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In the Matter of:

AMERICAN FEDERATION OF STATE, COUNTY,  
AND MUNICIPAL EMPLOYEES (AFSCME), LOCAL  
685, AFL-CIO,

Charging Party,

vs.

COUNTY OF LOS ANGELES, PROBATION DEPARTMENT,

Respondent.

### DECISION

For the Charging Party:

For the Respondent:

Before Kenneth Cloke, Hearing Officer



1 RICHARD NEIL SHUMSKY, has been a Deputy Probation Officer with  
2 Los Angeles County for fifteen years, and is assigned to the Cen-  
3 tinela Regional Placement Office. He has been President of Local  
4 685 for the past year and a half, is responsible for contract ad-  
5 ministration, and at times represents grievants.

6 He received a telephone call after the first of the year  
7 from Alan Ortolani, a Deputy Probation Officer, and Shop Steward  
8 for the Local, regarding a disciplinary meeting which was to take  
9 place in the presence of Mr. Mouton, a Supervisor who had just  
10 left the Centinela office. A "celebration" had been organized by  
11 employees of that office on the occasion of his departure, and Mr.  
12 Ortolani had been called in by Mr. Seeman, his Director, to dis-  
13 cuss hisrole in the "celebration".

14 The witness protested the anticipated presence of Mr.  
15 Mouton at the meeting to Mr. Hauptman, in charge of employee re-  
16 lations for the County, and Paul Simpson, who is in charge of em-  
17 ployee relations for the Probation Department, but received no  
18 response.

19 The meeting was held at the Crenshaw Office. Present  
20 were Mr. Ortolani, himself, Pat Caldwell (an alternate steward),  
21 Mr. Seeman, and Mr. Mouton. Since Mr. Ortolani is a Steward, Ms.  
22 Caldwell was brought in as an observer.

23 Mr. Seeman opened the meeting by asking Mr. Ortolani to  
24 repeat the words used to decorate the cake at the celebration. Mr.  
25 Ortolani indicated he did not feel free to make a statement due to  
26 the presence of Mr. Mouton. The witness asked Mouton why he was  
27 there, as he was no longer a supervisor at the Centinela office,  
28 and was taking copious notes. Mouton replied that he was making

1 his own investigation, and would take some action on his own be-  
2 half.

3 Mr. Shumsky asked whether that would be civil or physical,  
4 and Mouton made no response. The witness objected / <sup>that</sup> Mouton's  
5 presence at the meeting was preventing a free and open response  
6 and presenting a chilling effect on communications. He asked  
7 whether Mrs. Hurt, Director of Full Services for the Probation  
8 Department, supervisor to both Seeman and Mouton, and involved in  
9 a personal relationship with Mr. Mouton, had ordered the meeting.

10 Mr. Seeman indicated he had spoken to Mrs. Hurt by tele-  
11 phone about the matter, and that she had asked him to conduct an  
12 inquiry and get back to her with a report.

13 The witness slipped, and asked whether Mrs. Mouton (mean-  
14 ing Mrs. Hurt) did not have a personal relationship with Mr. Mou-  
15 ton, at which time Mr. Mouton stated that he would not always be  
16 President of the Union, and there would be ways to get him, or  
17 deal with him, afterwards.

18 The witness addressed Mr. Seeman, and asked whether he  
19 would allow this sort of conduct to continue. Seeman indicated he  
20 should just get on with it. He objected that management should  
21 answer Mr. Mouton, but Mr. Seeman made no comment, and began to  
22 question Mr. Ortolani, who made no further response, and the meet-  
23 ing broke up.

24 This was the first formal meeting in the disciplinary  
25 process. He had asked Mr. Simpson why Mr. Mouton was to be at the  
26 meeting, and Simpson had told him that Mrs. Hurt could direct any-  
27 one to be anywhere. It is common knowledge that Mrs. Hurt and Mr.  
28 Mouton have an on-going personal relationship. The witness felt

1 he should be at the meeting as a counterpart to Mr. Mouton, and  
2 would leave if he left.

3 ALAN ORTOLANI is a Deputy Probation Officer (DPO), Deputy II, at  
4 the Crenshaw Area Office. He has been a Probation Officer for 10  
5 years, and is a Steward for the Union.

6 On Friday, January 1, 1983, a group of employees were  
7 planning a celebration of the departure of Mr. Mouton from their  
8 office. Twenty minutes before the celebration, he spoke with Mr.  
9 Seeman, who asked what it was about. He told Seeman they intended  
10 to celebrate Mouton's departure with a cake over their fifteen  
11 minute break. They intended to invite Mouton, but tell him the  
12 nature of the celebration. Seeman indicated he thought it was  
13 in bad taste, and hoped it would not become institutionalized.  
14 The witness stated no County rules were being violated, and they  
15 had a right to free speech and association. Seeman indicated  
16 he would not preclude the meeting.

17 On the Wednesday following the celebration, he received a  
18 call from Seeman to come in and discuss the matter. Mr. Seeman  
19 indicated he had a received a call from Mrs. Hurt due to an anon-  
20 ymous call from a deputy complaining about the words written on  
21 the cake, which may have had some racial overtones.

22 The witness assured Mr. Seeman there were no racial over-  
23 tones, and that everyone in the office had participated, including  
24 mostly black staff members.

25 The cake mentioned three nicknames for Mr. Mouton, two of  
26 which had been invented by blacks, who felt more persecuted by Mr.  
27 Mouton than the whites did. he indicated the objection was lu-  
28 dicrous, and asked what was the point of the discussion.

1           Seeman indicated Mouton desired a meeting that afternoon  
2 between the three of them. The witness indicated he wanted union  
3 or legal counsel to be present, and that he would contact Mr.  
4 Shumsky and get back to him.

5           He was present during the testimony of Richard Shumsky  
6 concerning the meeting, and his testimony would be exactly the  
7 same as to what transpired.

8           The witness had been supervised by Mr. Mouton for two  
9 months in 1982, but was not supervised by him at the time of his  
10 departure. Mr. Mouton is a Supervising Deputy Probation Officer  
11 (SDPO), and a supervisor under the Ordinance.

12           He had ordered the cake, together with Jacques Ellis, a  
13 black employee, and both had picked it up. He had received no  
14 negative grams or evaluations from Mouton while under his super-  
15 vision.

16           The following witnesses were called on behalf of the  
17 Respondent:

18 DUDLEY SEEMAN, has been a Probation Director II for seven years,  
19 and has been with the Department for 28 years. He has been at the  
20 Crenshaw office since July 26, 1982.

21           On Friday, January 7, 1983, he was informed of a coffee  
22 klatch to celebrate Mr. Mouton's departure, and immediately call-  
23 ed Jacques Ellis, unofficial Social Remembrance Chairperson, who  
24 presides over all in-house social gatherings, and Alan Ortolani  
25 to his office.

26           He told Ellis to inform him of such events in the future.  
27 He told Ortolani he thought the event was in poor taste, and if it  
28 did not get out of hand, he would not interfere. Ortolani said

1 there would be no speech-making, and did not mention the cake.

2 On Tuesday following the event, he received a telephone  
3 call from Mrs. Hurt, his supervisor. She had received an anony-  
4 mous call suggesting racial overtones to the wording on the cake  
5 at a celebration organized by white DPO's. Some who were present  
6 had cameras and took photographs.

7 The next morning, he asked Mr. Ortolani to come to his  
8 office. Ortolani told him the cake read: "a gorilla by any other  
9 name is an asshole, Bye-bye Mou-Mou." He told Ortolani he  
10 thought it was in poor taste, and was told some of the staff had  
11 cameras, and had taken pictures.

12 Mr. Mouton telephoned, and expressed extreme displeasure  
13 with the event. He told Mouton he would investigate, and asked  
14 if he would be present at a meeting to see if they could resolve  
15 it.

16 He spoke to Ortolani the same day to set up the meeting.  
17 Ortolani expressed concern over the meeting, asked to have a rep-  
18 resentative present, since employee discipline was a considera-  
19 tion, and objected to Mouton's invitation to the meeting.

20 He then spoke with Mrs. Hurt, who informed him that Mou-  
21 ton should be present, if his presence could help resolve the mat-  
22 ter.

23 The meeting was attended by Pat Caldwell, Shumsky, Or-  
24 tolani, Mouton, and himself. Ortolani indicated before the meet-  
25 ing that he would remain mute. A lot of bantering and bickering  
26 went on. Mr. Shumsky made comments on the idiocy of the meeting,  
27 and unfairness of management, and derogatory statements about  
28 Mouton and Mrs. Hurt, by confusing their names. Mr. Mouton asked

1 him to conduct himself with decorum, and said personalities should  
2 not be a part of the meeting.

3 The witness identified their purpose as being to investi-  
4 gate the allegations which had been made and attempt to resolve  
5 the issue. Mouton's presence was questioned by Shumsky, and pos-  
6 sibly Ortolani. The witness explained why he had been invited,  
7 and asked Ortolani to explain what had happened. Ortolani refused  
8 to do so, so he recited the circumstances himself.

9 The meeting was heated and animated. Shumsky was ag-  
10 gressive and angry, and there was considerable bantering between  
11 he and Mouton. The witness could not keep track of all the com-  
12 ments that were made while coming in, and during the meeting.

13 He did not hear the words Mouton said, but heard no  
14 threats. After the meeting, he consulted with Mrs. Hurt, who ac-  
15 cepted his recommendation regarding discipline, which was to send  
16 a letter of concern which would not be referred to in a perform-  
17 ance evaluation if there were no recurrence. Both parties grieved  
18 his decision. He knew that Mr. Mouton and Mrs. Hurt had a person-  
19 al relationship.

20 Mrs. Hurt had been his supervisor from September, 1979,  
21 to the date of the hearing. She had consulted with him on dis-  
22 ciplinary matters occasionally, but has not called cases to his  
23 attention before, or reported anonymous phone calls before. He  
24 had heard Mr. Mouton referred to by his nickname, "Mou-Mou".

25 ALAN ORTOLANI was recalled by the Charging Party out of order with-  
26 out objection. He testified the wording on the cake was: "A gor-  
27 illa by any other name is still a famous anus -- bye bye Mou Mou".

28 Mr. Mouton's nicknames were "gorilla", "Famous Anus", and



1 "Mou-Mou".

2 AROS GARY MOUTON had been a Supervising Deputy Probation Officer  
3 for two and a half years at the time of the meeting.

4 Mr. Mouton was angry and hostile in demeanor, and refused  
5 several times to answer questions put to him by counsel, which  
6 were ruled relevant by the Hearing Officer. He refused to do so  
7 despite instruction that his testimony might be disregarded as a  
8 consequence, and indicated his belief that the entire proceeding  
9 was an invasion of his privacy. Inasmuch as the witness refused  
10 categorically to answer relevant questions put to him by counsel,  
11 his testimony was disregarded in its entirety under Commission  
12 Rule 6.07f. Given the witness' hostile and defensive demeanor,  
13 his answers would not have been given significant weight and cred-  
14 ibility on the issue presented, had he testified fully.

#### 15 DISCUSSION

16 Due to Mr. Mouton's refusal to testify fully and Mr. See-  
17 man's equivocal denial regarding the threat alleged to have been  
18 made by Mr. Mouton, the weight of the evidence suggests a threat  
19 was in fact made to Mr. Shumsky. This conclusion is supported by  
20 an evident provocation in the slip-of-the-tongue reference to  
21 Mrs. Hurt as Mrs. Mouton, by Mr. Mouton's threatening demeanor in  
22 hearing, by Mr. Seeman's lack of recollection concerning the com-  
23 ments made back and forth between Mr. Shumsky and Mr. Mouton, and  
24 by his recollection that they had been bantering back and forth  
25 since before the meeting began.

26 It is additionally clear that Mr. Mouton felt strongly  
27 that he had been personally insulted, and that Mr. Seeman in no  
28 way lent credence or support to Mr. Mouton's threat, other than

1 by inaction. There is no reason to disbelieve Mr. Seeman's otherwise  
2 credible account, or assume that he even heard the threat made by Mr.  
3 Mouton, or having heard it, treated it any more seriously than the  
4 angry denunciations he heard from Mr. Shumsky.

5 The issue therefore is two-fold: did Mr. Mouton's threat  
6 and/or Mr. Seeman's failure to respond constitute an unfair labor  
7 practice; and if so, what remedy is appropriate?

8 With regard to the unfair labor practice itself, it is rec-  
9 ognized that a threat issued by a supervisor to a Union representa-  
10 tive during a grievance meeting is a violation of the rule against  
11 employer interference, restraint and coercion. While the threat may  
12 have been uttered while in the heat of passion, and had as its ori-  
13 gin a personally offensive remark, it would be more likely that Mr.  
14 Shumsky would notice it, and give it credence, than would Mr. Mou-  
15 ton or Mr. Seeman, for whom it was clearly only part of an otherwise  
16 acrimonious session. Yet this in no way diminishes the fact that it  
17 was uttered, or that it is a violation of elementary labor law prin-  
18 ciples to allow a union representative to be personally threatened by  
19 a supervisor in the course of his official duties.

20 Mr. Mouton's demeanor and statements at hearing lent credence  
21 to his threat, and make sensible Mr. Shumsky's insistence on cor-  
22 rection. Mr. Mouton's anger and outrage were genuine, and whether  
23 deserved or not, had no business taking the form of a threat to do  
24 personal violence to a union representative.

25 The purpose of Section 12(a)(1), as of Section 8(a)(1) of the  
26 National Labor Relations Act, is to ensure that employees understand  
27 that they will not be pressured or threatened in the exercise of  
28 their free choice to join a union, or engage in protected concerted

1 activities.

2 Moreover, Professor Gorman has written:

3 "it is.... generally agreed that, to  
4 establish a violation of Section 8(a)(1),  
5 it is not necessary to demonstrate -- by  
6 direct testimony of employees or otherwise  
7 -- that particular employees were actually  
8 coerced, it is sufficient if the [employee]  
9 can show that the employer's actions would  
10 tend to coerce a reasonable employee...  
11 It is sufficient to demonstrate that the em-  
12 ployer action has the effect of restraint or  
13 coercion. It is not necessary to demonstrate  
14 that the employer intended to produce that  
15 effect." (original emphasis)  
16 Gorman, Basic Text on Labor Law (1976),  
17 pp. 132-133.

11 A reasonable employee would clearly have been coerced by  
12 Mr. Mouton's threat, whether he intended it or not, whether Mr. Shum-  
13 sky was intimidated or not, and it might be added, whether his mo-  
14 tive was purely personal or not.

15 Due to the similarity of language between ERO §12(a)(1) and  
16 NLRA's §8(a)(1), federal labor relations precedent may assist in  
17 interpretation. See, for example, Solano County Employees' Associa-  
18 tion v. County of Solano, 136 C.A.3d 256 (1982).

19 Counsel for the charging party argues that Good Hope Refin-  
20 eries, Inc., 245 NLRB 380 (1979) enfd., \_\_\_\_ F2d 57 (CA 5, 1980),  
21 cert. den., 449 U.S. 1012 (1980), is dispositive of the issue pre-  
22 sented for decision. In that case, a union steward accompanying an  
23 employee to a counseling session was told he would need union rep-  
24 resentation himself. The NLRB and Court of Appeals upheld a finding  
25 of violation.

26 If anything, the present case is more serious, as a reason-  
27 able union employee would more likely be intimidated by a threat  
28 of physical violence, than of discharge.

1 Respondent argues in its post-hearing brief that Mr. Shum-  
2 sky's complaint is "inconsequential". Yet magnitude goes more to  
3 the remedy than to the violation, unless it can be said that the  
4 statement is legally de minimus, which would be illogical with a  
5 threat to do violence. Nor would Mr. Seeman's discretionary  
6 authority to structure the meeting along lines which appeared most  
7 productive to him mitigate Mr. Mouton's fault. Mr. Seeman paid  
8 little attention to the trade in insults and challenges, and cred-  
9 ibly denied memory of particulars.

10 Respondent raises the issue of Mr. Shumsky's role at the  
11 meeting under NLRB v. J Weingarten, 420 U.S. 251 (1975). Yet there  
12 is no contention that the behavior of Mr. Shumsky, other than erroneously referring  
13 to "Mrs. Mouton", justified the threat made against him. Even if  
14 he was not properly there, he was present in an official capacity,  
15 and should not have been threatened.

16 If a union representative is belligerent or insulting, the  
17 meeting should be adjourned, and reconvened under more conducive  
18 circumstances, or cancelled and discipline imposed without a meet-  
19 ing. The remedy is not for an employer's representative to join  
20 the disruption and threaten the representative.

21 For these reasons, I find a violation of section 12(a)(1).


22 With respect to remedy, which neither party briefed, the  
23 Department's argument that the incident was not terribly significant  
24 deserves support. A small number of individuals were present, Mr.  
25 Shumsky provoked Mr. Mouton by personally insulting him and, in his  
26 mind, the woman he was closest to, both parties were hostile and  
27 argumentative, and Mr. Mouton was suffering from the prior insult  
28 of the cake.

1           The remark was in all likelihood said in anger, but without  
2 any serious intention to carry it out, and certainly Mr. Shumsky has  
3           as a union representative  
4 witnessed worse outbursts in his experience/. No other employees  
5 were present than union representatives, and it is unlikely that any  
6 were seriously intimidated as a result.

7           Having found a violation, I believe an appropriate remedy  
8 would be for the Department to notify those who were present that it  
9 recognizes that threats are contrary to the law, which protects con-  
10 certed activity, and that it will not tolerate threats of violence or  
11 resort to violence on the part of its supervisory staff.

12 Dated: July 22, 1983

13                               Respectfully Submitted,

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16                               KENNETH CLOKE  
17                               Hearing Officer  
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