

In the Matter of the Impasse Between)	
)	
LOS ANGELES COUNTY SHERIFF'S))	
DEPARTMENT)	
)	
- and -)	FACTFINDER'S FINDINGS
)	AND RECOMMENDED TERMS
)	OF SETTLEMENT
)	
ASSOCIATION FOR LOS ANGELES)	ERCOM Impasse Case No. 001-20
DEPUTY SHERIFFS)	
_____))	May 18, 2021
)	
Explosive breacher numbers and bonus)	
_____))	

Impartial Factfinder: Robert Bergeson

Appearing at the Factfinding Hearing:

On Behalf of Los Angeles County Sheriff's Department (LASD or Department)

Adrianna Guzman, Esq., Liebert Cassidy Whitmore
Anni Safarloo, Esq., Liebert Cassidy Whitmore
Jolina Abrena, Esq., Liebert Cassidy Whitmore
Chief Jack Ewell, Special Operations Division
Captain Dana Chemnitzer, Labor Relations & Compliance Bureau
Commander Joseph Williams, Special Enforcement Bureau (SEB)
Sergeant Fabby Barragan

On Behalf of the Association for Los Angeles Deputy Sheriffs (ALADS)

Will Aitchison, Esq., Public Safety Labor Group
Traci Anderson, Esq. Public Safety Labor Group
Derek Hsieh, ALADS Executive Director
Deputy Ervin Francois, Explosive Breacher
Deputy Kevin Hilgendorf, Explosive Breacher
Abner Klein, Force Entry Technical Training

BACKGROUND AND PROCEDURAL HISTORY

ALADS and the County of Los Angeles, by and through LASD, are parties to a memorandum of understanding (MOU) covering bargaining unit 611. That collective bargaining agreement expires on January 31, 2021. Among deputies included in the bargaining unit are "breachers" who are assigned to the Explosive Breaching Detail (Detail) which is a subset of the Special Enforcement Bureau.

The mission of the Detail, which was formed in 1999, is to provide SEB with an expedient and proven method of breaching structures during certain high risk incidents through the use of C2 and C3 explosives. Such explosives are detonated by a blasting cap. Barricaded suspects or hostage situations are the main reasons explosive breaching is used.

Since December 18, 2013, there have been 18 incidents to which Detail deputies have been deployed. Of those 18 events, four involved detonation of explosives and 14 did not. Of the 14 where there was not a deployment of explosives, various circumstances resulted in there not being a need for explosives at the scene. Some incidents where explosives were not detonated involved the suspect surrendering or leaving the scene, some involved the use of technology such as stealth probes, and in the two most recent incidents, a tactical caterpillar (Tac-Cat) was used in lieu of the explosive option.

Group grievances are not provided for under the MOU. Accordingly, when a dispute arose as to the appropriate pay for breachers in 2016, on October 24 of that year, 26 individual grievances were filed over that issue. Each grievance alleged that the filing deputy's pay was incorrect commencing with the date the breacher qualified for bonus pay under Los Angeles County Code Section 6.120.0209(B)(5). Ultimately that dispute resulted in mandamus proceedings in Los Angeles County Superior Court with the Court rendering a judgment on July 14, 2020 that the underlying issue was not controlled by the MOU but by the County Code. Accordingly, said the Court, the grievances were not arbitrable. The Court further ruled that the County was required to pay the affected breachers in accordance with the aforementioned County Code section not only retroactively to the date each breacher became eligible for the additional amount but also prospectively.

The percentage of pay to the Explosive Detail breachers as a result of the Court's decision is 11.6125% of the total of each deputy's regular earnings, longevity pay, and P&C Step 7 Pay. As indicated in ALADS exhibit 18, what the parties refer to as Critical Shortage pay, Advanced POST, Dive Pay, and the K-9 Detail bonus are not used in the calculation of the amount due to breacher deputies. As of the date of the hearing in this factfinding, the Department states it has made the retroactive pay believed owed under that ruling.

The Dive Team is another cadre of specially trained deputies within the SEB. Members of that team receive 5.6468% bonus pay. As with breacher deputies, members of the Dive Team do not perform such activities full-time yet receive their bonus pay as if full-time. Nevertheless, LASD has not advocated a similar reduction in the number of deputies on the Dive Team.

On April 28, 2020, the Board of Supervisors approved a County budget for fiscal year 2020-2021. However, as a result of COVID-19 impacts on County revenue, the County Chief Executive Officer (CEO) later recommended to the Board of Supervisors that there be downward adjustments in the 2020-21 recommended budget, including cuts to the Sheriff's Department. The proposed additional cuts to the Department budget amounted to \$145.4 million and included elimination of 1392 positions and 346 potential layoffs.

As set forth in Department exhibit 9, a June 29, 2020 memorandum from the CEO to the Board of Supervisors explicated a process whereby each County department would submit curtailment scenarios to create the details of the reduced budget ranging from 10 percent to 20 percent. There was no recommendation in the June 29 memorandum for a reduction to the SEB and, therefore, none for the Explosive Breaching Detail.

On August 18, LASD notified ALADS Executive Director Derek Hsieh by phone that it intended to shift the duties of the Explosive Breaching Detail to members of the Department's Arson and Explosives Detail. ALADs then asked LASD to submit its proposal.

On August 21, SEB Captain Joseph Williams sent a memorandum to Captain Dana Chemnitzer of the Bureau of Labor Relations and Compliance proposing that the number of Explosive Breaching Detail deputies be reduced from 17 full-time assignments to one full-time assignment and two part-time assignments. The memorandum references the importance of the independence of the Explosive Breaching Detail as a critical component of SEB but cites the budget shortfall in the LASD and notes that the Explosive Breaching Detail has been infrequently used. In response to receipt of that memo, ALADS asserted its right to negotiate over that advocated personnel cut.

On September 12, Sergeant Kevin Brown sent a memo to SEB SWT members and the SEB supervisory staff regarding Explosive Breaching. The memo stated that, as of that date, there appeared to be 17 "deployable breachers" and one sergeant in the unit and that those not among the deployable breachers were to turn in their breacher bags and firing assemblies. Brown further dictated that team leaders would be permitted to keep and store explosive devices ("no firing assemblies") in their cars, so that any deployable Explosive Breacher would have access to a variety of charges should one or multiple charges be needed on any given operation.

The parties met and conferred on September 22. During that session, the Department initially asserted that the motivation for the cuts in the Detail was financial. When ALADS asked what the amount of the savings was anticipated to be as a result of the cuts discussed, Department representatives said they had not calculated the savings and cited operational efficiency as an additional reason for the cuts in the cadre.

Capt. Williams sent a second, more detailed memorandum to Capt. Chemnitzer on September 25. In that memo, Williams further explained the rationale for his recommendation to significantly reduce the cadre of Explosive Breaching Detail from 17 full-time deputies and a sergeant to one full-time and two "part-time" deputies and a sergeant. He stated therein that explosives had not been ignited in an operation since 2017 and noted that the deputies currently assigned to the Detail had been spending less than 25 percent of their time performing breaching duties. Williams's memo further mentioned an estimated savings of \$363,320 as the result of the proposed reduction in staffing of the Explosive Breaching Unit.

Another meet and confer session was held on October 1 at which ALADS asked the Department for the calculations used to determine the purported \$363,320 savings. By memo of

October 5, Chemnitzer provided ALADS with the requested calculations. Rather than the \$363,320 indicated in the September 25 Williams memo, the October 5 memo asserted savings of \$203,537.

On October 13, another meet and confer session was held. During that session ALADS proposed that there be 12 full-time Explosive Breacher assignments each of which would be paid at 50 percent of the bonus amount provided for in the County Code. The parties then discussed that the Association's proposal would require that the 12 remaining breachers explicitly waive the codified pay provision. The Department then made a new counter-proposal which contained two options.

The first option proposed by the Department was a reduction to six "full-time" breachers who would each receive a bonus of 3.5 percent. The other Department-proposed option was one full-time assignment with two part-time assignments. ALADS' team then caucused, but did not make a counter-proposal after returning to the bargaining table. For its part the Department agreed to take ALADS' last proposal under advisement with a commitment to reply to it at the next meeting, then scheduled for October 21. On October 20, ALADS cancelled the meet and confer session scheduled for October 21.

On October 28, counsel for the Department sent ALADS' attorney a memorandum in which she informed the Association that the Department could not accept ALADS' last proposal. The memorandum went on to again contain two options which were to comprise the Department's Last Best and Final Offer (LBFO):

Option 1: Six full-time assignments at 3.67 percent contingent upon a written agreement that the Explosive Detail cadre would be ineligible for the pay provision set forth in County Code section 6.120.020(B)(5)

Option 2: One full-time assignment, with five part-time assignments, the staffing of which could come from any detail within SEB provided the relevant deputy qualifies for breacher duty through training and certification. Those assigned to part-time positions would be assigned to serve on designated days/shifts.

ALADS was warned that if it did not agree to one of those alternatives by 4:00 p.m. on November 10, the Department would infer the existence of an impasse. Moreover, the Association was told, the Department's position in impasse would be the second option immediately above.

Because the Association did not concede to one of the options advocated by the Department, on November 16, Ms. Guzman notified ALADS representative Will Aitchison that she would be filing a Notice of Impasse with the County Employee Relations Commission (ERCOM). On behalf of his client, Aitchison conceded that the parties were at impasse and requested that it be a joint declaration of impasse. ERCOM agreed that the parties were at impasse, and contacted a state mediator, Gerald Adams, to intercede. On December 23, Mediator Adams informed the Department that ALADS had declined his offer of participation in the process and had requested that the parties proceed to factfinding. With the Department's concurrence, ERCOM

thereafter certified the dispute to factfinding.

Returning to the financial side of this impasse, it is undisputed that during October 2020, the County CEO reduced the expected shortfall in LASD's budget from the original \$145 million to \$105 million. In addition, since the parties last met and conferred, as a result of the COVID-19 relief bill, the County now expects to receive \$1.9 billion in funding from the federal government as a result of the COVID-19 relief bill.

The above-summarized evidence was presented at a hearing of March 15, 2021 following which the undersigned prepared a draft report which was shared with a representative of each of the parties. Over the next two-plus weeks, post-hearing mediation efforts were made by this neutral factfinder which ultimately failed to effectuate a settlement of the issue herein and related litigation these parties aspire to put behind them.

ISSUE

The underlying issue in this proceeding is whether there should be a reduction in the current cadre of breachers with the related bonus received for performing such duties also being a consideration.

CRITERIA TO BE USED IN MAKING THAT DETERMINATION

The County's Employment Relations Ordinance (ERO) does not specify criteria to be used in factfinding. However, at Government Code Section 3505.4(d), the state Meyers-Milias-Brown Act (MMBA), which authorizes such local ordinances, does provide criteria for making factfinding recommendations. Those criteria are as follows.

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations, or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, other excused time, insurance, pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (8) Any other facts that are normally or traditionally taken into consideration in making the findings and recommendations.

POSITIONS OF THE PARTIES

The Department

The Department cites multiple reasons for proposing a reduction in the cadre of Explosive Breachers.

One reason is the County's financial difficulty and the accordant need for cost savings above and beyond the 10-20 percent contained in the June 29 budget memorandum.

Another reason relied upon by the Department is the infrequent deployment of breachers and detonation of explosives since December 2013. From that date until the present hearing, breachers had been sent out to secure entry to structures at a crime scene only 18 times and actually detonated explosives on only four of those occasions, the Department points out.

The Department further argues that none of the 17 deputies nor their sergeant has been performing breacher functions full time and that new technology has diminished the need for explosives to be mounted and detonated. The Department cites the Tac-Cat and stealth probes in that regard.

Therefore, asserts the Department, as indicated in its last, best and final offer, the Breacher Detail should be reduced to one full-time and two part-time deputies.

The Association

ALADS asserts that the Department's position must be rejected because of the spurious supporting rationale. Association argues in that regard are the following.

LASD initially cited merely finances in advocating a reduction in the number of breachers. However, when so doing the Department had not even calculated the savings to be expected from the advocated reduction. Moreover, argues ALADS, the Department continues to give short shrift to the fact the County's financial position has changed significantly over the last year.

The Department has also failed to explain how the Explosive Breaching Detail would be able to function with only one full-time person. The Dive Team certainly is not being asked to so reduce itself in size. Additionally, by all appearances LASD has not notified cities within the County to which the Department provides law enforcement services by contract of planned reductions to the breacher cohort although the proposed cuts are likely to have an impact on the level of service available under those contracts.

During the first relevant meet-and-confer session, the Department pointed to the infrequent use of explosive breaching as an additional reason for the reduction in the number of breachers suggesting that explosive breaching had not been used since 2017. However, as indicated in ALADS exhibit 19, commencing in December 2013, breacher deputies were deployed to 18

incidents with detonations made in four of those incidents. There were a variety of reasons for non-detonation: suspects surrendering, suspects fleeing and the use of stealth probes and the Tac-Cat. There is no way to know in advance of a deployment whether explosives will be needed to gain entry to a location.

ALADS further avers that the amount of time deputies spend on Detail work cannot be accurately calculated simply through consideration of call-outs. Given the dangerous nature of such duty and changes in related technology, breacher functions are a perishable skill requiring regular training to update as well as careful maintenance of equipment. Expert witness Abner Klein was particularly persuasive in that context, the Association contends. Klein was for a number of years a member of the SWAT team of the Las Vegas Metro Police Department where he was lead breacher and instructor for 16 years. Klein does not see how the Breachers Detail can possibly be effective with only one full-time member.

Contemporarily, the expected budget situation for Los Angeles County is no longer as dire as it was at the time of the June 29, 2020 final 2020-21 budget curtailment memorandum. Not only is the federal government expected to provide COVID-19 relief funds of \$1.9 billion, sales taxes and similar revenue sources are expected to rise substantially as more businesses open and more residents are vaccinated.

Moreover, says the Association, the County-ALADS MOU will expire on January 31, 2021. Rather than hurriedly reducing the size of the Detail, there is no reason the parties cannot fold the Detail size issue into bargaining over the successor MOU. So deferring the issue would allow the parties time to consider it in light of budget projections based on an economic scenario much more akin to what will be the case during the term of that successor contract.

ALADS asserts that, based on the above, the Department's complement of Explosive Breachers should remain at its current level and even assuming for purposes of argument there is some justification for a reduction in funds allocated to the Detail, the Department's position is patently draconian.

ANALYSIS AND RECOMMENDATIONS

As will be seen, there is some merit to the position of each of the parties.

It should be said at the outset that no explanation appears in this record for how a bonus amount of 11.1625% for deputies performing breaching duties came to be codified by the County as an employer as opposed to being set forth in the parties' MOU. I can say from nearly four decades as a labor relations neutral largely handling public sector matters that so doing is very, very rare. Notwithstanding that provision, it is my understanding that ALADS has not and does not take issue with the Department's position that any agreement to reduce the bonus amount to below the codified amount would require affected deputies to waive that right.

Because the evidence before me persuades that the 11.1625% has become excessive over the 22-year life of the Detail, it is initially recommended that the Department's proposal for a

mutual agreement to require such a waiver from breachers be adopted. So doing would be a step toward the remainder of my recommendations.

It is further recommended that there be some reduction in the cadre of breachers. Cmdr. Williams has stated that the average breacher has been performing that duty less than 25 percent of their work time. Although that figure may not be exact, it jibes with raw data in the instant record. (As an example, extrapolating from the hearing comments of Deputy Ervin Francoise and others, although explosive charges are only affixed to a structure in a minority of callouts, it appears that during a typical year each deputy in the Detail will be called out to potentially perform that function somewhere in the range of half a dozen times to a dozen times.) Nevertheless, because of a ruling by the L.A. County Superior Court, the County Code requires breachers to be considered as performing that duty “full time” so that the 11.1625% bonus applies to every hour they work. Although I am not persuaded that a reduction in the cadre of breachers should be as drastic as advocated by the County and I believe the function they perform requires regular training not factored into its calculations, it must be found that paying 17 deputies and a sergeant as if they were exclusively performing breacher functions when they are actually doing so less than one-fourth of their time cannot possibly be considered cost effective for the Department.

Notwithstanding that conclusion, the Department argues that the Explosive Breaching Detail should be reduced to one “full-time” and six “part-time” breachers. Frankly, it is unclear just what the Department means by “part-time” breachers and that is complicated somewhat by an absence of differentiation between a *position* and an *assignment*. In public personnel management, a “position” typically connotes a series of duties or functions for which money is budgeted to fund the performance of. Accordingly, it is assumed by the Department’s proposal that it believes these parties should agree that, going forward, one deputy position should be budgeted so that the incumbent filling it would receive a bonus 100 percent of their time at work whereas six other positions should be budgeted so that whomever fills such positions would receive the breacher bonus only a portion of their time. However, even should I be correct in that assumption, the County’s LBFO as presented at the factfinding hearing does not explicate whether the deputies filling those six positions would receive the bonus half of their time, only one-fourth of their time or even less than that.

Also problematic from the County’s LBFO is how, if that offer was acceptable to the Association, it should be determined which of the current 17 breachers would cease to perform that function nor how it would be decided who the “full-time” breacher would be as distinguished from the five “part-timers.” The undersigned inquired about that during the instant hearing but it was apparent no thought had been given to it. It is similarly unclear to this neutral factfinder whether the Department is suggesting retention of the sergeant position but it is assumed that particular matter has not been addressed because that classification is not in the ALADS bargaining unit.

Further unclear are the specifics of the Dive Team situation. Given that the Department has not advocated a reduction in the number deputies occasionally serving in that capacity, it might also be presumed that those deputies have been spending a larger proportion of their work hours

performing that function. Of course, it may also be the case that the Department views Dive Team members as being less problematic because the bonus they receive is only about half that of members of the Explosive Breaching Detail.

As with the Explosive Breaching Detail, the Dive Team is hierarchically under the Special Enforcement Bureau. That and the fact Dive Team deputies similarly perform their unique functions only a minority of their time beg asking why service on the Dive Team is only compensated at half the amount of the Explosive Breaching Detail. Perhaps the Dive Team's functions are only half as potentially catastrophic but surely Dive Team work can be hazardous duty. Accordingly, it would be a stretch to argue that Dive Team members are not what the MMBA refers to as "employees performing similar services in comparable public agencies."

It is parenthetically noted that during his presentation in the factfinding hearing, expert witness Abner Klein mentioned that the Department also has an Arson & Explosives Team. If that cohort has similar characteristics to the Explosive Breaching Detail, the bonus paid to its members would also be relevant in altering that received by breachers. However, unless I missed it, no other information was provided about that other special unit.

On this record, it therefore appears as though the bonus for breaching functions should be reduced to the same 5.6468% paid to members of the Dive Team. According to ALADS exhibit 18, for fiscal year 2020-2021 the collective amount the Department will pay to breachers because of the 11.1625% bonus will be about \$203,536.81. As such, reducing the breacher bonus to the same amount as for Dive Team members would save the Department about \$100,000 even without a reduction in the number of "full-time" deputies used to perform that function.

Although perhaps relevant mainly for ancillary political reasons, it seems to me that it should be kept in mind that the County has contracted with more than three dozen cities to provide a full range of law enforcement functions. Axiomatically, that includes the use of breachers should the need for them appear to arise. Also axiomatic is that as sheriff's deputies, breachers are often off duty for vacations, sick leave, IOD status and the like. The possibility of breaching situations simultaneously arising both within unincorporated areas and a contract city is also present. Although I am unpersuaded that, as opined by breaching instructor Klein, any reduction in the number of breachers would strike a serious blow to the effective of the Detail, neither do I understand how the Department could possibly have once advocated that 17 breachers be reduced to merely three, two of which would be less than full-time. Granted, the Department's position has since come up to half a dozen positions and that may ultimately be possible through available new technology. However, making a numerical decision is less than an exact science and even were the undersigned to place an exact number on what he believes to be appropriate there would still remain the issue of just which of the present 17 deputies should have breacher duties removed from them should push come to shove.

Given the latter consideration, it is recommended that a carrot-on-a-stick approach be used to reduce the number of breacher assignments. It may be that a mere reduction of the bonus to 5.6468% might motivate one or more of the current breachers to resign from such duty. At least in

theory the possibility of a higher average three years of income serving in another capacity within the Special Enforcement Bureau would be a consideration to those of retirement age to initiate that option sooner rather than later.

It is also recommended that the parties consider using the \$100,000 in first-year savings anticipated to come from reducing the bonus amount to 5.6468% to agree upon a buyout provision which might encourage others to seek reassignment elsewhere. If the parties so choose, there would need to be a finite date for acceptance of such a buyout. In the absence of any information on that point, nothing specific can be suggested other than that the length of time not be longer than 12 months.

In the event the parties should be skeptical of such an approach, this should be pointed out. On the one hand the evidence presented herein makes clear that, to date, the Department has been excessively skeptical about the state of its finances and, to be frank, the amount that has historically been allocated to the Explosive Breaching Detail has been microscopic. (If ALADS' calculations are accurate, the 11.1625% bonus paid to the current breachers amounts to approximately "one-hundredth of one percent of the Department's budget.") On the other hand, contrary to similar factfinding proceedings to which I have been appointed, the instant case does not involve a management attempt to justify layoffs if agreement with the union cannot be reached but simply an effort to take action which would result in some of the relevant employees transferring elsewhere within the organization with those remaining accepting lesser compensation for their involvement in the pertinent area going forward.

Having so opined, my involvement in this matter has ended in the absence of a mutual request by the parties for my further participation.

DATED: May 18, 2021

Respectfully submitted,

Robert Bergeson

Impartial Factfinder