

HOW MUCH IS THAT DOGGIE IN THE WINDOW?

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What, you ask, does the popular children's song¹ have to do with boroughs? It is the first song that comes to mind when thinking about the unanticipated costs associated with police canines. Why you ask? Well, it is not the upfront costs associated with the purchasing of the dog (perhaps your community received a grant to purchase the dog). The costs are based on two (2) realities: (1) many local governments fail to understand their obligations to pay canine handlers for off-duty time spent caring for the dog and (2) there are enormous penalties associated with successful lawsuits under the Fair Labor Standards Act. Both factors have left an environment ripe for eager attorneys who are anxious to capitalize on compensation errors. This is not an exaggeration – there literally are plaintiff's attorneys that advertise to canine handlers with promises of big payouts.

The legal basis of these claims is the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 et seq. The FLSA is the federal statute that defines what activities constitute "work" for purposes of compensation and provides the "rules" for overtime compensation. The term "work" is broadly defined by the FLSA to include any "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Holzappel v. Town of Newburgh, 145 F.3d 516, 522 (2nd Cir. 1998), cert. denied, 525 U.S. 1055 (1998).² Time spent by police officers caring for or training an assigned police dog during off-duty hours is compensable work time. Hellmers v. Town of Vestal, 969 F.Supp. 837, 842 (N.D.N.Y. 1997); Levering v. District of Columbia, 869 F.Supp. 24, 26-27 (D.D.C. 1994); Truslow v. Spotsylvania County Sheriff, 783 F.Supp. 274, 277-79 (E.D.Va. 1992). These activities are compensable because "feeding, training, exercising, and otherwise ministering to the needs of a canine dog are, at least up to a point, indispensable to the dog's well-being and to the employer's use of the dog." Id., citing, Reich v. New York Transit Authority, 45 F.3d 646, 650 (2nd Cir. 1995); Jerzak v. City of South Bend, 996 F. Supp. 840, 846 (N.D. Ind. 1998).

One of the most significant issues in defending these claims is that employers do not anticipate and provide for (even by virtue of the implementation of a policy) the manner in which canine handlers will be compensated for time spent caring for the dog while off-duty. Commonly, canine officers are scheduled to work forty (40) hours a

¹ The song was written by Bob Merrill in 1952.

² The Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), found that the FLSA applies to state and local governments. As a result of the Supreme Court's decision in Garcia, the FLSA applies to all boroughs.

week and therefore any time spent caring for the canine creates an overtime obligation. Any training, exercising, feeding, grooming, and/or providing veterinary care done outside of work time is potentially compensable as overtime.³

Often employers are unaware that their canine officers are spending significant time off-duty caring for the dog. In fact, most employers have no procedure or policy in place to determine and validate the amount of time an officer spends, while at home, caring for the canine. To be clear, there is no time clock at an officer's home to record the amount of time spent. Even if there were such a device, could the device accurately distinguish between time spent caring for the canine for the benefit of the employer as opposed to personal time spent with the dog beyond what is required to fulfill its needs? The difficulty associated with accurately recording and verifying this time is what makes defending these cases almost impossible.

If these lawsuits are impossible to defend, what can you do? First, understand that any remedy that could be pursued is only prospective. For past transgressions, a public employer could attempt to formulate a "settlement" (hopefully, without tipping-off its employee as to a legal cause of action) or it could simply ignore the issue (gambling that the effected employee does not learn of the error). The good news is that there is a limited statute of limitations on FLSA claims which is either two (2) or three (3) years.⁴ Second, the borough could, at a minimum, bargain a policy with the police union which sets forth specific time allotted for canine care.

Even the Courts recognize the difficulty of determining the exact amount of time canine officers spend caring for their dogs while off-duty. In Rudolph v. Metropolitan Airports Com'n, 103 F.3d 677, 681 (8th Cir. 1996), the Eighth Circuit Court of Appeals explained this difficulty by stating that an employer:

... cannot easily determine how long the officers work at home caring for the dogs. Dog care – feeding, grooming, cleaning cages or pens, and exercising – may take more time on one day than on others. It may be spread out, sporadic in nature. An officer might feed a dog when they get home, give the dog water later, and perform other care still later. The indeterminate nature of these tasks, we think, makes them exactly the sort of work as to which it makes sense for the parties to come to an agreement, to eliminate complicated, repetitious and hard-to-resolve

³ The FLSA provides public employers with the right to designate an alternate work week (typically 28 days) for employees who perform law enforcement activities. It should be noted, however, that most work weeks are collectively bargained as seven (7) consecutive work days. In order to utilize the Section 7(k) exemption, the collectively bargained work week would need to be eliminated and replaced with an alternate. 29 U.S.C. § 207(k); 29 C.F.R. § 553.201.

⁴ The three (3) year period is utilized for "willful violations" of the FLSA. Courts have found "willful violations" where the employer "knew or showed reckless disregard" for their obligations under the FLSA. McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988).

disputes about exactly how much time it took to care for the dogs each day.

Rudolph, 103 F.3d at 681.

Section 785.23 of the Code of Federal Regulations (“CFR”) provides a method for calculating overtime in situations where an employee performs work off-site and at indeterminate intervals. While Section 785.23 does not expressly address the payment of overtime to canine officers, federal courts have enforced reasonable agreements made pursuant to Section 785.23 between employers and canine officers with respect to overtime wages. Rudolph, 103 F.3d at 681; Leever v. City of Carson, 360 F.3d 1014, 1018 (9th Cir. 2004); Huss v. City of Huntington Beach, 317 F.Supp.2d 1151, 1157 (C.D. Ca. 2000).

The determination of “reasonable” turns on two (2) issues. First, the information known to the employer at the time it executed the agreement and any subsequent information it has obtained regarding the amount of time needed to care for a canine. Second, whether the employer has expressly required that the employees limit the amount of time spent to the time provided in the agreement.

What is reasonable? In Rudolph, the Eighth Circuit overturned a jury verdict which held that the provision of one half (½) an hour for each weekday and one (1) hour for each weekend day for canine care was unreasonable. The Court, in rendering its decision, focused on the existence and terms of the agreement between the parties. Specifically, the Court cited the provision of the contract which stated that the officers were not to spend more time caring for their dogs than they were paid for without seeking prior approval from the employer. The Court held that the agreement was reasonable despite the fact that the employees claimed to have regularly worked in excess of the time for which they were paid, because the employees agreed not to do so and the employer was entitled to rely on the clear terms of the agreement. Rudolph, 103 F.3d at 684.

In Brock v. City of Cincinnati, 236 F.3d 793, 807 (6th Cir. 2001), the Sixth Circuit concluded that seventeen (17) minutes per day of compensatory time was reasonable. In reaching this determination, the Court evaluated not only the amount of time agreed upon by the parties but also the non-monetary benefits (take-home cruiser, taxpayer-provided dog food, veterinary care, a kennel, travel to competitions, and on-duty training days) provided by the City.

What is unreasonable? In Holzappel, 145 F.3d at 526, a canine officer claimed that he spent up to forty-five (45) off-duty hours per week working with his assigned police dog. The employer instructed the officer to fill out his weekly overtime slip requesting two (2) hours of pay rather than calculate the actual amount of time he spent caring for the dog. The Court held that there was no “agreement” between the employee and the employer because the two (2) hour overtime limit was imposed on the employee unilaterally. Further, the Court noted that even if there had been an agreement, it would have been unreasonable as a matter of law because the employer knew that the employee

worked at least seven (7) off-duty hours per week, but the agreement only provided for two (2) hours of overtime pay. Id.

In Leever v. City of Carson, 360 F.2d 1014, 1019-1020 (9th Cir. 2004), the Ninth Circuit found that an agreement to pay a canine officer a flat \$60.00 a week (the equivalent of one hour of pay) to care for and train his/her canine was unreasonable. The Court based this decision on the fact that there was no evidence in the record that either the City or the Union made any inquiry into the number of hours actually spent, or reasonably required to be spent, by canine officers on canine care when negotiating the canine officer provision of the collective bargaining agreement. Moreover, the Court rejected the employer's contention that it had relied upon a "comprehensive parity study" it performed to determine the amount of time needed to perform canine care as the alleged study amounted to nothing more than handwritten notes. Id.

Why should my Borough care? The answer to that question is simple. If your borough employs canine officers and has not addressed off-duty compensation, your borough is inviting a lawsuit. As previously noted, these cases are extremely difficult to defend. A successful plaintiff is entitled to liquidated damages under the FLSA. Liquidated damages are double damages. In addition, an unsuccessful employer is responsible for attorney's fees.

What are your options? As outlined in the cases noted, there are many ways to address this issue. These include compensatory time off, reducing the regular work hours to account for canine care, setting a limit on hours of work devoted to canine care, or paying a flat rate (provided this flat rate at least reflects actual hours worked). If the canine officer is a member of a bargaining unit, all of these issues are mandatory subjects of bargaining, but the agreement of the unit can actually assist in defending a claim later on if done properly.

The point is – don't get carried away by that cute puppy's face or the promise that the doggie is free. This is one of those situations where there is no such thing as a free lunch.