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LOS ANGELES COUNTY

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EMPLOYEE RELATIONS COMMISSION

EMPLOYEE RELATIONS
COMMISSION
COUNTY OF LOS ANGELES

In the Matter of:)
)
ASSOCIATION FOR LOS ANGELES)
DEPUTY SHERIFFS (ALADS))
)
Charging Party)
)
v.)
)
LOS ANGELES COUNTY)
SHERIFF'S DEPARTMENT)
)
Respondent)
_____)

UFC 010-13 & 001-17

Hearing Officer Report

APPEARANCES

For the Charging Party: Will Aitchison
Public Safety Law Group
3021 NE Broadway
Portland, OR 97232

For the Respondent: Alexander Y. Wong
Liebert Cassidy Whitmore
6033 West Century Blvd., 5th Floor
Los Angeles CA 90045

Hearing Officer: Sheri E. Ross

Hearing Dates: May 7 and 8 and June 8, 2018

Introduction

The instant unfair labor practice proceedings arise under the Los Angeles County Relations Ordinance, Chapter 5.04 of the County Administrative Code, and the Rules and Regulations of the Los Angeles County Employee Relations Commission, (ERCOM). Pursuant to the Ordinance and applicable ERCOM Rules, the undersigned was appointed to act as Hearing Officer for ERCOM regarding the unfair employee relations practice charges filed herein.

Both parties appeared and were afforded a full opportunity to present relevant evidence, call, examine and cross-examine witnesses, and argue the merits of their respective positions during hearings held on May 7 and 8, and June 8, 2018. The Hearing Officer was provided with a transcript, voluminous documents, post-hearing briefs and copies of the cases cited therein for consideration in preparing this report. The matter now stands submitted.

THE UNFAIR EMPLOYEE RELATIONS PRACTICE CHARGES

The Association for Los Angeles Deputy Sheriffs, (ALADS), filed an unfair employee practice charge against the Los Angeles County Sheriff's Department, (Department), on March 14, 2013 alleging violations of Section 12 subsections A(1), A (2) and A (3) of the Commission Rules, Case No. 010-13, and served the Department that same date. On August 22, 2017 the Department filed a Motion for Bill of Particulars stating that it had been served with a Notice of Hearing on August 17, 2017. At this time another Hearing Officer was assigned to Case No. 010-13. The

Motion for this Bill of Particulars was denied at the hearing and a verbal answer was filed during the hearing.¹

The Association for Los Angeles Deputy Sheriffs, (ALADS), filed another unfair employee practice charge against the Los Angeles County Sheriff's Department, (Department), on January 26, 2017 alleging violations of Section 12 subsections A(1), A (2) and A (3) of the Commission Rules, Case No. 001-17, and served the Department that same date. On July 27, 2017 ALADS filed a First Amended Charge in Case No. 001-17 and served the Department the same date. On August 18, 2017 the Department filed an Answer and Motion to Dismiss the First Amended Charge in Case No. 001-17, which was denied at the hearing.

On February 14, 2018 ERCOM noticed the hearing in the consolidated cases 010-13 and 001-17 advising Respondent to file and serve an Answer. No further moving papers were filed after the February 14, 2018 Notice of Hearing in the consolidated matter issued.

FACTS

ALADS represents about 7900 deputy sheriffs employed by the Department. ALADS and the Department were parties to a Memorandum of Agreement effective 2005 to 2008, which was extended at times to remain in effect through November 2015. In 2015 the parties executed a new Memorandum of Agreement which was effective through 2018.

¹ There is no contention that the Motion for a Bill of Particulars was filed in an untimely fashion pursuant to ERCOM Rule 6.06(b). The verbal answer stated during the hearing in response to a request from the Hearing Officer, after the Motion for a Bill of Particulars was denied, met the requirements of ERCOM Rule 6.06 (d).

A portion of the Department's Manual of Policies and Procedures is a document entitled, "Guidelines for Discipline", (Guidelines). The Guidelines set forth the discipline process as well as the recommended range of discipline for particular offenses. Not every potential employee conduct which might result in disciplinary action is listed. The ranges of recommended discipline are known as the "Bail Schedule". The Guidelines are a supervisory tool utilized for direction as to which behaviors should be considered for discipline as well as the level of discipline to be imposed. The Guidelines also to provide information to Department employees. It is unclear when the Guidelines and the Bail Schedule came into existence and whether or not the Guidelines was ever the subject of bargaining between the parties.

On January 14, 2013 Lieutenant Daniel Lopez (Lopez) sent a letter to Steve Remige, (Remige) then Executive Director of ALADS, advising him of planned changes to the Guidelines. Lopez states in the letter that the changes are in response to recommendations from the Citizens Commission on Jail Violence, (CCJV), and attaches a list of changes in the range of proposed discipline for six types of conduct. Each proposed change either increased the discipline deemed appropriate for the offense and/or listed a new behavior that could constitute a violation. The Department introduced an email from Lt. Lopez to a variety of internal Department personnel dated January 30, 2013 stating that ALADS accepted the language in the policy per Remige. Remige never indicated in writing that ALADS accepted the proposed language.

On February 11, 2013 a Notice of Demand regarding the changes to the Guidelines was sent by Remige to the Lopez to cease and desist implementing the proposed changes until the parties have met. On February 11, 2013 Lopez also sent a letter to Remige clarifying and changing some of the modifications in the Guidelines which were made based on the CCJV recommendations. On February 14, 2013 Lopez sent Remige a letter stating that based upon their January 30, 2013 conversation at which time Remige stated that ALADS had no objection to the changes, the Department was moving forward with implementation, but the Department was willing to meet with ALADS to discuss the practical consequences of the changes. Neither Lopez nor Remige testified. The changes implemented in 2013 to the Guidelines are the subject of the first unfair employee relations practice charge, Case No. 010-13.

On September 8, 2016, another round of changes to the Guidelines was sent to Derek Hsieh, (Hsieh), the current Executive Director of ALADS. This set of changes was the product of both a group of lieutenants' recommendations and the input of Undersheriff Neal Tyler, (Tyler). The cover letter for this revision of the Guidelines offered to meet with ALADS to 'discuss the effects of these changes'. On September 13, 2016 ALADS sent the Department a Notice of Demand to cease and desist implementing this set of revisions and to meet and confer on the subject.

The 2016 revisions to the Guidelines were more expansive than those made in 2013. The more concerning revisions from ALADS perspective are listed in Appendix A.

On November 29, 2016 representatives of ALADS and the Department met in response to the cease and desist letter. IAB Captain John Roberts, (Roberts), Lopez and two other Department employees attended the meeting as well as Hsieh, Rebecca Bueno, ALADS Labor Relations Specialist, (Bueno), and some ALADS members. Hsieh and Roberts were the primary speakers for the parties at this meeting for about three hours discussing the Guidelines. At about 1:25 PM the Department called for a caucus. After five minutes of caucusing, the Department returned and Lopez stated that the Department was not present to negotiate the changes in the Guidelines because the Department believed the changes were a management right. Lopez further stated that the Department was still ready and willing to discuss the impact of the changes. Roberts confirmed Lopez' stated position. ALADS representatives then requested a caucus and returned to request an end to the meeting as the Department was refusing to negotiate.

ALADS reviewed its records of discipline imposed on bargaining unit members from January 2013 to May 2018. Of the 638 files reviewed, only 18 matters resulted in deputy discipline falling outside of the ranges set forth in the Guidelines. After the close of hearing, the Department did its own research on discipline imposed during this timeframe and found more instances of discipline imposed outside of the ranges set forth in the Guidelines than reported by ALADS. The testimony regarding the practical effect of the changes in the Guidelines presents the only facts disputed by the parties. The testimony of the results of both investigatory efforts was hearsay, may not have been comprehensive, and may not have matched the conduct categories which are the subject of the charges. The research methods

clearly did not cover the same base information nor can the reliability of the statistics be assessed.

ANALYSIS AND DISCUSSION

The Department bases its contention that no obligation to bargain exists of changes to the Guidelines on Los Angeles County Code Section 5.04.080, County Rights (emphasis added), which states:

- It is the exclusive right of the county to determine the mission of each of its constituent departments, boards and commissions, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. **It is also the exclusive right of the county to direct its employees, take disciplinary action for proper cause,** relieve its employees from duty because of lack of work or for other legitimate reasons, and determine the methods, means and personnel by which the county's operations are to be conducted; **provided, however, that the exercise of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours and other terms and conditions of employment.** (Ord. 9646 § 5, 1968.)

and Section 5.04.090 Consultation and Negotiation – Scope (emphasis added), which states:

- A. **All matters affecting employee relations, including those that are not subject to negotiations, are subject to consultation** between management representatives and the duly authorized representatives of affected employee organizations. Every reasonable effort shall be made to have such consultation prior to effecting basic changes in any rule or procedure affecting employee relations.
- B. **The scope of negotiation** between management representatives and the representatives of certified employee **organizations includes wages, hours, and other terms and conditions of employment** within the employee representation unit.
- C. Negotiation shall not be required on any subject preempted by federal or state law, or by County Charter, **nor shall negotiation be required on employee or employer rights** as defined in Sections 5.04.070 [Employee rights] and 5.04.080 [County rights] of this chapter.

In this regard the Department contends that negotiation and meet-and-confer are two separate and distinct concepts, the first of which does not apply in this matter. In 1968 the state enacted the Meyer-Milius-Brown Act (MMBA) (Gov. Code, §§ 3500-3510), which authorized public employees to bargain with governmental entities and encouraged the entities to negotiate and consult with its employees. *American Federation of State, County and Municipal Employees v. County of Los Angeles*, (1975) 40 Cal.App.3d 356, 358, quoting the same Ordinance Sections relied upon by the Department in its contention that the Guidelines are not negotiable, notes:

The rights of preemption stated in ERO originate in the legislative policy stated in the opening section of MMBA, to wit, section 3500 of the Government Code, which states in pertinent part: "... Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter.

In that case the issue in dispute was the reclassification of employees, which is specifically set aside for the Civil Service Commission's rulemaking in Section 34 of the charter.² The changes in disciplinary procedure and penalty ranges for discipline presented here is not preempted as a specific management right in any code, ordinance or other statutory provision.

The Department is correct that the Ordinance requires management representatives to consult with the representatives of employee organization on rule or procedure changes with regard to the practical consequences such decisions have on the workplace. But the obligation to consult

² "The [Civil Service] Commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law "The rules shall provide:
"(1) For the classification of all positions in the classified service"

does not carve out an exemption from the scope of topics which are mandatory subjects of bargaining – *wages, hours and other terms and conditions of employment*, as defined in LACC Section 5.04.090 (B). ‘Terms and conditions of employment’ logically and reasonably includes disciplinary procedures and penalties to be imposed. No exemption from ‘terms and conditions’ for disciplinary procedures and penalties for discipline for purposes of negotiation is set forth in the LACC.

Certainly, an employee would consider a rule requiring discharge for a single absence, whether authorized or unexcused, as a *term and condition of employment*. While none of the changes proposed in 2013 or 2016 are that serious in nature, they are not *de minimus* using any method of evaluation. Some examples are:

Failure to report use of force changed from 5 – 25 days suspension to (2013):
15-30 Days for the first offense
Discharge for the second offense

Inappropriate involvement in off-duty neighborhood/ business dispute
Changed from Written reprimand – 3-day suspension to (2016):
Written reprimand – 10-day suspension

Deceitful business transactions
Changed from 5 – 15-day suspension to (2016):
5-day suspension – discharge

And new behaviors were introduced such as:

Violating the Inmate Anti-Retaliation Policy (2013). 5 days – discharge
Off duty driving under the influence and/or control of a firearm(2016).
20 -25 days suspension
Off duty driving under the influence with BAC of .16 or higher and possession and/or
control of a firearm(2016)
25 days - discharge

Other cases in which ERCOM found 'rule' changes potentially impacted bargaining unit employee wages, hours and terms and conditions of employment and were not pre-empted management rights include: ALADS v. County of LA Sheriff's Department UFC 043-13; UFC 014-15 unilateral change of application of Civil Service Rule 18.01 to apply to misdemeanors; Coalition of County Unions, et al v. County of LA Chief Administrative Office, UFC 60.23 & 6.253 unilateral implantation of drug testing policy; Los Angeles County Professional Peace Officer's Association v Los Angeles County Sheriff's Department UFC 9.7, unilateral change of pay policy for Olympics duty.

The disciplinary process and penalty changes unilaterally implemented by the Department have a 'real and observable effect on terms and conditions of employment'. If "whether discipline should be imposed following a positive test result and the degree thereof are matters inextricably related to terms and conditions of employment and thus subject to mandatory negotiations under the Ordinance", [Coalition of County Unions, et al v. County of LA Chief Administrative Office, UFC 60.23 & 6.253], then certainly the broad spectrum of changes implemented in 2013 and 2016 disciplinary procedure and penalty ranges are likewise the subject of mandatory negotiations under the Ordinance.

The 2013 and 2016 implemented changes in the Guidelines are wages, hours and terms and conditions of employment as defined by LACC Section 5.04.090 (B). As such they are a mandatory subject of bargaining and the Department may not unilaterally impose changes to the Guidelines.

The Department's contention that ALADS waived its rights to negotiate or meet and confer about the 2013 proposed changes is contradicted by the evidence. We do not know what, if anything, Remige verbally conveyed to Lopez about the proposed changes inasmuch as he did not testify as to the alleged statement, Lopez did not testify as to the alleged statements, and the supposed waiver was never confirmed in writing to ALADS until after ALADS sent a cease and desist letter. Even if Remige did tell Lopez on January 30, 2013 that he had no objection to the changes, he was permitted to change his position before the changes were implemented on February 11, 2013. No waiver of rights occurred in 2013.

Finally the competing hearsay presented by the parties regarding the impact of the changes in terms of the percentage of cases in which Department supervisors/managers felt justified in imposing discipline outside the Guideline ranges, is of no consequence to whether or not the Guidelines are a subject of negotiation.

CONCLUSIONS

1. The undisputed facts disclose that the Department unilaterally changed the Guidelines for Discipline in both 2013 and 2016.
2. The discipline process and penalties set forth in the Guidelines for Discipline are within the scope of negotiation between the Department and ALADS as set forth in Los Angeles County Code Section 5.04.090 (B) and they are not exempted from this Code Section by any other statutory language.

3. Disciplinary procedures and penalties as set forth in the Guidelines for Discipline are not included in Los Angeles County Code Section 5.04.080's management rights "to take disciplinary action for proper cause".
4. The 2013 and 2016 modifications to Guidelines for Discipline are not *de minimus* in scope.
5. ALADS did not waive its right to negotiate over the 2013 proposed changes to the Guidelines for Discipline.

RECOMMENDATIONS

The duly appointed Hearing Officer recommends that the Employee Relations Commission find that Respondent, County of Los Angeles Sheriff's Department, violated Section 12 subsections A(1), A (2) and A (3) of the Commission Rules in 2013 and 2016 by unilaterally implementing changes in the Guidelines for Discipline.

The Hearing Officer further recommends that the Employee Relations Commission adopt the following orders:

1. Respondent rescind the changes to the 2013 and 2016 Guidelines for Discipline.
2. Respondent meet and confer with ALADS over the 2013 and 2016 'proposed' changes to the Policy Changes without limit to the practical consequences of such changes.

3. Respondent conform any discipline imposed under the 2013 and 2016 changed disciplinary standards to the maximum recommended discipline set forth in the Guidelines in place prior to the 2013 changes and make affected employees whole.
4. Respondent change all employee electronic and paper records to reflect the corrected levels of discipline.
5. Respondent shall post notices including on the Department email system of ERCOM's decision.

Respectfully submitted in Los Angeles, California this 31st day of August, 2018.



Sheri E. Ross
Hearing Officer

APPENDIX A

ALADS list of important changes to Guidelines in 2016:

- Mandating more serious levels of discipline for non-progressive discipline cases.
- Adding a prohibition unacceptable off-the-job conduct that impacted the Department's "reputation".
- Adding "public trust" as a factor in determining whether discipline is appropriate.
- Limiting the type and ultimately the number of cases eligible for Predisposition Settlement Agreements (PDSA), a system used as an alternative to a full investigation.
- Adding the Constitutional Policing Advisor to the list of individuals who must be consulted with before entering a PDSA.
- Mandating the inclusion of specific information, including lesser charges, into the text of written reprimands.
- Stating that the Department's responsibility in conducting investigations would be to gather information "to the best extent possible".
- Requiring the consideration of "harm to public trust," a term the Guidelines do not define, before making a disciplinary decision.
- Adding a manager, the Constitutional Policing Advisor, and the Case Review Panel to the disciplinary process.
- Limiting Education Based Discipline (EBD) to suspensions of ten or less days.
- Requiring the recording of the original number of intended days of discipline, as opposed to days actually issued.
- Removing the requirement that the Department offer EBD to its employees, and instead leaving it within the discretion of the unit commander.
- Prohibiting EBD for second and subsequent violations.
- No longer issuing letters of intent to discipline.
- Addition of levels of discipline with presumptive punishment ranges.
- Addition of the concept of "Aggravating and Mitigating Factors" to the disciplinary rules.
- Noting that the Guidelines are not "all inclusive".
- Making 45 changes to the Bail Schedule, all of which increased the punishment for ALADS' members by adjusting the punishment range on the high end, on the low end, or limited the punishment to discharge.
- The addition of presumptive penalties included in the bail schedule as a range.

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 September 4, 2018, I served the within HEARING OFFICER'S REPORT in the matter of UFC 010-13 & 001-17 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:

Will Aitchison Email: will@pslglawyers.com	Gregory P. Nelson, Commander Los Angeles County Sheriff's Dept. Email: GPNelson@lasd.org
Alexander Y. Wong Liebert Cassidy Whitmore Email: awong@lcwlegal.com	Joel Barnett, Captain Los Angeles County Sheriff's Dept. Email: jl Barnett@lasd.org
Adrianna E. Guzman Liebert Cassidy Whitmore Email: aguzman@lcwlegal.com	Mahdi A. Mohamed Advocacy Unit-LASD Email: mamohame@lasd.org

Executed on September 4, 2018 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