SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

JENNIFER AUGUSTUS, Plaintiff, vs. AMERICAN COMMERCIAL SECURITY SEERVICES, et al., Defendant	Case No.: BC336416 OPINION AND ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT/ADJUDICATION AND DEFENDANT'S MOTION TO DECERTIFY CLASS

Defendant ABM Security Services, Inc., dba American Commercial Security Services (ACSS), seeks summary judgment in Defendant's favor and against the plaintiff class with respect to all causes of action asserted against Defendant in the action. Alternatively, Defendant moves for decertification of the class under California Rule of Court 3.764(a)(3) and (4). The plaintiff class also has filed a Motion for Summary Adjudication of (1) the class' first cause of action for failure to provide rest periods; (2) Defendant's thirtieth affirmative defense (asserting that the claims are dependent on analysis of collective bargaining agreements [CBAs]), and (3) defendant's thirty-second affirmative defense (asserting validity of on-duty meal period agreements). After reading and considering all briefing, evidence and arguments of the parties, the court rules as follows: The Motion for Summary Adjudication of the Plaintiff Class is granted as to Plaintiffs' first cause of action for failure to provide rest periods and is denied in all

other respects. Defendant's Motion for Summary Judgment and for Summary Adjudication is denied. Defendant's Motion to Decertify is granted in part, and the meal period subclass is decertified; the Motion to Decertify is denied in all other respects.

I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff class is employed by Defendant as security guards. Defendant is a provider of security services. The operative complaint alleges that Defendant violated Labor Code section 226.7 and applicable regulations and wage orders by failing to authorize and permit rest breaks (the first cause of action), and violated Labor Code § 226.7 and 512 by failing to provide an uninterrupted, unrestricted meal period of not less than 30 minutes.

> The following subclasses were certified on February 27, 2009:
> Meal Period Subclass:
> All persons who are or were employed by Defendant . . . in any security guard position in California at any time during the period from July 12, 2001, through the entry of judgment herein who worked a shift of more than five (5) hours without being afforded an uninterrupted, unrestricted meal period of not less than 30 minutes.
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> Rest Period Subclass
> All persons who are or were employed by Defendant . . . in any security guard position in California at any time during the period from July 12, 2001, through the entry of judgment herein who worked a shift exceeding four (4) hours or major fraction thereof without being authorized and permitted to take an uninterrupted rest period of net ten (10) minutes per each four (4) hours . . .

The rest period subclass excluded those guards who fell within the rest period exemption approved by the DLSE covering sites manned by single guards.

ACSS guards operate in assignments ranging from small, one officer night shifts to large commercial sites with multiple officers; from the security officer sitting alone behind a desk to officers driving a car, patrolling a mall or other security work. Some officers are armed in high security buildings while others provide information and doorman services where the risk of crime is minimal. (See Plaintiff's Response to Defendant's Separate Statement of Undisputed

Material Facts in Support of Motion for Summary Judgment or Motion for Summary Adjudication ("P's Response to Sep. Stmt"), Nos. 5-6.)

Guard employees of defendant enter into revocable on-duty meal period agreements. It is undisputed that 96 percent of the class executed on-duty meal period agreements during their employment. (*See id.* Nos., 31-32.) ACSS claims it only uses the agreements when necessary and that the majority of guards enjoyed off-duty, paid lunch breaks. According to Defendant, those who took on-duty meals were permitted to eat and were paid for their time. Plaintiff disputes this fact. (*See id.*, No. 29.)

The putative classes include unionized employees and members of a SEIU Local (including named plaintiff Emanuel Davis) – whose meals and breaks were bargained collectively and determined by contract. (*Id.*, No. 7.) Those collective bargaining agreements expressly (a) acknowledge that duties in some locations prevent off-duty meal periods; (b) ensured that guards received at least two 10 minute breaks; and (c) mandated a grievance and arbitration procedure for resolving these disputes. (*See id.*, No. 8) The CBAs contain a provision as follows: The parties agree that the nature of the work performed by a security officer may prevent him or her from being relieved of all duties necessitating an on-the-job meal period. (*Id.*, No. 9.)

Most guards received rest breaks, albeit, on-duty breaks. Named plaintiffs admit they are smokers and took several "smoke breaks" throughout the workday. (See Defendant's Additional Facts Defeating Summary Adjudication and Supporting Evidence, No.31.) ACSS also applied for and received a rest break exemption from the California Division of Labor Standards Enforcement (DLSE) for its single guard sites from December 27, 2006 to December 26, 2007. (P's Response to Sep. Stmt, No. 48) ACSS applied for a subsequent exemption, but what it received from DLSE, according to Defendant, could not be administered, because it was over-inclusive in some areas and did not cover the guards in others. (*Id.*, No. 49.)

II. LEGAL ANALYSIS

A. Plaintiff Class' Motion for Summary Adjudication as to the Rest Break Subclass

Employers are required to allow all employees to take a paid rest break of ten minutes every four hours. (See 8 CCR §11040(12)(A).) Waiver of the rest period is prohibited. Under certain narrow circumstances, an employer may obtain an exemption from the rest period requirement by application to the DLSE. An exception may be provided, after application and investigation by the DLSE, where the DLSE finds that enforcement of the rest period provisions (1) would not materially affect the welfare or comfort of the employees, and (2) would work an undue hardship on the employer.

Regarding rest breaks, the relevant wage order provides:

> 12. Rest Periods
> (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (31/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
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> (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

Here, Defendant argues that it provides rest breaks, but acknowledges that a guard's rest break is always an on-duty rest break. Defendant's policies make all rest breaks subject to interruption in case of an emergency or in case a guard is needed (for example, when a tenant needs an escort to the parking lot, which could not be called a life threatening emergency but nonetheless is an important job duty for a security guard.) Because a guard must be available for these situations, guards must keep their cell phones or pagers on. Defendant's position is that interruptions are so rare that the guards are effectively getting their breaks; that plaintiffs have

presented no evidence that a guard who was interrupted could not restart their break; and that, because a guard is free to engage in non-work related activities during the rest period (provided the rest break is not interrupted) such as smoking cigarettes, surfing the internet, reading a newspaper or book, having a cup of coffee, etc., that the breaks are in compliance with the wage order and should not be considered on-duty time.

The position of the plaintiff class is that it is irrelevant whether a guard smokes, reads or sips coffee during the rest break provided by the Defendant, because it is undisputed a guard must remain available and must keep his or her pager or cell phone, so as to be able to respond if needed. According to the plaintiff class, an on-call break is no break at all, even if the break is not interrupted.

The Industrial Welfare Commission ("IWC") has defined "hours worked" to mean the time during which an employee is subject to the control of an employer, including all of the time the employee is suffered or permitted to work, whether required to do so. The evidence demonstrates, and the Defendant does not deny, that the guards are always subject to the control of the Defendant during their "breaks" because they remain on call. Under the governing statute and regulations and the case law interpreting them, the time an employee is on duty and subject to call is compensable work time. (*See e.g., Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (compulsory travel time spent by agricultural workers was compensable hours worked where workers were required to meet at designated departure points at a certain time to ride employer's buses to work and for return to the departure point after work even though workers were free to read, sleep, eat, etc. during the ride); *Aguilar v. Assoc. for Retarded Children* (1991) 234 Cal.App.3d 21 (the time an employer required a personal attendant to spend at the employer's premises constituted hours worked, even though the personal attendant was permitted to sleep).)

In *Aguilar v. Assoc. for Retarded Children, supra,* the plaintiffs were employees of a group home who were required to spend the night on the premises. Defendant paid employees

for the overnight work shift of 17 hours if the employees received less than five hours' sleep or spent more than three hours assisting one of the handicapped individuals in the group home. Otherwise the employees would receive no compensation for the 10 p.m. to 6 a.m. shift. The court found that the time the employee spent sleeping but remained on call was compensable, because that time came under the definition of hours worked, *i.e.*, time during which an employee was subject to the control of an employer, whether or not the employee was required to work. (*Aguilar, supra,* 234 Cal.App.3d at 30. C*f.*, *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal.App.4th 968, *disapproved on other grounds in Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573-574 (where an employee was not permitted to leave the work site during a meal period, the meal period is considered to be "on-duty.").)

In *Morillion v. Royal Packing Co., supra,* the defendant employer required worker plaintiffs to meet for work each day at specified parking lots or assembly areas. After plaintiffs met at these departure points, defendant transported them, in buses that defendant provided and paid for, to the fields where plaintiffs actually worked. At the end of each day, defendant transported plaintiffs back to the departure points on its buses. Defendant's work rules prohibited employees from using their own transportation to get to and from the fields. The Supreme Court held the employer exercised control over the employees by requiring them to travel to their worksites on the company-owned bus. The employer's imposition of mandatory departure times and disciplinary action for employees who drove their own cars to the fields was sufficient to satisfy the control requirement. The court found that it is only necessary that the worker be subject to the control of the employer in order to be entitled to compensation. (*Morillion, supra,* 22 Cal.4th at 584-585.) It did not matter that the employees were not in fact working while on the bus and that they were free to read, sleep, or do other activities for their own enjoyment.

In this case, there is no dispute that the security guards are under the control of their employer during rest breaks – while they may engage in leisure activities during such breaks,

they remain on call. (See e.g. Deposition of Fred Setayesh 77:5-17; Plaintiffs' Response to Defendant's Additional Facts Defeating Summary Judgment, No. 33.) As set forth in the cases cited above, it is irrelevant that an employee may read or engage in other personal activities during "down time." What is relevant is whether the employee remains subject to the control of an employer. Any such time counts toward hours worked.

This interpretation appears to be consistent with the views of the DLSE with respect to the conditions under which the rest break subclass is working. When Defendant applied for an exemption from rest breaks for its one-guard stations, the DLSE did an investigation and concluded that Defendant does not give afternoon breaks to day shift employees and gives no breaks to swing shift and graveyard shift employees. Defendant acknowledges that it has not changed its break policy in any way since that finding.

Defendant attempts to distinguish the cases cited above, arguing that they pertain to whether an employee must be paid in a particular circumstance. This argument misses the point. The relevant wage order provides that "rest period time shall be counted as hours worked for which there shall be no deduction from wages." Time that the employee is subject to the control of the employer is work time and must be paid without reference to the definition of a rest period. In order to make sense of the statutory scheme, a rest period must not be subject to employer control; otherwise a "rest period" would be part of the work day for which the employer would be required to pay wages in any event.

Defendant also argues that an interpretation of the statute and wage order requiring an employee to be relieved of all responsibilities on rest break would be unrealistic and unmanageable. There are two responses to this argument. First, whatever the wisdom of the statutory requirements, we have no power to rewrite the statute to conform to the courts' notion of sound policy. (*Morillion, supra,* 22 Cal.4th at 585.) Second, there is an exemption process through the DLSE to address circumstances of undue hardship for the employer, a process of

which Defendant has taken advantage for a defined circumstance and time period. If the employer chooses not to take advantage of the exemption process or is not eligible for an exemption, the statute requires that the employer pay an extra hour of pay as a penalty for rest breaks not provided.

Accordingly, the undisputed facts require that the plaintiff class' motion for summary adjudication as to the first cause of action be granted. For the same reasons, Defendant's motion for summary judgment is denied and Defendant's motion for summary adjudication of the first cause of action is denied.

B. Defendant's Motion for Summary Adjudication as to the Meal Break Subclass

Under California wage orders, an employer is prohibited from employing a non-exempt employee for more than five hours per day without providing that employee with an unpaid meal period of not less than thirty minutes. (See 8 CCR § 11040(11); Labor Code § 512(a).) Employers must relieve the employee of all duty during a required meal period and must provide the meal period no later than the end of the fifth hour worked. (*Id.*; Labor Code § 226.7.)

An exception exists where the nature of the work prevents the employee from being relieved of all duty, and when the employer and the employee agree to an on-duty meal period in writing. (8 CCR § 11040(11). The relevant Wage Order provides in part (emphasis added):

> 11. Meal Periods
> (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. **An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.**
> (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

(C) In all places of employment where employees are required to eat on the premises, a suitable place for that purpose shall be designated.

It is undisputed that almost every member of the meal period subclass has signed an on-duty meal period agreement, and that the agreements by their express terms are revocable. However, the plaintiff class argues that *none* of the signed agreements are valid, because the nature of the work of a security guard does not ever prevent a security guard from being given a meal break. Defendants argue that *every* signed agreement is valid, because the nature of security work prevents employees from being relieved of all duty during meal periods.

The dispute here is over whether the nature of the work prevents a member of the plaintiff class from being relieved of all duty, and the standard by which that fact is to be determined. Plaintiffs argue for a strict standard, as set forth in a DLSE letter 2002.09.04, which articulates a multifactor test. According to that letter, the facts that are considered in determining whether the nature of the work prevents an employee from being relieved of all duty during a lunch break are: (1) the type of work, (2) the availability of other employees to provide relief to an employee during a meal period, (3) the potential consequences to the employer if the employee is relieved of all duty, (4) the ability of the employer to anticipate and mitigate those consequences such as by scheduling work in a manner that would allow the employee to take an off duty meal break, and (5) whether the work product or process will be destroyed or damaged by relieving the employee of all duty. The burden rests on the employer to establish these facts. Moreover, the letter states: "The Division will conclude that an off duty meal period must be provided unless these factors taken as a whole decisively point to the conclusion that the nature of the work makes it virtually impossible for the employer to provide the employee with an off-duty meal period." (DLSE Opin. Ltr. 2002.09.04.)

According to the plaintiff class, Defendants are unable to show that the nature of the work makes it "virtually impossible" to provide the employees with an off duty meal period. Plaintiffs point to Defendants' own testimony that it would possible to give breaks; to the fact

that supervisors come and check on the guards; to the fact that other security companies give off duty meal periods and ACSS will schedule them when a client so requests; and to the fact that Defendant could, but does not, require staffing for such breaks in its contracts with clients.

Defendant disputes that the "virtually impossible" language of the 2002 letter sets forth the correct standard. Defendant relies on a more recent DLSE letter, 2009.06.09, involving truckers transporting hazardous explosive materials, who cannot leave their trucks for lunch breaks without violating state and federal regulations governing carriers of hazardous materials. In that letter, the DLSE backed away from the "virtually impossible" language, stating that, "the express language of the wage order contains no requirement that in order to have an on-duty meal period, the employer must establish that the nature of the work makes it virtually impossible for the employer to provide the employee with an off-duty meal period, as suggested in the 2002 opinion letter. Nor is there a rational basis to impose such a narrow, imprecise and arbitrary standard." The 2009 letter also states that an employer must establish "facts and circumstances in the matter [which] point to the conclusion that the nature of the work prevents the employee from being relieved of all duty."

The question of whether the nature of the work prevented the employee from being relieved of all duty is a question of fact dependent on a variety of factors. In the instant matter, the facts suggest that at some locations, particularly those with multiple guards on duty at any given time, it could be relatively easy to relieve one guard at a time from all duty. Conversely, at a remote site with a single security guard, the nature of the work may well prevent a guard from being relieved of all duty for a meal break. Indeed, the CBAs in place that govern some of the class members acknowledge that duties in *some* locations prevent off-duty meal breaks. (P's Resp. to D's Sep Stmt, No. 8.)

These are issues that must be decided based on the facts relevant to staffing at a particular location, the remoteness of the location and possibly the nature of the security assignment at the

location. The court may not determine the "winning" evidence as to the class as a whole, but must leave the matter to determination by the trier of fact based on the particular circumstances of an individual security guard's assignment. As the question whether the nature of the work prevents a guard from taking an off duty meal break presents factual issues that must be resolved on a case by case basis, Defendant's motion for summary adjudication with respect to the meal break claims is denied. For the same reasons, the plaintiff class' motion for summary adjudication of Defendant's thirty-second affirmative defense, asserting the validity of the on-duty meal period agreements, is denied. The plaintiff class' motion for summary adjudication as to the defendant's thirtieth affirmative defense, asserting that the claims are dependent on analysis of collective bargaining agreements, also is denied.

C. Defendant's Motion to Decertify the Class

An order certifying a class is conditional and may be modified at any time. A modification is appropriate where new or more detailed information, not before the court in the prior proceeding, undermines the basis for the court's earlier ruling. (*Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 360.) A class should not be decertified unless changed circumstances suggest that the case cannot properly proceed as a class action. (*Weinstat v. Dentsply International, Inc.* (2010) 180 Cal.App.4th 1213, 1226.)

Here, as to the meal period subclass, the court has before it evidence making clear that, based on the proper legal standard, there are individualized issues that must be resolved to determine whether or not the on-duty meal period agreements are valid and enforceable. As discussed above, at some locations where multiple guards are on duty at any given time, the trier of fact could find that it was possible and not burdensome to relieve one guard at a time from all duty, and could find that at remote sites staffed by a single guard the nature of the work did prevent the guard from being relieved. The trier of fact also would have to make determinations with respect to guards working in a variety of circumstances between those extremes, for

example, at a single guard site relatively close to a multiple guard site. The variety of different conditions under which individual class members work requires individualized determinations with respect to the validity of the on-duty meal break agreements. Thus, common issues of fact do not predominate as to the meal period subclass.

The variety of working conditions of class members and the effect of those conditions on the evaluation of the validity of the on-duty meal break agreements were not fully apparent at the time of the class certification motion.[1] The facts presented in the Defendant's motion for summary adjudication as to the meal period claims makes plain that the issues presented cannot properly be litigated on a classwide basis. This changed circumstance makes it appropriate for this court to grant the Defendant's motion to decertify the class as to the meal period subclass only. The motion to decertify is denied in all other respects.

ORDER

The Motion for Summary Adjudication of the Plaintiff Class is granted as to Plaintiffs' first cause of action for failure to provide rest periods and is denied in all other respects. Defendant's Motion for Summary Judgment and for Summary Adjudication is denied. Defendant's Motion to Decertify is granted in part, and the meal period subclass is decertified; the Motion to Decertify is denied in all other respects.

Dated: December 23, 2010

Carolyn B. Kuhl
Judge of the Superior Court

[1] Defendant's motion to decertify also relied on the decision of *Faulkinbury v. Boyd & Associated* (2010) 185 Cal.App.4th 1363. After oral argument in this matter, while the motion to decertify was under submission, the California Supreme Court granted review of the *Faulkinbury* case. (2010 Cal.LEXIS 10120 (Cal. Oct. 13, 2010).) Consequently, the Court of Appeal opinion may not be considered by this court.