17 minutes of notification).

18                   The department expected the SEB members to be ready when called during their off-duty hours.  
19 (RT Lelevier 375:16-24.) During off-duty hours, SEB members needed to answer their sergeant when  
20 called and ready to respond on a moment's notice. (RT Lelevier 377:1-4.) Off-duty SWAT members  
21 were expected to be on the road and en route to the emergency within 30 minutes of being called in.  
22 (RT Berry 153:10-19.) See also RSA Exhibit 3, which provides that the members were required to  
23 respond within 30 minutes of notification in order to be eligible for retention of an overnight county  
24 vehicle.

25                   By way of example, the SWAT team was not allowed to participate in the Las Vegas to Baker  
26 run. (RT Berry 235:1-2; Walsh 110:110:25; 111:1-2; Penning 273:23-25; 274:1-4.) On another  
27 occasion, SWAT members were prevented by the department from attending a wedding during off-duty  
28 hours. (RT Penning 270:20-25; 271:1-12; 272:20-25; 273: 1-5.) If an employee's time is so restricted

1 that he/she cannot pursue personal activities and come and go as she pleases, the employer is considered  
2 to have direction and control of the employee. (*Madera Police Officers Assn v. City of Madera (1984)*  
3 *36 Cal.3d 403*)

4 **VI. RESERVATION OF JURISDICTION**

5 RSA respectfully requests that the Hearing Officer retain jurisdiction over this matter.

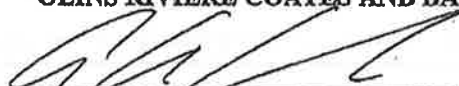
6 **VII. CONCLUSION**

7 For the foregoing reasons, RSA respectfully requests that the Hearing Officer: sustain the  
8 grievance; determine that the County violated Article IV, Section 3A of the parties' MOU by failing to  
9 pay standby pay to members of SWAT and Aviation since June 14, 2012; order the County to comply  
10 with Article IV, Section 3 of the parties' MOU going forward; order the County to make RSA members  
11 whole from June 14, 2012, going forward; and order such other and further relief as the Hearing Officer  
12 deems appropriate.

13 *Respectfully submitted,*

14 Dated: January 6, 2014

**OLINS RIVIERE COATES AND BAGELA**



Adam E. Chaikin, Esq.  
Attorneys for RIVERSIDE SHERIFF'S  
ASSOCIATION

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EXHIBIT "C"

**COUNTY OF RIVERSIDE, CALIFORNIA  
BOARD OF SUPERVISORS POLICY**

**Subject:**  
**OVERNIGHT RETENTION OF COUNTY VEHICLES**

**Policy**  
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**PURPOSE:**

As a condition of employment, county employees are responsible for arranging their own transportation to their regular assigned job sites at county facilities by the appointed start time, regardless of how remote or distant from their home, or the travel time required. Authorization of the overnight retention of vehicles is not intended for the convenience, benefit, betterment, or private use of county employees. Overnight retention of county vehicles may result in federal and state income tax obligations that will be the responsibility of the employee.

This policy is applicable to all vehicles owned by Riverside County and is not considered part of a Board of Supervisors' approved executive compensation package. Policies regarding the overnight retention of vehicles as part of a Board approved executive compensation package are addressed in the most current management resolution.

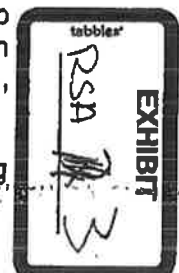
**POLICY:**

Allowing employees to retain county vehicles overnight at home reduces availability of the vehicles and generally results in higher operating costs to the county. Overnight retention of vehicles is appropriate only when it is in the *overall* best interest of the county through improved services and/or reduced costs. Authorization shall not be based on the ability of an agency/department to receive non-county reimbursement for vehicle costs. To the fullest extent possible, department heads shall establish procedures to reimburse employees for mileage incurred using their personal vehicles to respond to emergencies while off-duty.

This policy applies to: 1) all county departments/functions; 2) agencies which function similarly to county departments under terms of a contract (e.g., Riverside County Fire); and 3) all districts/authorities governed by the Board of Supervisors in their various governing board capacities.

To safeguard county equipment, employees authorized overnight retention of county vehicles should park those vehicles in garages or off-street locations whenever possible. County vehicles authorized for overnight retention are not intended for private use, except where such use by an employee cannot be avoided due to the nature of the employee's on-call duties. This policy strictly prohibits use of a county vehicle authorized for overnight retention by anyone other than a county employee who has authorization from the Executive Office to retain a vehicle overnight. This policy also limits riders to other county employees who have a specific work-related reason to be in the vehicle unless the rider's transport is the purpose of the vehicle assignment (e.g., transporting a foster child).

Overnight retention of county vehicles shall not be authorized unless the following criteria have been met:





**COUNTY OF RIVERSIDE, CALIFORNIA**  
**BOARD OF SUPERVISORS POLICY**

**Subject:**  
**OVERNIGHT RETENTION OF COUNTY VEHICLES**

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**Criteria 1 - Each department head shall submit a written request for the department's use of overnight vehicles each fiscal year.**

Each department head will be responsible for submitting written requests for overnight retention of county vehicles annually. The written request must include the following:

- The number of county vehicles that need to be authorized for overnight retention during the year. The number of vehicles requested should be consistent with the maximum number of off-duty emergency responses received during any consecutive 24-hour period during the last fiscal year. Off-duty emergency responses are sudden, unexpected events between the hours of 5:00 p.m. and 7:00 a.m. that pose a clear and imminent danger requiring action within 30-minutes to prevent or mitigate the loss or impairment of life, health, or property. Some examples include:
  - Officer-involved shootings;
  - Hazardous materials incidents;
  - Child abuse or abduction interventions and/or investigations;
  - Rescue and recovery operations;
  - Disasters and civil defense; or
  - Animal control.
- The documentation to support the number of off-duty emergency responses that took place during the period used to justify the number of vehicles requested. The documentation should confirm the type of event, the number of off-duty *immediate* responders, and the time the event took place.
- The information about the vehicles that will be authorized for overnight retention, including make, model, vehicle's county identification number, and a detailed description of the special equipment that requires the vehicle to be retained overnight. The number of vehicles included in this detail shall not exceed the number of vehicles requested for overnight retention.

Within the context of this policy, the term special equipment refers to equipment that must be mounted on or contained in the county vehicle and must be absolutely essential to an employee's performance of his/her duties responding to emergencies while off-duty. This equipment cannot be readily transferred to an employee's private vehicle.

- The department head's signature to confirm the request is accurate and reflects cost efficient use of county vehicles.

**COUNTY OF RIVERSIDE, CALIFORNIA  
BOARD OF SUPERVISORS POLICY**

**Subject:**  
**OVERNIGHT RETENTION OF COUNTY VEHICLES**

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**Criteria 2 - Each department head shall submit a written request to authorize employees for overnight retention of vehicles each year.**

Each department head will be responsible for submitting written requests to authorize employees for overnight retention of vehicles annually. To qualify for overnight vehicle retention, the employee must have job duties that regularly require an off-duty emergency response to an event where there is imminent danger to life, health, or property. More specifically, the employee would reasonably expect to respond to an off-duty emergency, while on-call, at least twice a week on average and must respond within 30-minutes to preserve life, health, and/or property. Authorization shall not be made based on rank or job title. The funding source to support the vehicle costs has no bearing on this policy. The employee must also meet one of the following requirements:

- Must be a sworn (vs. administrative), law enforcement employee assigned job responsibilities that routinely require him/her to respond immediately to emergency public safety situations (vs. administrative or public relations tasks) during off-duty hours with law enforcement equipment mounted on or contained in his/her specific vehicles.

**OR**

- Must be an employee who is required to intervene in abuse or abduction cases during off-duty hours as part of his/her job assignment. Authorization for overnight vehicle retention shall be solely for the purpose of better protecting the clients and minimizing liability to the county.

**OR**

- Must be uniquely qualified to respond to a natural or chemical disaster due to a certification or license issued by a national or state agency or be an immediate responder to weather emergencies or traffic control calls from the California Highway Patrol dispatch unit.

**OR**

- Must be uniquely qualified to respond to off-duty hour emergencies involving dangerous or improperly controlled animals.

**OR**

- Must be uniquely qualified to respond to off-duty hour emergencies in support of public safety and public health communication systems and technologies

Overnight retention of vehicles shall only be authorized for individuals whose assigned job duties routinely place them on-call continuously, 24 hours a day, 7 days a week, year-round (24x7) or in regular rotation with other staff members within a department/function.

**COUNTY OF RIVERSIDE, CALIFORNIA  
BOARD OF SUPERVISORS POLICY**

**Subject:**  
**OVERNIGHT RETENTION OF COUNTY VEHICLES**

**Policy  
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**Recordkeeping**

Each department head will also be responsible for establishing a method for tracking overnight retention of county vehicles and maintaining the appropriate records. Records shall include the name of employee retaining the vehicle overnight, the date(s) the vehicle was retained by the employee, and the starting and ending mileage of the personal and business use of the vehicle.

Records shall be maintained pursuant to Board of Supervisors' Policy A-43, *County Records Management and Archives Policy*. All documentation is subject to audit and/or review. Departments/agencies are responsible for ensuring documentation is maintained to comply with the provisions of this policy. Failure to maintain mileage records for county vehicle use will result in the reporting of the fair market value of the use of the vehicle as taxable income to the employee.

Commuting between home and the worksite is categorized as personal use by the IRS and may be a taxable benefit even when job assignments require the overnight retention of vehicles. Department heads are responsible for ensuring an accurate report of personal use of vehicles, as defined by IRS regulations, is reported to the Auditor-Controller's Office on a regular basis. The procedures for submitting this information shall be coordinated with the Auditor-Controller's Office. The Auditor-Controller's Office is responsible for ensuring payroll reporting of vehicle benefits is consistent with IRS regulations.

**PROCEDURE:**

1. On or before June 1, agency/department heads shall annually submit requests for vehicle and employee authorization for overnight retention of vehicles. All authorization requests shall be forwarded in the form required (see attached). The Executive Office shall reject without review requests not submitted in the required form.
2. The Executive Office shall review each request and notify the department of approval or denial.
3. The Executive Office and/or Fleet Services Division may periodically review a sample of vehicle utilization data to verify that employees use their authorization to retain vehicles overnight as intended. Low utilization may be grounds for suspension or revocation of overnight retention privileges. If a review of the sample from any department shows that assignments are not consistent with this policy, a formal audit of the department's vehicle usage will be undertaken and the report forwarded to the Board of Supervisors for action.

**COUNTY OF RIVERSIDE, CALIFORNIA  
BOARD OF SUPERVISORS POLICY**

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**OVERNIGHT RETENTION OF COUNTY VEHICLES**

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4. While all authorization requests must be resubmitted annually, department heads must immediately inform the Executive Office of any changes that result in an employee becoming ineligible for overnight vehicle retention authorization or changes to vehicles retained by employees overnight.
5. Any denial or revocation of authorization of overnight retention of a county vehicle may be appealed to the Executive Officer or designee on a case-by-case basis.

**Reference:**

Minute Order 3.7 of 05/07/96  
Minute Order 3.1 of 07/01/03  
Minute Order 3.3 of 04/10/07  
Minute Order 3.6 of 07/14/09  
Minute Order 3.10 of 07/27/10

**Attachments to follow:**

Request for Authorization of Overnight Vehicle Retention Forms

# REQUEST FOR AUTHORIZATION OF OVERNIGHT VEHICLE RETENTION

## DEPARTMENT AUTHORIZATION

(One per Department)

Number of vehicles authorized for overnight retention: \_\_\_\_\_

Date used to justify the number of vehicles: \_\_\_\_\_

**You must also attach the following documents:**

- Documentation to support number of vehicles requested. An example of appropriate documentation would be incident reports for the date used to justify the number of vehicles requested. Any documentation submitted must confirm after-hour incidents that required an immediate response (within 30 minutes) by employees who were on-call.
- A list of the vehicles to be authorized for overnight retention. Please include the vehicle's county identification number, make, model, and description of the special equipment that requires the vehicle be authorized for overnight retention. An electronic copy of this list must be submitted to the Executive Office.
- A list of employees to be authorized to retain vehicles overnight. For each employee, the "Employee Overnight Vehicle Authorization Form" must be attached and signed by the employee. An electronic copy of this list must be submitted to the Executive Office.

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*The department submits this request for authorization of overnight vehicle retention in accordance with Board Policy D-10, which specifies the conditions under which the Executive Officer may authorize employees other than department and agency heads to retain county vehicles overnight. The undersigned department head confirms the information contained herein is accurate and acknowledges his/her responsibility to inform the Executive Office of any changes to employee or vehicle eligibility for overnight retention authorization and to notify the Auditor-Controller of any personal use of vehicles on a regular basis. In signing this request, the undersigned department head confirms the request reflects the most cost efficient use of county vehicles.*

\_\_\_\_\_  
Department Head Name (Please Print)

\_\_\_\_\_  
Department

\_\_\_\_\_  
Department Head Signature

\_\_\_\_\_  
Date





**EMPLOYEE OVERNIGHT VEHICLE RETENTION  
AUTHORIZATION FORM**  
(One per Employee)

The department submits this request for authorization of overnight vehicle retention in accordance with Board Policy D-10. The undersigned employee confirms the information contained herein accurately documents the justification for authorizing overnight retention of a County vehicle. In signing this request, the undersigned employee acknowledges a responsibility to use and house the vehicle appropriately in accordance with Board Policy D-10. The undersigned employee also acknowledges his/her understanding that overnight use of a county vehicle may result in the reporting of vehicle use as a taxable employee benefit which may have state and federal tax implications for the employee.

DEPARTMENT: \_\_\_\_\_

EMPLOYEE NAME: \_\_\_\_\_ COUNTY EMPLOYEE ID: \_\_\_\_\_

EMPLOYEE ADDRESS \_\_\_\_\_

POSITION CLASSIFICATION: \_\_\_\_\_

IF SWORN, BADGE NUMBER: \_\_\_\_\_

EMPLOYEE SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

This employee qualifies for overnight vehicle retention because the employee would reasonably expect to respond to an off-duty emergency, while on-call, at least twice a week, within 30-minutes to preserve life and/or property and: (check at least one)

The employee is a sworn law enforcement employee assigned job responsibilities that routinely require him/her to respond immediately to emergency public safety situations.

The employee is required to intervene in child abuse and abduction cases during off-duty hours as part of his/her job assignment.

The employee is uniquely qualified to respond to a natural or chemical disasters or accidents due to a certification or license issued by a national or state agency or an immediate responder to weather emergencies or traffic control calls from the California Highway Patrol dispatch unit.

The employee is uniquely qualified to respond to off-duty hour emergencies involving, dangerous or improperly controlled animals.

The employee is uniquely qualified to respond to off-duty hour emergencies in support of public safety and public health communication systems and technologies

As part of assigned duty, this employee regularly serves in "on-call" status:

Continuously, 24x7  
In rotation, serving \_\_\_\_\_ number of day(s) every wk mo yr

**EXECUTIVE OFFICE RECOMMENDATION:**

APPROVED      DENIED      SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

CONDITIONS:      UNRESTRICTED 24X7      ROTATIONAL ONLY

COMMENTS: \_\_\_\_\_

EXHIBIT "D"





**RIVERSIDE COUNTY SHERIFF'S DEPARTMENT  
BOB DOYLE, SHERIFF**

**TO: All Personnel**

**DATE: January 20, 2005**

**FROM: Bob Doyle, Sheriff**

Supplemental to Department  
Directive #04-002, Dated 2/23/04

**RE: Department Standby/On-Call Status**

This Department Directive supercedes all previous Department policy concerning standby/on-call status and shall be effective immediately.

"Standby/On-Call Status": An employee on standby or on-call status shall remain immediately available to respond to an emergency during off-duty hours and shall be subject to the following restrictions:

- Remain available for immediate contact via telephone and/or pager.
- Refrain from consuming alcoholic beverages and/or medication to the extent that they would interfere with responding to or performing their duties.
- Remain in the general vicinity of their home or duty station during the on-call period.
- Arrange their personal affairs to ensure their immediate response to a call out; employees are expected to be enroute to the scene within thirty (30) minutes of notification.

In the event an employee who is on standby/on-call status becomes unable to respond or fulfill the above obligation, they shall immediately notify their supervisor.

Authorized Positions: The following positions are authorized for standby/on-call status. No other positions are authorized without the approval of the chief deputy. Nothing in this directive shall be construed to require the Department to place individuals on standby/on-call status.

- Each patrol station is authorized one (1) investigator position.
- HDT one (1) position
- SIB two (2) investigator positions (one east/one west)
- CHU four (4) investigator positions (two east/two west)
- AIU two (2) investigator position
- Forensic Services three (3) positions (one east/two west)
- Coroner's Bureau two (2) positions (one east/one west)
- Coroner's Bureau one (1) Supervising Deputy Coroner
- Media Information Bureau one (1) position
- Media Information Bureau one (1) Adjunct (when utilized)

BD:js

RIVERSIDE COUNTY SHERIFF'S DEPARTMENT  
BOB DOYLE, SHERIFF

TO: All Personnel DATE: March 15, 2005

FROM: Bob Doyle, Sheriff Supplemental to Department Directive #04-002, Dated 2/23/04 & 1/20/05

RE: Department Standby/On-Call Status

This Department Directive supercedes all previous Department policy concerning standby/on-call status and shall be effective immediately.

"Standby/On-Call Status": An employee on standby or on-call status shall remain immediately available to respond to an emergency during off-duty hours and shall be subject to the following restrictions:

- Remain available for immediate contact via telephone and/or pager.
- Refrain from consuming alcoholic beverages and/or medication to the extent that they would interfere with responding to or performing their duties.
- Remain in the general vicinity of their home or duty station during the on-call period.
- Arrange their personal affairs to ensure their immediate response to a call out; employees are expected to be enroute to the scene within thirty (30) minutes of notification.

In the event an employee who is on standby/on-call status becomes unable to respond or fulfill the above obligation, they shall immediately notify their supervisor.

Authorized Positions: The following positions are authorized for standby/on-call status. No other positions are authorized without the approval of the chief deputy. Nothing in this directive shall be construed to require the Department to place individuals on standby/on-call status.

- Each patrol station is authorized one (1) investigator position.
- HDT two (2) positions (one east/one west)
- SIB two (2) investigator positions (one east/one west)
- CHU four (4) investigator positions (two east/two west)
- AIU two (2) investigator position
- Forensic Services three (3) positions (one east/two west)
- Coroner's Bureau two (2) positions (one east/one west)
- Coroner's Bureau one (1) Supervising Deputy Coroner
- Media Information Bureau one (1) position
- Media Information Bureau one (1) Adjunct (when utilized)

# **ATTACHMENT C**

Liebert Cassidy Whitmore  
A Professional Law Corporation  
6033 West Century Boulevard, 5th Floor  
Los Angeles, California 90045

1 J. Scott Tiedemann, Bar No. 180456  
stiedemann@lcwlegal.com  
2 Paul D. Knothe, Bar No. 254011  
pknothe@lcwlegal.com  
3 LIEBERT CASSIDY WHITMORE  
A Professional Law Corporation  
4 6033 West Century Boulevard, 5th Floor  
Los Angeles, California 90045  
5 Telephone: 310.981.2000  
Facsimile: 310.337.0837  
6

7 Attorneys for Respondent  
COUNTY OF RIVERSIDE

8 BEFORE THE BOARD OF SUPERVISORS  
9 OF THE COUNTY OF RIVERSIDE  
10

11 IN THE MATTER OF ARBITRATION  
BETWEEN,

12 RIVERSIDE SHERIFFS' ASSOCIATION,

13 Grievant,

14 and

15 COUNTY OF RIVERSIDE,  
16

17 Respondent.

RE: Standby Duty Premium Pay  
Grievance No. RI213-001

RESPONDENT COUNTY OF RIVERSIDE'S  
OPPOSITION TO RIVERSIDE SHERIFFS'  
ASSOCIATION'S APPEAL OF ARBITRATOR  
ROBERT STEINBERG'S OPINION AND  
AWARD

18 TO THE HONORABLE SUPERVISORS FOR THE COUNTY OF RIVERSIDE:

19 The County of Riverside opposes the Riverside Sheriffs' Association's appeal of the  
20 March 18, 2014 Opinion and Award by Robert Steinberg.

21 **I. INTRODUCTION AND PROCEDURAL HISTORY**

22 The RSA filed a grievance alleging the County improperly failed to pay each member of  
23 the SWAT team and Aviation Unit one hour's wages for every eight hours off duty. The RSA  
24 unreasonably contends that SWAT and Aviation deputies are in perpetual standby status when  
25 they are off duty and therefore entitled to standby pay. The Arbitrator reasonably denied the  
26 grievance because the SWAT and Aviation deputies were not specifically placed on standby no  
27 violation of the MOU occurred. Indeed, there is no basis for the RSA's request for the deputies to  
28

798563.5 RI030-105

RESPONDENT COUNTY OF RIVERSIDE'S OPPOSITION TO RSA'S APPEAL OF  
ARBITRATOR'S OPINION AND AWARD

1 be paid not to work.

2 Standby pay is only available on a limited basis under Article IV, Section 3 of the MOU.  
3 To be entitled to standby pay a deputy must be *specifically* placed on standby by the Department  
4 Head or his designee. Placing a deputy on standby is an affirmative act, i.e. a deputy is not  
5 automatically on standby every moment that he is not working simply by virtue of his  
6 assignment. When a deputy is placed specifically on standby, he must severely restrict his off-  
7 duty activities to be able to report to duty on a moment's notice; however, as the MOU expressly  
8 acknowledges, deputies can be called in to work in other emergency circumstances that do not  
9 entitle them to standby pay. The Arbitrator correctly found that the MOU requires that the  
10 affirmative act of specifically placing a deputy on standby duty must occur for a deputy to be  
11 entitled to standby pay, and that such an affirmative act has not occurred.

12 The act of placing a deputy on standby duty involves significant financial considerations  
13 and therefore is a decision that requires careful consideration. If the SWAT and Aviation  
14 deputies were found to be on standby for all of their off-duty hours, as the RSA asserts, they  
15 would be entitled to fifty-six hours' pay for forty-hours worked. This would amount to an  
16 approximately 40% increase in pay for each of the over thirty deputies assigned to the SWAT  
17 team and Aviation Unit.

18 Although SWAT and Aviation have not been placed specifically on standby duty, and  
19 therefore are not entitled to standby pay, the deputies are compensated financially for the  
20 demands associated with their specialized skills. SWAT deputies earn a premium of \$1.85/ hour  
21 for all hours worked.<sup>1</sup> Aviation deputies earn a premium of \$3.85/hour, \$3.10/ hour or \$1.55/  
22 hour, depending on whether their classification is Chief Pilot, Pilot, or Tactical Flight Officer.<sup>2</sup>  
23 Further, when a deputy responds to an emergency during his off-duty hours, he generally earns  
24 the overtime rate of one and one half times his regular rate for those hours.

25  
26 <sup>1</sup> See MOU Article IV, Section 3, Paragraph J., subparagraph 2. This is true despite the fact that  
27 most hours worked by deputies on the SWAT team are not in SWAT activations. Former SWAT  
28 Deputy Aaron Penning testified that this premium compensated him for being available to  
respond to call-outs while on-duty. (Penning, Tr. 290:24-219:2.)

<sup>2</sup> See MOU Article IV, Section 3, Paragraph J., subparagraph 5.

1           The RSA superficially argues that the Department Head specifically placed the SWAT  
2 and Aviation deputies on standby by submitting forms to the County Executive Office to obtain  
3 authorization for the deputies to take Department vehicles home overnight.<sup>3</sup> These forms are  
4 used by the County Executive Office for all County departments, and were not tailored to the  
5 operations of the Sheriff's Department. The Executive Office employees responsible for creating  
6 the form did not intend to require that in order to be authorized to take home a vehicle, a Sheriff's  
7 Deputy must be placed specifically on standby under the MOU. Likewise, the Sheriff's  
8 Department employee who submitted the forms did not intend to place deputies specifically on  
9 standby under the MOU by approving the forms, or to communicate to the Executive Office that  
10 those deputies had been placed specifically on standby. Finally, the Executive Office employee  
11 who reviewed the submitted forms was not interested in whether Sheriff's Department employees  
12 had been placed specifically on standby when approving the retention of vehicles.

13           The RSA's second argument is that the SWAT and Aviation deputies are entitled to  
14 standby pay because they allegedly had a status the RSA calls "standby De Facto." This  
15 argument fails for two reasons. First, as the arbitrator correctly found, a fair reading of the plain  
16 language of the MOU, which was the product of vigorous negotiation between the County and the  
17 RSA is that "an affirmative act by the Department head or designee specific to a deputy is  
18 required before the deputy becomes eligible for standby pay"; this reading does not allow for  
19 "standby De Facto." A finding that deputies were on "standby De Facto" is prohibited by the  
20 contractual requirement that a deputy must be placed "*specifically* on standby." (Emphasis  
21 added.)

22           Moreover, even if "standby De Facto" were possible under the contract, the evidence  
23 shows that the deputies assigned to the SWAT team and Aviation unit are not restricted in their  
24 off-duty time in a manner equivalent to being placed on standby duty. Most significantly, a  
25 SWAT or Aviation deputy who does not respond to a call during his off-duty hours is not subject  
26

27 <sup>3</sup> The RSA's inclusion of the Aviation deputies in this argument is apparently in error, as no such  
28 forms were submitted on behalf of the Aviation deputies, who do not take Department vehicles  
home.

1 to discipline; a deputy who is on standby duty and does not respond to a call is insubordinate and  
2 subject to discipline.<sup>4</sup> Further, a SWAT or Aviation deputy is free to travel, regardless of  
3 distance from his station, or to consume alcohol during his off-duty time; a deputy who is on  
4 standby duty would be subject to discipline for doing the same, even if he is not called to work  
5 during those standby hours.

6 Therefore, this honorable Board should accept the arbitrator's decision in full.

7 **II. ANALYSIS**

8 **A. THE CONTRACT ONLY ENTITLES DEPUTIES TO STANDBY PAY**  
9 **WHEN PLACED SPECIFICALLY ON STANDBY DUTY**

10 The MOU, at Article IV (Workweek, Overtime, and Premium Pay), Section 3 (Premium  
11 Pay), Paragraph A (Standby Duty) provides, "[w]henever placed by the Department Head  
12 specifically on standby duty, an employee otherwise off duty shall be compensated for such duty  
13 by an additional payment equal to one (1) hour straight time pay for each eight (8) hours of  
14 standby duty. Said compensation shall be in addition to the employee's regular salary  
15 entitlement. Standby duty compensation shall cease when the employee reports to work." (Joint  
16 Exhibit (JX) 1 at p. 15.)<sup>5</sup> If on perpetual standby duty under Article IV, Section 3, an employee  
17 who worked 40 hours in a week would receive the value of 16 hours' straight time in standby pay  
18 for his 128 off-duty hours – equivalent to a 40% pay increase.

19 The MOU specifically contemplates that a deputy can be called back to work from off-  
20 duty without being placed on standby duty. (See Article IV, Section 3, Paragraph B: "Except  
21 as hereinafter otherwise provided, an employee called back to work to meet an emergency on an  
22 overtime basis, *whether or not they are in a standby or professional call duty status*, shall  
23 receive minimum credit for one hours' work." (JX 1 at p. 15.)) Therefore, the fact that SWAT

24 <sup>4</sup> SWAT and Aviation Deputies, like all Sheriff's Deputies, are subject to call while off-duty and  
25 are sometimes called and requested to work in response to emergencies occurring during their  
26 off-duty hours. SWAT deputies receive such calls somewhat more frequently than the average  
27 Sheriff's Deputy.

28 <sup>5</sup> The County has attached a copy of its post-hearing brief to the arbitrator and copies of the  
exhibits referenced in this Opposition. Due to the length of Joint Exhibit 6, the County has  
attached only a relevant excerpt of that exhibit. The County will gladly provide all exhibits and  
hearing transcripts at the Board's request.

1 and Aviation deputies are sometimes called in from off duty does not mean that they were placed  
2 specifically on standby.<sup>6</sup>

3 **B. THE DEPUTIES AT ISSUE HAVE NOT BEEN SPECIFICALLY PLACED**  
4 **ON STANDBY DUTY AND ARE NOT ENTITLED TO STANDBY PAY**

5 Captain Ron Berry is the commander of the SWAT team and Aviation unit. He testified  
6 that the affirmative act of placing a deputy on standby duty requires a “specific direction to an  
7 employee that they’re going to be placed on standby.” (Berry, Tr. 263:18-23, 293:1-14.) Captain  
8 Berry has not given this direction; nor have any of his subordinate managers. (Berry, Tr. 254:14-  
9 255:1.) It is undisputed that no member of the SWAT team or Aviation unit has been told he was  
10 being specifically placed on standby duty.

11 As the arbitrator correctly found, the SWAT team and Aviation unit have operated in the  
12 same manner with regard to off-duty hours since at least 2008. The SWAT and Aviation deputies  
13 never received standby pay, but the grievance was not filed until June 2012. There was never a  
14 mutual agreement to pay the SWAT and Aviation deputies one hour’s straight wages for every  
15 eight hours off-duty.

16 In accordance with the MOU’s requirement of specific placement on standby duty for the  
17 receipt of standby pay, the Sheriff’s Department has issued Department Directive #04-002 which  
18 authorizes certain enumerated positions within the Department for specific placement on standby  
19 duty. Additional positions have been authorized by supplemental memoranda to Department  
20 Directive #04-002. (See JX 7). Deputies assigned to the SWAT team and Aviation unit are not  
21 among the authorized positions. In order to obtain authority to place an employee whose position  
22 is not identified in Department Directive #04-002 on standby, a commander must submit a budget  
23 request to the Chief Deputy justifying the expense of placing that employee on standby, and have  
24 that request approved. (JX 8; Berry, Tr. 122:8-124:17.) The commander of the SWAT team and  
25 Aviation unit, Captain Berry, has not requested authority to put these deputies on standby duty.

26 \_\_\_\_\_  
27 <sup>6</sup> As the arbitrator noted, there were fifty-one activations of the SWAT team in the 29-month  
28 period between November 1, 2011 and May 5, 2013. Thirty-six of these activations were high-  
risk search warrants, which are usually pre-planned and therefore do not require calling deputies  
in from off-duty.



1 (Berry, Tr. 263:24-264:18.)

2 The RSA tries to avoid this essential fact by taking out of context a County-wide form for  
3 authorization to take home a County vehicle, which was not designed or interpreted with standby  
4 provisions of the MOU in mind. Although the RSA relies on these forms for both SWAT and  
5 Aviation deputies, forms were only submitted on behalf of the SWAT deputies.

6 The County Executive Office did not intend, in either the development of Policy D10 or  
7 promulgation of the associated form, to require that a Sheriff's Department employee be  
8 specifically placed on standby under Article IV, Section 3 of the MOU in order to take home a  
9 vehicle. (Johnson, Tr. 391:24-6, 394:15-23.) The Sheriff's Lieutenant responsible for submitting  
10 the forms testified that he did not intend to place on standby the deputies for whom he requested  
11 authorization to take home cars, nor did he intend to communicate to the Executive Office that he  
12 had. (Kondrit, Tr. 361:14-362:1.) The Executive Office, in reviewing the forms, did not consider  
13 whether the deputies were on standby duty under the terms of the MOU in approving  
14 authorization to take home vehicles. (Chow, Tr. 396:17-400:14.)

15 Because the SWAT and Aviation deputies have not been placed specifically on standby  
16 duty, they are not entitled to standby pay under the MOU.

17 **C. THE OFF-DUTY HOURS OF SWAT AND AVIATION DEPUTIES ARE**  
18 **NOT EQUIVALENT TO STANDBY DUTY**

19 The plain language of the MOU does not permit a finding that the SWAT and Aviation  
20 deputies are entitled to standby pay based on a theory of "standby De Facto." Even if such a  
21 claim had any support in the contract, the RSA's claim would fail because the SWAT and  
22 Aviation deputies are not restricted in their off-duty time in the manner they would be if they had  
23 been placed specifically on standby.

24 Department Directive #04-002 sets out significant restrictions that apply to employees  
25 who have been placed specifically on standby duty. The employee "shall remain immediately  
26 available to respond to an emergency during off-duty hours." (JX 7.) The Directive requires that  
27 deputies, "*[r]emain in the general vicinity* of their home or duty station during the on-call  
28 period." (Id.) The employee must "*[r]efrain from consuming alcoholic beverages and/or*

1 **medication** to the extent that they would interfere with responding to or performing their duties.”  
2 (Id.) Further, the Department’s General Orders Manual, at Attachment A, part II, provides, “[i]t  
3 is County policy that employees **shall not be under the influence of alcohol or drugs** while on  
4 duty or on a standby or an on-call status[.]” (JX 6 [emphasis added].)

5 It is undisputed that no SWAT or Aviation deputy has been disciplined for failing to  
6 respond to off-duty calls, as they would be if they had been placed specifically on standby duty.  
7 (Penning, Tr. 276:10-21.) Deputies do not receive negative remarks in their performance  
8 evaluations for being unavailable during their off-duty hours; some receive praise for making  
9 themselves available. No SWAT or Aviation deputy has been reassigned from the team for  
10 failing to respond to off-duty calls. (Berry, Tr. 298:16-21.) (See also Kondrit, Tr.366:20-23  
11 (deputies who are “constantly” unavailable during off-duty hours are not removed from the team);  
12 Walsh, Tr. 78:12-12 (deputies who were reached by phone during call-outs who informed Sgt.  
13 Walsh they were unavailable were not threatened with removal from the team; Sgt. Walsh has  
14 never heard any SWAT supervisor question a member’s commitment for missing an activation.)  
15 Failing to respond to off-duty calls has not prevented deputies from being promoted to sergeant.  
16 (Walsh, Tr. 107:16-108:23.)

17 SWAT and Aviation deputies are not required to remain in the general vicinity of their  
18 home or duty station during their off-duty hours. For example, the SWAT team commander was  
19 aware that one former deputy traveled to the Fresno area every other weekend. That former  
20 deputy was not subjected to discipline or adverse treatment; in fact, he is now a SWAT sergeant.  
21 (Berry, Tr. 265:19-266:5.)

22 Captain Berry is aware of the fact that deputies on the SWAT team sometimes consume  
23 alcohol and can be under the influence of alcohol during their off-duty hours; no action has ever  
24 been taken against any deputy for off-duty alcohol use. (Berry, Tr. 262:24-263:16.) Deputies  
25 have consumed alcohol, during their off-duty hours, to an extent that would prevent them from  
26 responding to an emergency call **in the presence of** their supervisors, on multiple occasions.  
27 (Berry, Tr. 303:5-25; Walsh, Tr. 90:11-24.) The restriction of off-duty alcohol consumption,  
28 which is an integral part of standby duty, does not apply to SWAT and Aviation deputies during

1 their off-duty time.

2 Deputies on the SWAT team are asked, as a courtesy, to inform their supervising  
3 sergeants if they know in advance that they will be unavailable to respond to off-duty calls. The  
4 purpose of this request is to avoid wasting time in an emergency trying to contact a deputy if it is  
5 already known the deputy will be unable to respond; there are no adverse consequences to a  
6 deputy for failing to provide this requested courtesy. (Walsh, Tr. 77:23-78:17.)

7 **D. THE RSA RELIES ON EVIDENCE THAT THE ARBITRATOR**  
8 **CORRECTLY FOUND UNPERSUASIVE**

9 During the three-day arbitration hearing, three members of current SEB leadership  
10 testified that no deputies on the SWAT team or Aviation unit were placed on specifically on  
11 standby, and that no deputies on the SWAT team or Aviation unit were required to informally  
12 adhere to the restrictions of standby duty. No current SWAT team or Aviation unit member  
13 testified that he had been placed specifically on standby or required to informally adhere to the  
14 restrictions of standby duty.

15 The RSA, in its appeal brief, relies heavily on the testimony of former SWAT deputy  
16 Aaron Penning, *who left the SWAT team in 2010*, and former SWAT sergeant David Lelevier,  
17 *who left the SWAT team in 2008*. Even assuming that the testimony of Penning and Lelevier were  
18 reflective of current practices, their testimony would not support entitlement to standby pay.

19 **1. Former SWAT Deputy Aaron Penning**

20 Former Deputy Penning testified that, although it was “expected” that he respond to  
21 activations while he was on the SWAT team, “I wasn’t required to,” and that he “missed a few.”  
22 (Penning, Tr. 276:23-277:8.) Deputy Penning was unable to point to any concrete consequence  
23 that he suffered for missing activations. Penning testified, “[t]he occasional SWAT call-out could  
24 be missed without, I guess, negative attention.” (Penning, Tr. 270:8-9.) Former Deputy Penning  
25 testified that he did not know of any “formal discipline” imposed on himself or any other deputy  
26 for being unavailable to respond to calls during off-duty hours. (Penning, Tr. 276:10-21.)  
27 Former Deputy Penning received positive remarks in his performance evaluation for responding  
28 “the majority of the time.”

1           Despite his supervisor's request for advance notice of his unavailability during his off-  
2 duty hours, Deputy Penning chose not to provide his supervisors with such notice. (Penning, Tr.  
3 274:10-23.) Deputy Penning admitted that he did not always tell his sergeant when he went out  
4 of town because, "We weren't busy enough to take that risk. . . Even though there were no  
5 obligations during the weekend, I felt that it was easier to take my chances and not tell my  
6 sergeant and do what I wanted to do on my days off so I didn't have a negative perception." (Tr.  
7 274:10-23.)

8           Former Deputy Penning testified that he was never told by his sergeant that he could not  
9 do as he wished with his off-duty time. (Penning, Tr. 289:15-290:3.) Further, Penning was never  
10 told by his supervisors that he could not use alcohol during his off-duty hours. (Penning, Tr.  
11 289:10-14.) Penning testified that, while on the SWAT team, he consumed alcohol off-duty and  
12 only refrained if he was given advance notice there was a high likelihood he would be called in.  
13 (Penning, Tr. 289:10-14.)

14           Former Deputy Penning acknowledged that he and his colleagues had not been placed  
15 specifically on standby, *although some wanted to be placed on standby*: "I know the formal  
16 request was brought up several times to have two of the five squads who were already on duty on-  
17 call for that week, and flip-flop squads. Also the request was made for on-call pay during our off  
18 hours between shifts, making at least half the team always on-call or legitimately on-call, like an  
19 investigator, where you're getting on-call pay, expected to be sober." (Penning, Tr. 277:9-22.)

20           **2. Former SWAT Sergeant David Lelevier**

21           The RSA relies on former SWAT Sergeant Leleiver's testimony for the proposition that a  
22 deputy who was routinely unavailable during off-duty hours would be "frowned upon" and  
23 counseled. Lelevier admitted this was pure speculation: "I can't recall anybody that was  
24 actually routinely unavailable." (Lelevier, Tr. 378:5-14.) Indeed, Lelevier admitted that it was  
25 "always the culture" on the SWAT team that "deputies can let their sergeants know they are  
26 unavailable in their off-duty hours." (Lelevier, Tr. 377:5-11.)

27           Likewise, former Sergeant Lelevier's testimony that he counseled a deputy for missing a  
28 call-out is unreliable because the witness clearly did not remember the facts: "I believe - I believe

Liebert Cassidy Whitmore  
A Professional Law Corporation  
6033 West Century Boulevard, 5th Floor  
Los Angeles, California 90045

1 so. I believe one that I can think of – I believe. But I don't recall specifically that it was – I know  
2 that there was one, and that was probably part of my – there were a few things that happened with  
3 a specific deputy, and I believe one of them was where he didn't answer his phone on his call –  
4 out. [The other things that happened with the deputy included] Not having his radio – not having  
5 his radio charged, and there was something else but I don't – I don't remember the details, but I  
6 do remember having an issue. If I'm not mistaken, that was one of the issues that was involved.”

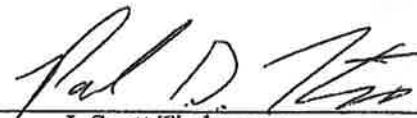
7 (Lelevier, Tr. 380:5-20.)

8 **III. CONCLUSION**

9 The arbitrator correctly found that the SWAT and Aviation deputies are not entitled to  
10 standby pay for their off-duty hours under Article IV, Section 3 of the MOU. Therefore, this  
11 honorable Board should accept the arbitrator's decision in full.

12 Dated: April 4, 2014

LIEBERT CASSIDY WHITMORE

13  
14  
15  
16 By:   
17 J. Scott Tiedemann  
18 Paul D. Knothe  
19 Attorneys for Respondent  
20 COUNTY OF RIVERSIDE  
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28

Liebert Cassidy Whitmore  
A Professional Law Corporation  
6033 West Century Boulevard, 5th Floor  
Los Angeles, California 90045

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: **6033 West Century Boulevard, 5th Floor, Los Angeles, California 90045.**

On April 4, 2014, I served the foregoing document(s) described as **RESPONDENT COUNTY OF RIVERSIDE'S OPPOSITION TO APPEAL OF HEARING OFFICER'S DECISION AND AWARD** in the manner checked below on all interested parties in this action addressed as follows:

**Robert D. Steinberg, Esq.**  
**DISPUTE RESOLUTION SOLUTIONS**  
**P.O. Box 5294**  
**Culver City, CA 90231**  
**Email: rdsteinberg@msn.com**  
**[Arbitrator]**

**Adam Chaikin, Esq.**  
**OLINS RIVIERE COATES AND BAGULA**  
**2214 Second Avenue**  
**San Diego, CA 92101**  
**Email: chaikin@orcblaw.com**  
**[Attorneys for Riverside Sheriffs' Association]**

- (BY ELECTRONIC SERVICE)** By electronically mailing a true and correct copy through Liebert Cassidy Whitmore's electronic mail system from ebernabe@lcwlegal.com to the email address(es) set forth above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- (BY U.S. MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 4, 2014, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

  
\_\_\_\_\_  
Erlinda Bernabe