BEFORE THE
EMPLOYEE RELATIONS COMMISSION
COUNTY OF LOS ANGELES

In the Matter of: AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), LOCAL 1271, Charging Party, and LOS ANGELES COUNTY DEPARTMENT OF HEALTH SERVICES, Respondent.	UFC No. 021-16

HEARING OFFICER'S REPORT

On October 6, 2016, the American Federation of State, County and Municipal Employees (Charging Party or Union) filed an unfair employee relations practices charge (Charge), alleging that the Los Angeles County Department of Health Services (Respondent or Department), engaged in unfair employee relations practices in violation of the Los Angeles County (County) Code sections 5.04.030, subdivision (o), 5.04.070, and 5.04.090.[1]

The matter regularly came for hearing before Samuel D. Reyes, Hearing Officer, on October 23, 2017, in Los Angeles, California.

[1] The County Code codifies the County's Employee Relations Ordinance (ERO), Ordinance No. 9646, and the cited provisions are found in sections 3, subdivision (o), section 4, and section 6 of the ERO, respectively. Further references to the ERO are to the codified provisions.

Eli Naduris-Weissman, Attorney at Law, represented Charging Party.

Jeffrey M. Hausman, Attorney at Law, represented Respondent.

Charging Party charges that Respondent discriminated against County employees it represents by failing to retroactively pay the employees a wage increase tentatively agreed-to on November 7, 2013, which increase was paid to other represented employees during the same bargaining cycle. The discrimination is alleged to have occurred because the employees represented by Charging Party exercised protected rights in their collective fight to retain an existing health benefit. Respondent denies the allegations. It asserts that tentative agreement with the unit represented by Charging Party was not reached until January 11, 2016. Cost-of-living wage increases were paid to all units consistent with its practice of making salary increases effective in the month in which agreement is reached on all items subject to bargaining. Employees represented by other units received two percent raises in 2013, 2014, and 2015 because they reached agreement earlier than the unit represented by Charging Party. Charging Party cannot claim discrimination because it voluntarily agreed to a six percent raise, which is equivalent to the three two percent raises received by the other units, in the final agreement reached January 11, 2016.

Oral and documentary evidence was received at the hearing. The record was left open for the parties to file closing briefs. Both parties submitted initial closing argument on December 4, 2017. Respondent submitted reply closing argument on December 21, 2017, and Charging Party submitted reply argument on December 22, 2017. The matter was submitted for decision on December 22, 2017.

FINDINGS OF FACT[2]

1. The Union represents physician assistants employed by the Department in Bargaining Unit 321.

2. Starting in late 2010, the Union and Respondent engaged in negotiations for an initial collective bargaining. The parties were unable to reach agreement, and on March 20, 2012, the Department declared impasse. No terms or conditions of the Department's last, best, and final offer were implemented. At the heart of the dispute was the Department's insistence that new employees be covered by a new health program, Choices, instead of the existing MegaFlex program. The Union maintained that the subject of which health plan unit employees would receive was a permissive subject of bargaining, and that impasse could not exist over the failure to reach agreement on the matter.

3. On March 30, 2012, the Union filed an unfair labor practice charge, UFC No. 008-12, amended on May 3, 2012, alleging that the Department and two other County departments that employed physician assistants, the Sheriff's Department and the Coroner's Office, were discriminating against unit members and interfering with the unit members' collective bargaining rights.

4. On the date the matter was scheduled for hearing, August 1, 2013, the parties agreed to place unfair practice charge proceedings on hold and to resume bargaining. Bargaining resumed on September 6, 2013, and continued through November 7, 2013. As of

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[2] The facts are largely undisputed. Charging Party called one witnesses, Field Director Steve Koffroth (Koffroth), and Respondent called one witness, Senior Manager Robinetta Campbell-Mack (Campbell-Mack). Charging Party submitted 14 exhibits and Respondent submitted 10 exhibits, all of which were received in evidence.

November 7, 2013, tentative agreement had been reached with respect to all items, except for health benefits.

5. The tentative agreement with respect to salaries called for unit members to receive a two percent salary increase "effective upon date of implementation," and two percent salary increases on October 1, 2014, and April 1, 2015. (CP Exh. 6.[3])

6. Koffroth, the lead negotiator for the Union in the 2013 to 2016 bargaining, testified that the Union's intent in agreeing to the dates for the salary increases was to align the unit's salary payment schedule with those of other bargaining units, a goal shared by Respondent. Koffroth further testified that the parties had specifically discussed October 1, 2013, as the date of implementation, which was consistent of what other bargaining units ultimately agreed to.

7. On November 7, 2013, the Department made its last, best and final proposal, reiterating its position that new employees receive the Choices health program. The proposal incorporated the County's health benefits proposal of October 14, 2011, and stated:

"IF THIS LAST, BEST AND FINAL PROPOSAL IS ACCEPTED, AFSCME LOCAL 1271 AGREES TO RECOMMEND A POSITIVE RATIFICATION TO ITS MEMBERSHIP. PENDING RATIFICATION, THE TENTATIVE AGREEMENT WILL REMAIN CONFIDENTIAL (NO PUBLICATION) EXCEPT FOR NOTIFICATION TO THE BOARD/CEO, AFFECTED DEPARTMENT HEADS, AND UNION LEADERSHIP, OR AS MUTUALLY AGREED OTHERWISE.

"IF REJECTED, THE COUNTY DECLARES IMPASSE.

"COUNTY BARGAINING POLICY IS THAT THERE IS NO RETROACTIVITY ON ANY COMPENSATION ADJUSTMENTS. THE DECISION AND ORDER IN UFC 12.16 REQUIRES EXHAUSTING THE IMPASSE RESOLUTION PROCEDURES, INCLUDING MEDIATION AND FACT-FINDING, AS PART OF THE GOOD FAITH BARGAINING PROCESS. THE COUNTY RETAINS ITS RIGHT TO COMMUNICATE WITH EMPLOYEES REGARDING THE STATUS OF BARGAINING INCLUDING PUBLICATION OF THE LAST AND BEST OFFER MADE AT THE BARGAINING TABLE." (CP Exh. 7; emphasis in original.)

8. The Union rejected the Department's offer.

9. Other bargaining units on the same bargaining cycle as Unit 321 who accepted County offers, those of Psychiatric Social Workers, Supervisory Professional Social Workers, and Agricultural Weights and Measures Inspectors, received two percent cost-of-living increases effective October 1, 2013, October 1, 2014, and April 1, 2015. These units reached tentative agreement on all matters in the latter part of September 2013 or in early October 2013.

10. At the time of the Union's rejection of the Department's last, best and final offer, the Commission did not have any sitting members and the parties could not avail themselves of impasse resolution procedures. New Commission members assumed their posts in December 2014.

11. The pending unfair practice charge proceeded to hearing on February 14 and March 17, 2014, before Hearing Officer Jan Stiglitz (Stiglitz). On July 8, 2014, Hearing Officer

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[3] References to exhibits are to those submitted by Charging Party, and are abbreviated as "CP Exh."

Stiglitz recommended dismissal of the charge. He concluded that health benefits was a mandatory subject of bargaining, that the Department could insist on a different health program for new employees, and that such insistence did not constitute interference or discrimination pursuant to the ERO. On April 27, 2015, the Commission adopted the recommendation and dismissed the charge.

12. The Union appealed the Commission's decision to Superior Court, and then to the Court of Appeal. Neither court reached the merits of the case, as the jurisdiction of the Superior Court to hear the matter was challenged. After it reached a tentative agreement with the Department, as set forth below, the Union withdrew the appeal while pending in the Court of Appeal.

13. The parties returned to the bargaining table while court proceedings were pending. After four bargaining sessions during the period of November 4 to December 3, 3015, the parties agreed to mediation. Mediation was conducted on January 11, 2016 and the parties reached a tentative agreement. The new Memorandum of Understanding (MOU) was to be effective from October 1, 2013 to September 30, 2018.

14. The tentative agreement included a salary schedule and education bonus study, and stated that "Beginning September 30, 2018, new employees will no longer be enrolled in the MegaFlex medical benefit." (CP Exh. 10.) As it pertains to salaries, the tentative agreement provided for salary increases of six percent effective October 1, 2015, three percent effective January 1, 2016, three percent effective October 1, 2016, two percent effective October 1, 2017, and two percent effective April 1, 2018.[4]

[4] The raises were expressed in "levels," which made the percentages approximate numbers.

15. The tentative agreement reached on January 11, 2016, contained the following language in the "General Salary Movement" section: "2.a.i. Including the express reservation of the Union's right to challenge the County's refusal to give retroactive pay increases in connection with the previous impasse." (*Ibid.*) Koffroth testified that the Union wanted the quoted reservations language in order to preserve its ability to seek salary increases retroactive to October 1, 2013, based on the November 7, 2013 tentative agreement on salaries. During negotiations leading to the January 11, 2016 agreement, he had presented a copy of a case he argued required retroactivity, *Los Angeles County Employees Assn., Local 660 et al. v. County of Los Angeles* (1985) 168 Cal.App.3d 683 (*Local 660).* The Department disagreed with his position. The Union deems the filing of the unfair practice charge in this matter as its attempt to obtain the retroactive salary increases, and Koffroth denied any intent to waive the Union's ability to raise the challenge.

16. The tentative agreement also contained the following language: "Agreement is subject to ratification by the Union and approval by the Board of Supervisors. The Parties agree that this Tentative Agreement is enforceable and is admissible and subject to disclosure pursuant to Evidence Code 1123." (*Ibid.*) The parties exchanged several emails regarding drafting and approval of the final memorandum of understanding, and the issue of salary increase retroactivity to October 1, 2013 was not raised during these communications.

17. The January 11, 2016 tentative agreement was ratified by Unit members on April 4, 2016, and approved by the Board of Supervisors on May 3, 2016. The term of the MOU is October 1, 2013 to September 30, 2018.

18. Campbell-Mack, the lead negotiator for the Department, testified about the reasons behind the Department's agreement to a six percent raise effective October 1, 2015. The Board of Supervisors had approved two percent cost-of-living increases for 2013, 2014, and 2015. Since the physician assistant unit had not received the two percent cost-of-living increases in 2013 or 2014, the County felt it was fair to aggregate the already approved four percent into the 2015 cost-of-living increase to achieve the six percent salary increase. This rationale for the six percent increase was communicated across the bargaining table.

19. Campbell-Mack also testified about the County's position with respect to retroactivity of salary increases. It is the County's practice to pay cost-of-living increases on the month in which tentative agreement is reached on all items. The reason for the policy is to provide an incentive to reach agreement sooner rather than later. In support of her testimony, Respondent pointed to the agreements with the units set forth in factual finding number 9 and submitted evidence regarding ten other bargaining units who reached agreement in 2015 or 2016. In nine of those instances, the salary increase took effect in the same month in which agreement was reached. In one case, that of unit 324 involving physicians, tentative agreement was reached on February 17, 2016, but the increase became effective November 18, 2015, or three months earlier.

20. Campbell-Mack agreed that the salary increases to Union members resulting from the January 11, 2016 tentative agreement involved some retroactivity, to October 1, 2015. She explained that the date was proposed, and accepted, to align the October 1, 2015 date to the date other units received increases in 2015 and because it had taken so long to reach agreement. On

cross-examination, she referred to the retroactivity date as simply a "random" date to which the parties agreed in collective bargaining.

21. Bargaining with another unit, 411, involving building trades, also involved the filing of an unfair practice charge and a mediated settlement. The issue dividing the parties in that case was pay rates for apprentices. Neither party formally declared impasse, but the union filed an unfair practice charge alleging bad faith bargaining. While the charge was pending and before a hearing was set, the parties agreed to mediation. They reached a tentative agreement on all matters, except apprenticeship rates, on July 21, 2016. The effective date of wage increase was July 1, 2016. It is unclear if the unfair practice charge is still pending, but the apprenticeship pay rates issue remains unresolved.

DISCUSSION AND LEGAL CONCLUSIONS

1. County Code section 5.04.070 provides: "Employees of the county have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation of all matters of employee relations. Employees of the county shall also have the right to represent themselves individually in their employment relations with the county. No employee shall be interfered with, intimidated, restrained, coerced or discriminated against because of his exercise of these rights."

2. Charging Party asserts that Respondent discriminated against its members in denying salary increases retroactive to October 1, 2013, October 1, 2014, and April 1, 2015 because they, unlike members of other represented units, chose to exercise their collective bargaining right to fight for the MegaFlex health plan. On November 7, 2013, Charging Party and Respondent reached tentative agreement on salary increases for the 2013-2015 contract

cycle. Other bargaining units had reached similar agreements on salary increases and the increases were paid to those units effective October 1, 2013, October 1, 2014, and April 1, 2015. Charging Party asserts that such differential treatment on the basis of its members engaging in protected activity constitutes an unfair practice charge, and relies on *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*) and *Local 660* in support of its argument. Any claim that Respondent was simply adhering to a policy against retroactivity is a pretext to hide the true motive for the discrimination, as the policy itself is an incentive for employees not to avail themselves of protected bargaining rights, and, in any event, it has not been consistently applied.

3. In *Campbell*, the union and the city had reached agreement on all but two issues, contributions toward health insurance premiums and distribution of anticipated revenues due to savings in pension costs. The parties had agreed that wage increases would be paid retroactive to October 1, 1978. The parties then entered into impasse resolution procedures established by the city's employee relations ordinance. After an impasse meeting and mediation were unsuccessful, the matter was submitted to the city council for its determination. The council heard from the parties, and announced its decision on March 22, 1979. The council adopted the city's bargaining position on the two outstanding issues. However, it also changed the effective date of the salary increases to February 1, 1979, which retroactivity issue was not before it pursuant to impasse resolution procedures. Other bargaining units had also agreed to the October 1, 1978 wage increases and all received the increases on the agreed-upon date. The union was the only employee organization which negotiated to impasse and the only one to utilize the impasse resolution procedures.

The union brought an action under the Meyers-Milias-Brown Act, Government Code[5] section 3500 et seq., alleging that the city discriminated against its members in violation of section 3506.[6] The court concluded that participation in the protected "activities" referred to in section 3502 included participation in the process of engaging in negotiations to reach agreement, including participation in impasse resolution procedures. The employees in question had, therefore, engaged in protected activities.

The court then noted that the anti-discrimination language in the state statute had been patterned after federal law, the National Labor Relations Act, 29 U.S.C., section 141 et seq., and borrowed the discrimination analysis in *NLRB v. Great Dane Trailers* (1967) 388 U.S. 26 (*Great Dane*). The court cited the *Great Dane* analysis as follows: "If an employer's discriminatory conduct is 'inherently destructive' of employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. [citation] [¶] If the adverse effect is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. [citation]." (*Campbell*, *supra*, at pp. 423-424; emphasis in original.) In concluding that the employer had engaged in discrimination, the *Great Dane* court found it unnecessary to decide the degree to which the challenged conduct affected

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[5] Unless otherwise stated, all further statutory references are to the Government Code.

[6] Section 3506, like County Code section 5.04.070, prohibits discrimination against employees for exercising protected rights: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." Section 3502 contains the rights set forth in the first two sentences of County Code section 5.04.070.

employee rights because the company did not come forward with evidence of legitimate motives for awarding accrued vacation to nonstrikers but not to those who remained on strike.

The *Campbell* court reached a similar conclusion: "The situation here is analogous. The city has in effect discriminated against employees represented by [the union] by withholding from them a degree of retroactivity in wage and fringe benefit increases which had been agreed upon in earlier negotiations, and which was granted to all other employees. The inference is strong that the motivation for that discrimination was to 'punish' [the union] and its members for utilizing an impasse procedure which the city adopted as part of the meet and confer process and which, as we have noted, is on that account part and parcel of activities protected by the statute. [¶] The city has advanced no other reason for the discrimination. Indeed, in its brief it suggests that the differential retroactivity period was adopted precisely to 'reward' other employee organizations for having settled their disputes without utilizing the impasse procedure." (*Campbell*, *supra*, at p. 424; emphasis in original.) The court held that less favorable retroactivity date for those who exercise their collective right to use the impasse-resolution process constituted discrimination under section 3506.

In *Local 660*, the County had reached a fringe benefits memorandum of understanding with a coalition of unions on fringe benefits. The agreement covered the County's contribution to health insurance for employees represented by coalition members. No additional bargaining was expected with respect to fringe benefits, but other negotiations were ongoing with respect to local matters being handled by individual unions. The County passed an ordinance approving the health insurance increase as to those unions which had completed wage negotiations but not as to unions which had not reached such agreements. In the past, the

County had waited for all units to reach agreement on all matters before implementing the coalition-wide fringe benefit agreement. The court analogized the case to *Campbell*, and concluded that rewarding groups who had reached agreement improperly discriminated against those groups who were exercising their protected right to engage in continued negotiations. In analogizing *Campbell*, the court stated: "Similarly here, County Supervisor Pete Schabarum stated in recommending immediate implementation of the health benefit increase for settling units: 'I believe this is an appropriate action to take for those employee groups which cooperate with us in reaching prompt agreement.' In rewarding those groups, the County improperly discriminated against the groups which were still negotiating." (*Local 660*, *supra* at p. 690.) Such discrimination was held to violate section 3506.

4. Charging Party has not established that Respondent discriminated against its members for exercising protected rights. Unlike in the *Great Dane*, *Campbell* and *Local 660* cases, Charging Party did not establish that Respondent's conduct was inherently destructive of employee rights or that Respondent harbored anti-union motivation in its actions. In this case, Respondent did not draw an arbitrary or discriminatory distinction between those exercising protected rights and those not exercising the rights. Rather, as it typically does, Respondent sought to have the effective date of a salary increase with any unit tied to reaching a final agreement on all items. This is a non-discriminatory reason tied to the legitimate goal of reaching finality on all items subject to bargaining. The Department and the unit represented by Charging Party reached impasse despite having tentatively agreed on the same two percent increase offered to other units. Tentative agreement as to one or more items, without more, does not establish that those items are finalized, as the tentative agreements may change in

order to allow movement with respect to other items. This is what in fact happened in this case, as impasse was broken when changes in the parties' prior proposals on salaries and health benefits led to a full tentative agreement on January 11, 2016. Thus, unlike in *Campbell* and *Local 660*, bargaining over salaries had not concluded for the employees represented by Charging Party in November 2013, and they were not discriminatorily denied a benefit they had already attained. The employees in the units set forth in factual finding number 9 received raises starting in October 2013 because they had reached agreement on an entire agreement not because they were favored over those represented by Charging Party.

Charging Party asserts that Respondent's stated reason for its treatment of its members is analogous to those asserted in *Campbell* and *Local 660* in that it forces its members to forgo impasse procedures and to rush to agreement in order to obtain the benefit of the retroactivity date. However, as noted in this Report, those cases are distinguishable. Moreover, this argument is unpersuasive as it would render suspect any proposal made subject to final agreement on all items of a memorandum of understanding.

Charging Party points to the fact that wage increases were given effect before the month tentative agreement was reached in two instances, in this case and in the case of the physicians unit, in support of its argument that Respondent's retroactivity policy assertion is pretextual. This argument is unpersuasive, as the overwhelming majority of the examples submitted at the hearing are consistent with the practice. Moreover, even in those two instances, the retroactivity period was a relatively short three months. While no explanation was provided at the hearing for the reason(s) for the three-month retroactivity in the case of the physician unit, the retroactivity in this case stems from facts unique to the instant situation.

Charging Party also argues that the treatment afforded to Unit 411 evidences discriminatory intent. Members or Unit 411 still have an unresolved issue, apprenticeship pay rates, and were able to secure a pay increase despite this unresolved issue. Not all the facts and circumstances surrounding that situation were presented at the hearing. However, a key distinguishing fact undermines Charging Party's argument. The fact that both unions filed unfair practice charges while bargaining was taking place indicates that if discrimination was involved it was not because the employees engaged in concerted protected activity.

Campbell and *Local 660* represent instances in which the facts clearly establish discriminatory treatment on the basis of the exercise of protected activities and are therefore distinguishable. Thus, it was not disputed in either case that bargaining had ended as to the items on which retroactivity was sought, and changing the terms of the finally resolved items was evidence of discrimination. In *Campbell*, the only unresolved issues subject to the impasse resolution procedures were health insurance contributions and distribution of pension revenue, and there was no legitimate need to modify the agreed-to retroactivity of wage increases. In *Local 660*, bargaining on fringe benefits had concluded, and there was no legitimate reason to delay implementation as to those who were still bargaining over local unit matters. In neither case was there a legitimate reason found for the failure to award retroactivity. On the contrary, the court pointed to contemporaneous employer assertions of punishing those who exercised protected rights and/or rewarding those who did not. Moreover, in *Local 660* the court cited as further evidence of discrimination the fact that the County had deviated from its past practice of implementing fringe benefit agreements even if it had to wait for local negotiations to conclude in some units.

5. Respondent denies it engaged in discrimination, and argues that *Campbell* and *Local 660* are distinguishable in several respects. One such distinction is that neither case involved a signed memorandum of understanding. It cites *San Diego Firefighters, Local 145, AFL-CIO v. Bd. of Admin. of San Diego City Employees' Retirement System* (2012) 206 Cal.App.4th 594, 614, fn. 16, and *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 334-335, for the proposition that once a memorandum of understanding is reached, its terms are binding. Significantly, Charging Party agreed to a six percent increase, effective October 1, 2015, which was in lieu of the two percent increases it retroactively seeks through this proceeding. Charging Party counters that it expressly reserved its right to challenge Respondent's failure to provide salary increases effective October 1, 2013, October 1, 2014, or April 1, 2015.

Unlike the *Campbell* or *Local 660* cases, or the instant matter, the cases relied upon by Respondent did not involve allegations of discriminatory treatment in violation of labor relations statutes and are distinguishable. The disagreement between the parties about the retroactivity issue, which disagreement was memorialized in the language of the tentative agreement, makes clear that this matter was not resolved at the bargaining table despite execution of the memorandum of understanding. Moreover, it will not be assumed that in agreeing to the terms of the MOU Charging Party waived its claim of discriminatory treatment. Accordingly, execution of the memorandum of understanding does not bar consideration of Charging Party's claims of discrimination in violation of County Code sections 5.04.030, subdivision (o), 5.040.070, or 5.04.090.

6. By reason of the foregoing Findings of Fact and Discussion and Legal Conclusions, it is concluded that Respondent did not violate County Code sections 5.04.030, subdivision (o), 5.040.070, or 5.04.090.

RECOMMENDATION

It is respectfully recommended that the Commission adopt the Findings of Fact and Discussion and Conclusions, and dismiss the Charge.

DATE: 1/16/18

Samuel D. Reyes
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 January 17, 2018, I served the within HEARING OFFICER'S REPORT in the matter of UFC 021-16 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:

Jeffrey M. Hausman Hausman & Sosa, LLP 20750 Ventura Blvd., Suite 105 Woodland Hills, CA 91364 Email: JHausman@hausmansosa.com	Eli Naduris-Weissman Rothner, Segall & Greenstone 510 So. Marengo Avenue Pasadena, CA 91101-3115 Email: enw@rsglabor.com

Executed on January 17, 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