

FILED

LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

2017 OCT 30 AM 11:37

In the Matter of)
SERVICE EMPLOYEES INTERNATIONAL)
UNION, LOCAL 721)
Charging Party)
and) REPORT
LOS ANGELES COUNTY SHERIFF'S)
DEPARTMENT (LASD))
Respondent)
UFC No. 005-15)

APPEARANCES

For Charging Party:

Katie Engst
SEIU Local 721

For Respondent:

Jolina Abrena
Liebert Cassidy Whitmore

BACKGROUND

This proceeding is based on an Unfair Labor Practice Charge filed by SEIU Local 721 on April 14, 2015. Sara Adler was appointed as the Hearing Officer. Hearings were held on October 17, 2016, May 22, 2017 and July 31, 2017, 2017. Katie Engst, Esq. represented SEIU. Jolina Abrena, Esq. represented LASD. The parties submitted closing briefs. The matter was considered fully submitted upon my receipt of the post-hearing briefs.

The Charging Party alleges that Respondent violated the Employee Relations Ordinance (ERO) Section 5.04.240 (or its predecessor provision) by retaliating against Josephina Santos, R.N. (Santos) for filing a grievance on or about October 8, 2014¹ relating to her Performance Evaluation.

SUMMARY OF THE RELEVANT FACTS

As a preliminary matter, it is important to understand that Respondent's medical staff has both civilian medical supervision and also administrative supervision by members of the Sheriff's Department. Investigations of misconduct are controlled by the

¹ Santos filed an initial grievance and then a revised grievance

Sheriff's Department, although medical personnel may be part of the investigatory team.

Santos had been employed as a nurse by Respondent since 2003. At the time at issue she held the position of Supervising Staff Nurse originally on the night-shift. In that position she had consistently received Performance Evaluation ratings of "Very Good". In early 2014 Santos got a new supervisor, Nurse Manager Amy Huynh R.N. (Huynh)², who on or about September 17, 2014, gave her a Performance Evaluation rating of "Competent". Grievant believed that that was unfair and told Huynh that she was going to grieve.

On or about September 22, 2014 Grievant met with Huynh who gave her a Performance Log Entry (PLE) regarding a late call-in that had occurred about a month previously. The PLE notes the late call-in and reminds Santos of the relevant policy. It is not formal discipline and does not go into a formal personnel file. In the same discussion Huynh also touched on a matter regarding Santos' subordinate employee's handling of Konopin³, a controlled substance. On or about September 25 Santos was given a PLE reminding her of the Narcotic Policy relating to the

² Santos had also applied for this position.

³ The Klonpin incident is complicated because the ultimately issued 15-day suspension related to this incident is before the Civil Service Commission and not relied upon here, but it was a basis for some of the actions that were complained of in this charge.

Klonopin error. The parties had continued interaction over the Klonopin incident and it became the subject of an Internal Affairs (IA) investigation naming both Santos and her subordinate.

On or about October 15, 2014 Grievant was ordered by Nursing Director Brenda Doyle, R.N. (Doyle) and Lt. Tab Rhodes (Rhodes) to attend a training class on leadership. She had earlier in 2014, along with all other night-shift supervisors, been ordered to take this class, but had not done so. Santos viewed this training as "non-mandatory training" and objected to being ordered to attend.

On December 29, 2014 Huynh called Santos near the start of her shift. It appears that things were somewhat chaotic where Santos was working and the call was short with Huynh believing that Santos had hung up on her before Huynh was through. Later in the shift Doyle held a meeting with Santos and Huynh that Doyle intended to use to improve communications between them. According to Doyle and Huynh, Santos was loud, disruptive and demeaning. Doyle ended the meeting as unproductive. With Doyle's approval, Huynh requested an IA investigation into Santos' conduct on December 29th. The IA investigation was authorized by Cmdr. Kuykendall (Kuykendall). On or about January 15, 2015 Huynh gave Santos a PLE reminding Santos of the policy to be respectful and instructing her to not hang up on callers. Santos

was notified of the IA investigation on February 5, 2015 when she was told that she would be reassigned as a result of the investigation of the December 29, 2014 meeting. Kuykendall testified the decision was his and that this transfer was intended to relieve the personnel conflicts that appeared to have developed.

On February 24, 2015 Santos was informed that, with Kuykendall's consent, she had been added to an ongoing IA investigation of a problem that had occurred in 2013 with Santos' subordinate's handling of Librium. She was again reassigned, but this time to a position with no supervisory duties. Kuykendall testified that he became concerned about Santos' supervisory competence when there were three IA investigations⁴ of Santos going on. After the IA investigations were concluded, on or about February 4, 2016, Santos was reassigned to a position with normal supervisory duties. On March 3, 2016 Santos was served with a 3-day disciplinary suspension relating to the December 29, 2014 meeting with Doyle and Huynh.

⁴ The Klonopin, the Librium and the December 29, 2014 meeting with Doyle.

DISCUSSION

The parties agree that the Charging Party has the burden of proof in setting forth a *prima facie* case of the alleged violation. The required elements of proof are that the employee engaged in protected activity, the employer knew of the activity, the employer took adverse action against the employee and that the adverse action was taken *because of* the exercise of those rights. If a *prima facie* case is made, the burden then shifts to Respondent to establish that there were legitimate, non-discriminatory reasons for the actions. Finally, the burden moves back to the Charging Party to prove that the claimed reasons were pretextual.

There is no dispute that filing a grievance is an activity protected by the ERO. Huynh, at least, knew that Santos planned to – and did – file a grievance over her performance rating. All of the decision-makers ultimately knew of the filing of the grievance. Some, but not all, of the claimed retaliatory actions can be characterized as adverse actions.

The parties agree that PERB's interpretation of provisions similar to those of the ERO have held that proof of retaliation can be established based on timing plus at least one additional factor such as disparate treatment, the departure from usual

procedures, inconsistent explanations or a cursory investigation of the employee's alleged misconduct.

Although the timeline recited above is accurate, it is also somewhat misleading. The clearest example of this is the order Santos received to attend the leadership training. The order had been given in early 2014, and Santos had been reminded of it in June, 2014 well prior to the performance evaluation being given to Santos. Although Santos had formed the belief both that it was non-mandatory and that she was singled out to be ordered to take the training, the facts are otherwise. All night-shift supervisors were ordered to take the training and, for them, it then became mandatory. At the time she received the order here complained of, she was the only supervisor who had not complied.

The Librium incident had occurred in 2013 and was the subject of an IA investigation well before October, 2014. The undisputed testimony of Respondent's witnesses was that there are statutory time limits to investigations of sworn personnel, but not of civilian employees. As a result, the investigation of civilian employees is often long-delayed. As it relates to this incident, the interview of Santos' subordinate did not occur for over a year. When the subordinate detailed Santos' involvement, the investigator asked Kuykendall to expand the IA investigation to include Santos, which he did.

The parties sharply disagree about whether or not the PLEs constituted an adverse action. The most reasonable description of PLEs in this context is that they are counseling that is pre-disciplinary but may feel to the employee as discipline. For the purposes of this analysis I will disregard the PLE related to the Klonopin incident. Santos acknowledged that she did call in late on the occasion referenced in the PLE⁵. Huynh testified, without dispute, that she was assigned elsewhere for part of the time between the occurrence and the issuance of the PLE. This PLE was issued before the grievance was filed but after Huynh was told the Santos intended to file a grievance. There is no evidence that there is a second factor supporting an inference of retaliation. The second relevant PLE, over what Huynh believed was Santos abruptly hanging up on her, was issued three months later. It is within the time frame where inference from timing is reasonable, but again there is no second factor shown by the evidence.

Kuykendall's transfers of Grievant, first away from her usual assignment and then to a non-supervisory position were effected at a time that he (likely) knew of the grievance filing. Although Santos believed that the whole December 29, 2014 incident had been misinterpreted and was unfair, at the time of the first move what Kuykendall knew was that a serious personnel

⁵ All incidents here are analyzed for anti-union bias and are not subject to a just cause evaluation.

conflict has arisen. There is no evidence that this was a pretextual reason for reassigning Santos. While coincidences are suspect when there is an allegation of adverse actions/disparate treatment, in fact the timing of Santos being added to the Librium incident seems to have been wholly coincidental. Since there is no dispute that there were then three separate IA investigations involving Grievant, it was not unreasonable for Kuykendall to move her to a position with no supervisory duties but no loss of pay and there is no evidence that this was pretextual.

The last event in this whole chain is the imposition of a 3-day suspension in March, 2016. While the date of imposition is significantly beyond the usual parameters of an event from which inferences are reasonable, this discipline resulted from the IA investigation of the December 29, 2014 interactions with Santos and thus can be appropriately included as "timely". The request for an IA investigation was based on the meeting held by Doyle with Santos and Huynh in her attempt to improve their ability to communicate. In their morning telephone conversation, Santos believed that she had more pressing matters and needed to get off the phone as soon as possible. Huynh believed that Santos hung up on her before their discussion was completed. Santos testified that she was frustrated and angry when the telephone call was the subject of the afternoon meeting with Doyle. There

is little evidence in the record regarding this discipline, perhaps because it is also the subject of a grievance. It appears that the suspension may have related to matters other than the Doyle meeting, but no certainty that it did. There are no second factors relating to the suspension in this record to support inference of retaliation for protected activity.

There is no doubt that this was a difficult period in Santos' work life, and no question but that the relationship between Santos and Huynh was poor at the relevant times. On the other hand, the sole support for an inference of retaliation is the timing of the incidents/events and there is no evidence in the record of second supporting factors. While the timing of the events certainly warranted careful evaluation, the Charging Party did not prove that any of the alleged retaliatory actions actually were the result of Santos' protected activity.

In it's post-hearing brief the Charging Party also alleged, for the first time, that there were multiple *Weingarten*⁶ violations. The evidence shows that, on multiple occasions when meeting with Huynh, Santos asked to have a witness present and was denied that right. There is one instance that she testified to asking for a Union Steward and being denied. The right to have a Union Steward present for investigatory meetings is important and if she was denied, it is a serious violation of

⁶ NLRB v. J. Weingarten, Inc. 420 U.S. 251 (1975)

her rights. However, she did not have the right to simply have another employee be a witness and that appears to have been her requests.

CONCLUSION

Charging Party, SEIU Local 721, did not prove a violation of Section 5.04.240 of the ERO.

RECOMMENDATION

It is the recommendation of the Hearing Officer that ERCOM approve and adopt the following Order:

UFC Charge 005-15 is dismissed.

DATED: October 30 2017

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Sara Adler", written in a cursive style.

Sara Adler, Hearing Officer

PROOF OF SERVICE BY ELECTRONIC MAIL ONLY

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the aforesaid county; I am over the age of eighteen years and not a party to the within entitled action; my business address is 500 W. Temple Street, 374 Hall of Administration, Los Angeles, CA 90012.

On October 31, 2017, I served the within HEARING OFFICER'S REPORT in the matter of UFC 005-15 on the interested parties in said action, by electronic transmission. The electronic transmission report indicated that the transmission was complete and without error. Service was completed as follows:

<p>Katie Engst SEIU Local 721 1545 Wilshire Blvd Los Angeles, CA 90017</p> <p>Email: Katie.Engst@seiu721.org</p> <p>Jolina Abrena, Associate Liebert Cassidy Whitmore 6033 W. Century Blvd., 5th Floor Los Angeles, CA 90045</p> <p>Email: jabrema@lcwlegal.com</p>	<p>Gregory P. Nelson, Captain Los Angeles County Sheriff's Dept. 211 W. Temple Street Los Angeles, CA 90012</p> <p>Email: GPNelson@lasd.org</p> <p>Mahdi A. Mohamed Advocacy Unit-LASD 4900 S. Eastern Ave., Suite 101 Commerce, CA 90040</p> <p>Email: mahmohame@lasd.org</p>
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Executed on October 31, 2017 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.


Rose Henderson