In the Matter of Arbitration Between AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 119, Charging Party -and- LOS ANGELES COUNTY ENGINEERS DEPARTMENT, Respondent	File No. UFC 1.14 RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly for hearing before William Levin, duly appointed Hearing Officer on January 18, 1971, February 8, 1971, and February 17, 1971, the Department of Engineers represented by Wayne K. Lemieux, Deputy County Counsel, and the American Federation of State, County and Municipal Employees, Local 119 (hereinafter referred to as AFSCME), represented by Herbert March, Attorney at Law, and evidence having been introduced both oral and documentary, and the parties agreeing, per stipulation, that Rule 6.09 of the Rules and Regulations of the Los Angeles County Employees Relations Commission shall be deemed to mean a report from the Hearing Officer is required 30 days after receipt of the complete transcript, and the transcript having been received on March 8, 1971, and the Hearing Officer having considered the evidence and the oral arguments of the parties, now finds:

A. Charge As to Warren Oliney's Written Reprimand:

I. Findings:

1. Warren Oliney is a sewer maintenance superintendant in the County Engineers Department, and a member of the Union.

2. On September 29, 1970, Oliney testified in behalf of Freddie Blacknell, in a hearing before the Civil Service Commission of the County of Los Angeles, arising out of Blacknell's demotion for alleged excessive absenteeism.

3. After testifying at the Blacknell hearing, Oliney was told by C. Pearson, Sewer Maintenance Supervisor, that it was not becoming of him as a supervisor to testify in behalf of Blacknell.

4. On October 9, 1970, Oliney and Sam McAllister, a fellow sewer maintenance superintendant, senior to Oliney and a Union member, had a dispute regarding a work assignment made by McAllister. The County did not directly or indirectly cause the dispute to occur.

5. In a document entitled Reprimand for Improper Conduct, dated October 20, 1970, from C. Pearson, Oliney was charged with:

(a) Insubordination in questioning a work assignment made by the Senior Sewer Maintenance Supervisor.

(b) Exhibiting conduct unbecoming a supervisor by openly challenging the work assignment.

The County did not issue this reprimand to Oliney because of his participation in the activities of AFSCME.

6. On November 9, 1970, Oliney filed a written grievance stating the reprimand was improper, and based on a biased and distorted account of the fellow supervisor, before determining Oliney's version of the incident. After a meeting on Oliney's grievance, the grievance was withdrawn.

II. Conclusions of Law:

The Hearing Officer concludes from the ultimate facts hereinbefore found that:

The County Engineers did not violate Section 12(a)(1) of the Ordinance by issuing the reprimand to Oliney.

III. Order:

The charge is dismissed as to the written reprimand of Warren Oliney.

B. Charge As to Paul McKinney:

I. Findings:

1. Paul McKinney, hired by the County in 1968, as a Senior Equipment Maintenance Man, joined the Union about 8 months prior to January, 1971, when the Union became the official bargaining union for the Automotive Equipment Unit.

2. His report as a probationee, in January, 1969, gave an over-all evaluation as "competent"; and he received the same over-all evaluation in April, 1969, and April, 1970. His effectiveness was described in April, 1969, as "above standard"; and he was described in April, 1970, as a "conscientious and industrious employee."

3. In December, 1968, and again in January, 1970, McKinney received an over-all appraisal of 86 in "promotability" in an examination for Equipment Maintenance Foreman. He was not a member of the Union at the time these appraisals were made.

4. In September, 1970, McKinney was given an over-all appraisal of 78 in "promotability" in an examination as Electro-Mechanic. This score, and that of James Wilkiel's were the lowest of the five applicants; the other three applicants were not Union members.

5. McKinney protested that the September, 1970, appraisal of promotability rated him "acceptable", rather than "good" under the item designated Knowledge and Skills "to perform the duties of the higher level position." He informed Personnel he had additional experience and education not reflected in his personnel file. He submitted this additional information, and Personnel recommended his over-all rating be increased to 83. This increased rating has not yet been approved by the Civil Service Commission.

6. McKinney does not believe the Personnel officer who graded him discriminated against him because of Union activity, but to the contrary, had always been honest and fair with him.

7. The Supervisor in the County Engineers did not grade Paul McKinney at a lower rate because of his activities in AFSCME. McKinney was given the lower rate in good faith, based on the information he had supplied to the County as to his experience and education.

II. Conclusions of Law:

The Hearing Officer concludes from the ultimate facts hereinbefore found that:

The County Engineers did not violate Section 12(a)(1) of the Ordinance in rating Paul McKinney in September, 1970.

III. Order:

The charge is dismissed as to the appraisal of promotability given Paul McKinney in October, 1970.

C. Charge As to Sidney Mouton:

I. Findings:

1. Sidney Mouton has been employed by the County over 25 years and has been in Sewer Maintenance about 11 years. He is a Union member.

2. On August 25, 1970, Mouton was served a letter from the Department of County Engineers stating that effective September 1, 1970, he was being reduced from Sewer Maintenance Leadman to Sewer Maintenance #2. This letter stated that the disciplinary action was based on unacceptable conduct, namely:

(a) Threatening fellow employees.

(b) Frequent disregard of alleged rules and regulations.

(c) A poor attendance record.

3. After consultation with the Union, Mouton, in a letter dated August 26, 1970, appealed the action to the County Civil Service Commission, in which letter he denied the validity of each charge.

4. Mouton, at the time he denied the charges on August 26, 1970, believed that one of the reasons for the demotion was his Union activity.

5. The charges filed with the Employee Relations Committee alleging that Mouton was demoted for Union activity were filed on November 13, 1970.

6. By written compromise dated December 14, 1970, the Department of Engineers and Mouton, through his attorney, agreed to a compromise providing that:

(a) He would withdraw his protest.

(b) He would be placed on a 6-month period of observation.

(c) Monthly conferences would be held with supervision.

(d) If, at the end of the period Mouton had improved his performance rating to a fully satisfactory level, he would be restored to Sewer Maintenance Leadman.

(e) To achieve the satisfactory rating, Mouton was required to improve his attendance and to refrain from arguing with fellow employees or otherwise thrusting himself into discussion concerning work decision not part of his crew assignment.

II. Conclusions of Law:

The Hearing Officer concludes from the ultimate facts hereinbefore found that:

The Charging Party has failed to establish that there was good cause, within the meaning of Paragraph 6.12 of Rule 6

of the Los Angeles County Employees Relations Commission, for the filing of the charge more than 60 calendar days following occurrence or discovery of the alleged act or acts on which the charge was based.

III. Order:

The charge is dismissed as to the demotion of Sidney Mouton.

D. Charge as to Wilkiel:

I. Findings:

1. James Wilkiel, now completing his 6th year with the County, is a Helper Electrician.

2. Wilkiel joined AFSCME the latter part of 1968, as President of Section 119G of the Union, which includes Sewer Maintenance Men. He has participated in a number of discussions with supervision regarding employee problems in the unit.

3. Wilkiel's original application for employment reflected the specialized electrical training he had at a technical school in Chicago. Also he was an instructor in electrical work 3 years at a trade school in Los Angeles.

4. In two previous appraisals of promotability, for the position of Sewer Plant Operator, prior to his joining the Union, Wilkiel received grades of 86 and 88.

5. Other than a comment in his 1969 Performance Evaluation that he had a tendency to "cut corners", Wilkiel's Performance Evaluations for 1967, 1968, 1969, and 1970, rated his over-all evaluation as "competent", and contained comments praising his work.

6. Wilkiel's 1967 Performance Evaluation stated in part that "with more background in electrical controls and related

mechanical equipment, you could advance to an Electro-Mechanic classification."

7. In September, 1970, Wilkiel received an over-all rating for appraisal of promotability of 75. This was the lowest score for five applicants' and the three top scores were for non-Union members.

8. Wilkiel had the greatest seniority as among the five applicants for the opening in September, 1970.

9. At least two members of supervision said Wilkiel was making trouble.

10. The County gave Wilkiel a lower rating than he deserved because of his Union activity.

II. Conclusion of Law:

The Hearing Officer concludes from the ultimate facts hereinbefore found that:

The County Engineers did violate Section 12(a)(1) of the Ordinance in its appraisal of promotability of James Wilkiel in October, 1970.

III. Order:

The County Engineers Department is ordered to submit a new appraisal of promotability for James Wilkiel for the Electro-Mechanic job, and with the appraisal, to submit a written statement setting forth in detail its basis for determining each of the five items rated in the appraisal of promotability.

E. Charge As to Blacknell:

I. Findings:

1. Freddie Blacknell has been employed by the County approximately 11 years, has been in Sewer Maintenance about 5 years, and joined the Union in early 1969. He is an officer of the Union.

2. Blacknell's Performance Evaluation in April, 1967, stated that "your attendance record is in need of immediate and continued improvement."

3. On August 17, 1970, the County Engineers notified Blacknell he was being reduced to Sewer Maintenance Man #1 from Sewer Maintenance Man #2 because his attendance had not met satisfactory standards for several years.

4. Blacknell believed at the time that he received the notice that he was being discriminated against.

5. On August 21, 1970, the Civil Service Commission received a request for a hearing from Blacknell in which he stated:

(a) He had not been warned in April, 1967, that the Department would take action against him.

(b) In connection with all his absences, he gave advance notice to Supervision except when he was sick.

(c) There have been no efforts to warn him with regard to this action by Supervision.

6. The Civil Service Commission conducted a hearing on September 29, 1970, and concluded that all reasonable attempts to aid Blacknell in improving his attendance had been made and that good cause existed to sustain the reduction in position.

II. Conclusions of Law:

The Hearing Officer concludes from the ultimate facts hereinbefore found that:

The Charging Party has failed to establish that there was good cause, within the meaning of Paragraph 6.12 of Rule 6 of the Los Angeles County Employees Relations Commission, for the filing of the charge more than 60 calendar days following occurrence or discovery of the alleged act or acts on which the charge was based.

III. Order:

The charge is dismissed as to the demotion of Freddie Blacknell.

In the Matter of Arbitration Between AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 119, Charging Party -and- LOS ANGELES COUNTY ENGINEERS DEPARTMENT, Respondent	)	No. UFC 1.14 REASONS FOR PROPOSED FINDINGS OF FACT, CONCLUSIONS AND FINAL ORDER

A. Background:

It is clear from the testimony that the Charging Party has experienced a great deal of difficulty in surviving as a representative of a significant number of employees in sewer maintenance. From 44 members in December, 1969, it had dropped to 19 members, in October, 1970.

But the fact that membership has dropped does not necessarily mean the County Engineers have violated the Employees Relations Ordinance and violated rights of Union members. The drop in membership is far more likely attributable to the fact that AFSCME is a minority union.

It is also clear from the testimony that County supervision, at least in the early months of Union organization, made little effort to hide its lack of enthusiasm about AFSCME's attempts to establish itself. But supervision distaste for a particular union or union membership -- without more -- is not enough to establish an unfair employee practice, under the terms of the Ordinance. Supervision unhappiness about union organization, in private industry or in the public sector, is the norm, not the exception. In the context of the matters to be considered in this hearing, the question is whether the County interfered with, re-

strained, or coerced employees in the exercise of rights recognized or granted in this Ordinance (Section 12(a)(1)), which rights under Section 4 provide that an employee has the right to form, join and participate in the activities of employee organizations of their own choosing and that no employee shall be interfered with, intimidated, restrained, coerced or discriminated against because of his exercise of these rights.

With these broad guidelines in mind, let us consider the circumstances in connection with each of the affected employees:

1. Oliney Charge:

The Union attempted through general background information to establish that Oliney was the subject of general harassment. But the essence of its charge against the County, so far as Oliney was concerned, was that his testimony in behalf of Blacknell at a Civil Service Commission hearing caused him to be reprimanded several weeks later.

There is no question but that Pearson acted improperly in telling Oliney, after the Civil Service Commission hearing, that it was unbecoming to testify in Blacknell's behalf. Oliney's response to Pearson at the time was that he was only telling the truth; and it is difficult to understand how anyone in supervision can believe, in today's world of employer-employee relations, that an employee should be unwilling to testify in behalf of a co-employee, in a truthful manner, simply to protect an employer. Such an approach is neither reasonable nor realistic.

But even assuming the reprimand given to Oliney was an attempt to intimidate him for his testimony at the Blacknell hearing, it is not clear the Ordinance would have been violated. The matter of Union discrimination, at least as indicated in the Findings of Fact by the Civil Service Commission, was not raised.

Recognizing, however, the argument in this hearing that the claim of Union discrimination was in fact raised at the Civil Service Commission hearing of Blacknell, and considering Pearson's improper comment to Oliney after that hearing, the Union still has not established the action taken against Oliney, growing out of the McAllister altercation, violated the Employees Relations Ordinance. There was an altercation with McAllister. The County did not instigate that altercation. McAllister, a Union member, still felt at the time of this hearing that Oliney was unjustified in raising an issue with him. The dispute was not of such a minor nature that the County could be charged with using the situation as an excuse to discipline Oliney. Further, the record does not reflect that Oliney's Union activity was of such an important nature that the County was anxious to harass or coerce him.

2. McKinney Charge:

McKinney testified:

(a) He did not feel the man who graded him discriminated against him because of Union activities; and he considered him as always "honest and fair with me."

(b) He "didn't go into the full details of my duties at those firms" listed in his original application agreement in terms of experience.

(c) He submitted "at a later date" his additional educational experience.

In view of McKinney's statements, there is no substance to the Union claim McKinney received his grade because of Union activity. The Union argues that there was input into McKinney's appraisal by a supervisor named Cornelius, who allegedly demonstrated hostility to the Union. But it was the item of "Knowledge and Skills" which was changed upward after McKinney first informed

Personnel of his experience and education, not the other items for which Cornelius may have had an imput. McKinney's grade was apparently less than it should have been, but not because the County had violated the Ordinance.

3. Mouton Charge:

Mouton testified that when he was first notified on August 25th of his demotion, he knew a reason for the demotion was his Union activity. The next day, after consulting with his Union attorney, he specifically requested a Civil Service Commission hearing. Yet no charges were filed with the Employee Relations Commission until November 13, 1970, almost 20 days after the expiration of the 60-day limitation provision in Rule 6.

The Union argues the 60 days is a short period of time for filing charges. But this is not now an arguable matter. The 60-day rule is clear and cannot be disregarded, absent good cause. Mouton does not have such good cause. By his own testimony, he felt his Union activity was the factor in his demotion on August 25, 1970; and the charge should have been filed by October 25, 1970.

In view of the ruling that the 60-day time limitation was not complied with, there is no need to discuss the effect of the December, 1970, settlement except to observe that it seems unreasonable that an employee can in December, 1970, agree to a complete settlement of a matter presented to the Civil Service Commission and yet contend, in a hearing two months later, that another County body can make a ruling, dealing with the same matter, directly contradictory to the settlement.

4. Wilkiel Charge:

It is true that the appraisal challenged by Wilkiel was for the Electro-Mechanic position, a different job than the one

involved in the two previous appraisals (Sewer Plant Operation #1).

Nevertheless, it is difficult to believe that in a period of two years, Wilkiel would have become less effective, rather than more effective. Yet in the item of "Supervision" on the appraisal, in July, 1968, he was rated "good", and in September, 1970, he was only rated "acceptable." And the Supervision item, unlike other items which are graded in the appraisal, contains no reference to the "higher level position." It is difficult, too, to believe that he had dropped from "outstanding" in Initiative and Resourcefulness" to "acceptable." And it is significant that over three years earlier, Wilkiel's Performance Evaluation stated that "with more background in electrical controls and related mechanical equipment, you could advance to an Electro-Mechanical classification", the exact job now in question.

Obviously there is hostility between Wilkiel and supervision. Despite the word game played at the hearing by supervisors who denied they called Wilkiel a "trouble maker" but admitted they may have said he caused trouble, the fact is that Wilkiel, strongly identified in his Union activities, was disliked by Supervision. Some of that dislike is obviously due to the newness to County Supervision of the whole concept of collective bargaining among County employees. A further complication is the fact Wilkiel headed a Union which did not have the contract with the County. But notwithstanding these two reasons (both understandable and both not deserving of any critical comments), the fact remains that supervision decided that Wilkiel, in pursuing the aims and objective of his members, was upsetting the personnel situation. His appraisal was made, with this in mind.

The County Counsel argues that in a sense a re-appraisal might be a meaningless exercise because the appraisal of promotability only accounts for 25% in any promotional exam and the written exam accounts for 75%, so that even if Wilkiel received a lower or higher grade he might end up with the same rating. This may well be true. But Wilkiel is still entitled to a fair and accurate appraisal of the promotability, an appraisal which does not reflect his supervision's unhappiness with his Union activity.

It is impossible to determine a new appraisal of promotability for Wilkiel based on the record at this hearing. Nevertheless, in view of the finding that the County Engineers did give Wilkiel a lower rating because of his Union activity, it is ordered to re-evaluate him and to set forth in detail the basis for the re-evaluation. In making this re-appraisal, the County is not required to give Wilkiel a higher rating on any of the items simply because he has the greatest seniority. But certainly the experience gained during the years with the County should reflect itself in Wilkiel's rating, more than in the original rating.

5. Blacknell Charge:

The Union takes a clearly inconsistent position. On the one hand, both in its testimony and argument, the Union contends the County has had a long history of moving affirmatively against AFSCME and its members, in violation of the Ordinance. On the other hand, the Union is contending that Blacknell did not know, when he received the notice of demotion in August, 1970, that there might be Union discrimination involved in the County's action.

Blacknell's testimony, too, is hard to reconcile with the position he now takes. He testified he did not understand there

was a Union discrimination element to his demotion at the time he received it, and did not reach this conclusion until the other events occurred (McKinney's and Wilkiel's promotability problems and Oliney's reprimand). Yet he further testifies that at the time he received the notice, he felt he was being discriminated against, though he did not know why. And he further acknowledges that because of an incident which occurred the day of the demotion, involving one of his supervisors (Pearson), he was concerned about his participation in the Union.

The comments made in the discussion regarding Mouton also apply here. Perhaps 60 days is not a lengthy period in which to make a decision to file a charge. But if Blacknell, an active member of the Union, had witnessed several years of the kind of discriminatory practices claimed by the Union in this hearing, and if, when he received the notice of demotion, he felt he was being discriminated against, it seems logical that he should have made a decision to file his claim with the Employee Relations Commission within the required 60 days.