

LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

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COMMISSION

APR 14 1989

In the Matter of:

AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL
EMPLOYEES, LOCAL 685

Charging Party

and

COUNTY OF LOS ANGELES
PROBATION DEPARTMENT

Respondent

UFC 1.80

REPORT OF HEARING OFFICER

I. BACKGROUND

On May 20, 1988, American Federation of State, County and Municipal Employees, Local 685 ("Union") filed and Unfair Employee Relations charge against the County of Los Angeles Probation Department ("County") alleging a violation of Section 12 (a)(3) of the Employee Relations Ordinance ("ERO"). A hearing was held on November 7, 1988 before Sara Adler, Hearing Officer. At the conclusion of the hearing the parties elected to make closing arguments in writing. The Hearing Officer requested Reply Briefs (letter of request attached), which were filed by both parties, and the matter was considered fully submitted upon receipt of the Reply Briefs by the Hearing Officer.

II. APPEARANCES

For the Union:

Alexander Cvitan
Reich, Adell & Crost
501 Shatto Place
Suite 100
Los Angeles, CA 90020

For the County:

Kenneth Miller
Employee Relations Division
526 Hall of Administration
222 N. Grand Avenue
Los Angeles, CA 90012

III. ISSUES

The charge establishes that the Issues in this matter are as follows:

1. Did the County violate the ERO when it refused to meet and confer with the Union prior to the imposition of disciplinary guidelines effective 9/1/88?
2. If so, what is the appropriate remedy?

IV. RELEVANT PROVISIONS OF:

A. THE ERO

SECTION 5:

"It is the exclusive right of the County to...take disciplinary action for proper cause; 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 [this matter] may have on wages, hours and other terms and conditions of employment."

SECTION 6:

...

(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...defined in Section...5 above. ...

B. MEMORANDUM OF AGREEMENT

ARTICLE 36, SECTION D:

"Except as specifically provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its right, and agrees that the other shall not be required, to negotiate with respect to any other matter covered herein or with respect to any other matters within the scope of negotiations, during the term of this Memorandum of Agreement.

V. CONTENTIONS OF THE PARTIES

A. CONTENTIONS OF THE CHARGING PARTY

The Charging Party Contends:

1. That the Respondent refused to negotiate issues affecting wages, hours and other terms and conditions of employment despite a demand to negotiate by the Charging Party regarding proposed Disciplinary Guidelines.
2. That the Respondent unilaterally implemented the Disciplinary Guidelines on September 1, 1988.
3. That employees have been disciplined pursuant to the Disciplinary Guidelines.
4. That failure to negotiate these Guidelines is a violation of the good faith bargaining mandate of Section 3(0) and constitutes and Unfair Employee Practice as defined in Section 12(a)(3) of the ERO.

B. CONTENTIONS OF RESPONDENT

The Respondent contends:

1. That the subject matter falls within the rights of Respondent as those rights are defined in ERO Section 5.

2. That Respondent afforded the Charging Party two separate opportunities to consult regarding the Disciplinary Guidelines prior to their implementation.
3. That any obligation to negotiate was waived by the Charging Party in the Memorandum of Agreement.

VI. STATEMENT OF FACTS

The facts in this matter are not in dispute. By letter dated May 4, 1988, Respondent transmitted a draft of the proposed Disciplinary Guidelines for information purposes and invited the Charging Party to contact them with any questions or for further information. Identical letters were sent to all unions with whom Respondent has Memoranda of Agreement. Richard Shumsky, President of the Local 685 arranged a meeting and made a demand to negotiate the Disciplinary Guidelines. Respondent refused, taking the position that its only obligation was to consult. The Charging Party filed the instant charge on May 20, 1988. By letter dated May 26, 1988, Respondent offered another opportunity to consult regarding the Disciplinary Guidelines. By letter dated July 20, 1988, Respondent transmitted the final draft of the Disciplinary Guidelines, which included some modification resulting from consultation with other unions. The Disciplinary Guidelines were fully implemented effective September 1, 1988. Employees represented by the Charging Party have been disciplined under the Guidelines.

The parties' 1985-87 MOU had expired at the time that this demand for bargaining the Disciplinary Guidelines and the parties were in negotiations for a new agreement. The 1988-1991 MOU was effective June 8, 1988 after being ratified in September, 1988.

VII. DISCUSSION

The critical issue in this matter is the "Full Understanding, Modifications, Waiver" provision of the 1988-91 MOU ("Zipper Clause"), not the similar provision in the preceeding MOU as argued by the Respondent - as that MOU had expired and the record indicates no agreement between the parties not to negotiate on matters not before the subject of negotiation.

The Charging Party argues that the 1988-91 MOU cannot be a waiver because the Respondent's refusal to bargaining (and the instant charge) occurred prior to the ratification of the current MOU. However, the current MOU's Zipper Clause waives any rights which the Charging Party may have had with respect to the Disciplinary Guidelines precisely because the events occurred prior to the time it was ratified. A general waiver may be ineffective as to a particular issue if that issue was not within the contemplation of the parties. However, in this matter, the Charging Party was fully aware of the issue of its desire to bargain the Disciplinary Guidelines and nonetheless signed the MOU without specifying them as a reserved subject (if so found in the ULP proceeding to be a subject of bargaining). Article 36D of the 1988-91 MOU states, "Except as specifically provided herein...each party agrees that the other shall not be required to negotiate...." (emphasis added) The Respondent probably could not have effectively prohibited the Charging Party from including such an exception to the waiver, but there is no bargaining history (relevant to the Zipper Clause) in the record and no other reason to suggest that the Respondent was attempting to "have it's cake and eat it too" by first denying the

obligation to bargain and then denying the right to bargain by refusing to include it as an exception. Here, however, even if Respondent was found to be required by the ERO to negotiate over the Disciplinary Guidelines, the Charging Party has waived its right to negotiate in the subsequently entered into Zipper Clause.

In conclusion, it is unnecessary to determine whether or not the Respondent was required to negotiate over the Disciplinary Guidelines as the question has become moot.

RECOMMENDATION

The Hearing Officer recommends that the Employee Relations Commission approve and adopt the following order:

"UFC 1.80 is dismissed as moot."

DATED: April 4, 1989

Respectfully submitted,

A handwritten signature in cursive script, reading "Sara Adler".

Sara Adler, Hearing Officer