


LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

In the Matter of)	
)	
AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL EMPLOYEES)	
(AFSCME), LOCAL 119)	
)	
Charging Party)	
)	
v.)	UFC 1.83
)	
DEPARTMENT OF FACILITIES)	
MANAGEMENT)	
)	
Respondent)	


O R D E R

After due consideration of the Respondent's Request for Reconsideration, the Charging Party's reply thereto, and upon the entire record in this proceeding, the Commission affirms its Decision and Order of February 23, 1990.

DATED at Los Angeles, California this 18th day of May, 1990.



JOSEPH F. GENTILE, Chairman



PAUL K. DOYLE, Commissioner



ROBERT D. STEINBERG, Commissioner

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DECISION AND ORDER

The charge in this case was filed by the American Federation of State, County and Municipal Employees, Local 119 (Union or Charging Party) against the Los Angeles County Department of Facilities Management (County or Respondent) alleging that the County had violated Section 12(a)(1) of the Employee Relations Ordinance (Ordinance) with respect to the classification of Union Steward Frank Arburtha following the elimination of his position.

The matter was duly referred to Hearing Officer John D. Perone, who held a hearing on May 24, 1989. The parties appeared and were afforded full opportunity to present evidence, develop argument, and cross-examine witnesses. The Union made an oral closing argument and the County submitted a post-hearing brief. Hearing Officer Perone submitted a Report received in the Commission's office on August 1, 1989. The Charging Party filed Exceptions to

this Report and the County submitted a statement in opposition to these Exceptions. The Commission thereafter obtained a transcript of the proceedings.

In the instant case, the Union contended that the Respondent violated Section 12(a)(1) of the Ordinance when, in response to the contracting out of certain maintenance work, it demoted Arburtha to the Helper, Painting class rather than place him either in the Painter class or in the Career Development Program (CDP) and/or reduced his salary some \$700 per month.¹ The Respondent denied the allegations and asserted that union animus did not enter in to Arburtha's placement following the elimination of his former position.

Frank Arburtha was hired by the County in October 1960 and was promoted to the permanent position of Power Equipment Painter in January 1970. He became a Union Steward in the early 1970's and was appointed Chief Steward in 1981. While Chief Steward, Arburtha assumed the additional position of Vice President with AFSCME, Council 36 in November 1985.

During the spring and summer of 1988, the Department was involved in preparations for the October 1, 1988 implementation of the contracting out of its automotive fleet maintenance work which had traditionally been performed by County employees. This contracting effort ultimately resulted in the elimination of about 190 positions. Approximately 120 of the affected employees held permanent positions; the remainder were classified as temporary

¹Although the Painter position was variously referred to as a "journey-level painter" or a "craft painter," the Civil Service title for the position is "Painter."

employees. Arburtha's position was included in those positions slated for elimination.

As part of its efforts to find alternative employment for the affected employees, the County created an interview panel composed of Senior Deputy Director Frank Work and two subordinate managers: Ken Wellcome and Thane Durst. The placement of each employee was determined by the interview process and the review of an application completed by the employee listing education and experience. According to the County witnesses, unanimous agreement of the interview panel members was required with respect to the placement of each employee.

Following his interview in September 1988, Arburtha was reduced effective October 1, 1988 to the Helper, Painting class with a reduction in salary from \$2588 to \$1876 per month. It is undisputed that had Arburtha been given the Painter position or placed in the CDP, he would have suffered no reduction in pay.

The documentary evidence disclosed a varied disposition of the employees displaced by the County's contracting efforts. Approximately 60 of the permanent employees were retained in the Department, 27 of whom were placed in the CDP. The other permanent employees were either transferred to other County Departments, hired by the private contractor, or laid off. The majority of the temporary employees were released from County service and accepted positions with the private contractor. No temporary employee was placed in the CDP.

The Hearing Officer found that the Charging Party ". . . could not carry it's (sic) burden to show by weight of the evidence that the County discriminated against Mr. Arbutha (sic) because of his union activities." (H.O. Report, p. 10.) He therefore recommended that the charge be dismissed.

The Union in its Exceptions focused primarily on the Hearing Officer's findings and conclusions with respect to the County's refusal to place Arburtha in the CPD. The thrust of these Exceptions was twofold: 1) The Hearing Officer's analysis was faulty in that he did not apply the Wright Line test², and 2) the Hearing Officer's credibility findings were erroneous in that they were not supported by the "clear preponderance" of all the relevant evidence. The County in its statement in opposition essentially argued that the Hearing Officer's findings and conclusions warrant adoption as they were grounded in credibility assessments.

Having carefully reviewed the entire record in this matter, we adopt the Hearing Officer's findings and conclusions with respect to Arburtha's non-appointment to the Painter position, albeit for different reasons than the Hearing Officer. For the reasons discussed below, however, we reverse the Hearing Officer's findings and conclusions regarding the County's refusal to place Arburtha in the CDP.

This Commission has previously employed the standard developed by the National Labor Relations Board (NLRB) in Wright Line, supra, to examine the relationship between employees' protected

²Wright Line, A Division of Wright Line, Inc. (1980) 105 LRRM 1169.

activities and County actions which detrimentally affect their employment.³ In brief, the Wright Line test as applied to disputes involving the Ordinance requires that the Charging Party make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the County's decision. Once this is established, the burden shifts to the County to demonstrate that the same action would have taken place even in the absence of the protected conduct. If the County's asserted reasons for the adverse action are shown to be a pretext to mask prohibited conduct, the County has failed to meet its burden.⁴

It is appropriate to begin our analysis with a brief discussion of the respective roles of the Hearing Officer and the Commission. We first observe in this regard that the Commission in prior decisions has afforded special deference to the findings of its Hearing Officers predicated on credibility determinations. Such deference is warranted as it is the Hearing Officer rather than the Commission who has the opportunity to observe first hand the demeanor of the witnesses and who has lived with the case. The Commission members, on the other hand, are presumed to have broad experience and expertise in labor relations matters and it is the Commission to which the Board of Supervisors has delegated administration of the Ordinance. Hence, the Commission, in drawing

³Federation of Public Sector Workers, Professional Social Service Supervisors v. Department of Public Social Services (1983) UFC 24.2.

⁴The NLRB's Wright Line test was met with a mixed reception among the Courts of Appeals. This conflict was resolved by the U.S. Supreme Court in NLRB v. Transportation Management Corporation (1983) 462 U.S. 393, 113 LRRM 2857.

inferences from the entire record and in applying the Ordinance, is relatively unfettered by the findings in such regard made by the Hearing Officer which are not grounded in credibility determinations. Resolutions of conflicting testimony are sometimes referred to as testimonial inferences; inferences drawn from the record as a whole are occasionally referred to as derivative inferences.⁵

The Commission acknowledges that as a reviewing body it has little basis on which to dispute a Hearing Officer's testimonial inferences and that it should refrain from deciding matters on derivative inferences in clear conflict with credibility determinations made by a Hearing Officer. Such, however, is not the case herein for the credibility findings made by the Hearing Officer are incomplete and such assessments, in any event, are not necessarily determinative of the ultimate issue presented in this case. Rather, resolution thereof is predicated on derivative inferences drawn by the Commission in the context of the Wright Line mode of analysis.⁶

In accordance with the dictates of the Wright Line standard, we first consider whether the evidence is sufficient to support the inference that Arburtha's union activities may have played a part in the employment decisions at issue.

⁵For a full discussion, see *Penasquitos Village, Inc. v. NLRB* (9th Cir. 1978) 565 F2d 1074, 97 LRRM 2244.

⁶As such, we need not resolve the conflict in the testimony as to statements attributed to Work which purportedly manifested proscribed animus toward Arburtha.

The evidence in this regard demonstrated that Arburtha had been a Steward and Chief Steward in excess of 15 years and that his union activities in these capacities were well known to County management, including Work, Durst, and Wellcome. The evidence further demonstrated that on several occasions prior to his demotion Arburtha as the Union Steward had taken positions which had brought him into direct conflict with Work. Such incidents include Arburtha's submission of grievances in response to Work's policy change requiring a doctor's certificate for sick leave benefits, Arburtha's challenge in the spring of 1988 to Work's attempt to search employees' cars in conjunction with a missing patrol car light bar, and, again in spring 1988, Arburtha's threat to file a grievance regarding Work's decision to supply County tools to maintenance helper Dave Carol.

The evidence also disclosed that in September 1988, immediately prior to Arburtha's placement interview, Arburtha had sent a letter to William Steward, Work's immediate superior, wherein he alleged that Work had denied him various temporary Painter positions in retaliation for his Union activities. The evidence further disclosed that Arburtha had filed applications for temporary Painter positions in August 1988 and January 1989 and had received examination scores of 90 and 83, respectively, out of a possible 100 points.

Additional evidence relative to the Union's prima facie case consists of Supervisor James Hunter's unrefuted testimony that during a meeting with Work in January 1989 to discuss his placement in the CDP, Work told him not to become argumentative

or he would end up like Arburtha. As the record is devoid of any evidence that Work and Arburtha had clashed on matters other than those involving Arburtha's Steward functions, Hunter's testimony constitutes probative evidence in support of the inference that Arburtha's demotion manifested union animus on the part of the County.⁷

From the foregoing, we conclude that the Union has made a prima facie showing that Arburtha's union activity was a motivating factor in the County's decision to demote him rather than place him in the Painter position or the CDP. Our conclusion is based on the unrefuted testimony of Supervisor Hunter and the fact that Arburtha's union activities as discussed above were directed against the highest ranking manager on the selection panel.

We next consider the evidence proffered by the Respondent as to whether the same action would have been taken with respect to Arburtha in the absence of his engaging in union activities.

In regards to the County's decision to not offer Arburtha a Painter position, our review of the pertinent job descriptions and the testimony of the County witnesses compels the conclusion that Arburtha did not meet the experience requirements for the Painter position. Notwithstanding Arburtha's examination scores noted above, the evidence failed to demonstrate that Arburtha

⁷The Hearing Officer's failure to give this testimony any weight as it "was not substantiated by other evidence" is erroneous under the Wright Line standard. His observation as to what Work might have meant by his statements to Hunter is nothing more than sheer speculation.

was qualified for immediate promotion to this position. The evidence further failed to establish that the reasons proffered by the County in this regard were pretextual as no evidence was presented that any employee similarly situated to Arburtha was promoted to a position for which he did not meet the stated minimum requirements. Hence, we conclude that the County would not have promoted Arburtha to the Painter class even in the absence of his protected activity and that the County did not violate Section 12(a)(1) of the Ordinance accordingly.

The CDP as described by the County witnesses is essentially designed to help employees who have reached a career "dead end" receive in-service training so they can qualify for a position in another field and suffer no loss in pay while receiving such training. Although no specific criteria were apparently developed concerning eligibility for the CDP, Work testified that it was designed for "high potential" employees with seniority not a prime factor. Work also stated that in selecting individuals for the CDP from those employees displaced by the contracting out of the automotive maintenance work, the interview panel considered the need for employees in the particular field, the employee's demonstrated interest in the new position, the impression created by the employee during the interview process, and the employee's background.

The Hearing Officer found that "[t]he selection of CDP participants was made, according to the evidence submitted, on a consistent and equitable basis." (H.O. Report, p.8) The Hearing Officer did not enumerate the facts in the record evidence on which

he based this finding and it appears that it was not grounded in any specific credibility assessment. As such, it is nothing more than a conclusion based on derivative inferences drawn from some unspecified portion of the record and warrants no deference as it is simply not supported by the evidence when such is considered in light of the Wright Line standard.

As discussed supra, the evidence presented herein was sufficient to support the inference that Arburtha's union activities may have played a part in the employment decisions at issue. In addition to the evidence considered regarding the County's failure to promote Arburtha to the Painter position, the record includes additional evidence bearing on the determination of whether the County's failure to place Arburtha in the CDP was violative of the Ordinance. Moreover, unlike the dispute concerning Arburtha's non-appointment to the Painter position, the County failed to present evidence sufficient to rebut the Union's prima facie showing that Arburtha's nonacceptance in the CDP was motivated by union animus.

A review of the pertinent evidence discloses that Arburtha met the stated selection criteria for placement in the CDP to train for the Painter position. Arburtha had previously demonstrated an interest in the position as he had applied for a temporary Painter vacancy. His scores of 90 and 83 percent in two examinations administered for temporary positions certainly evince an aptitude

for the work and suggest that he had the potential to successfully complete the CDP training process. As the Department had filled a number of temporary Painter positions, it also appears that it had a need for qualified Painters. Further, the County presented no evidence that Arburtha had a poor work record which might have warranted his exclusion from a program such as the CDP. The evidence in fact was to the contrary, for Arburtha testified without contradiction that prior to the elimination of his position, he had performed certain "lead" functions in his unit.

The County's proffered evidence as to its decision not to place Arburtha in the CDP apparently consists of nothing more than the assertions of its witnesses that Arburtha's union activities did not influence the decision making process. More is required of the Respondent under the Wright Line test to rebut the Charging Party's prima facie case than such self-serving testimony. This is particularly so for it is the County which has the best access to proof of its motivation.

It therefore must be concluded that the County has failed to meet its burden of proof required to rebut the inference drawn from the record evidence as discussed herein that Arburtha's union activity was a motivating factor in the County's decision to deny him admission to the CDP. It follows therefrom that the County violated Section 12(a)(1) of the Ordinance when it demoted Arburtha to the Helper, Painting class.

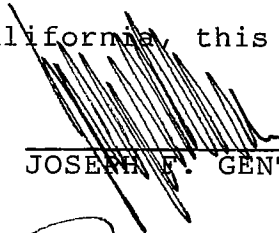
O R D E R
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IT IS HEREBY ORDERED that charge UFC 1.83 is sustained in part and dismissed in part as follows:


(1) The allegation that the County violated Section 12(a) (1) of the Ordinance when it demoted Frank Arburtha to the Helper, Painting class rather than place him in the Career Development Program (CDP) is sustained. The County is therefore ordered to place Arburtha in the CDP retroactive to October 1, 1988 and make him whole for all pay and benefits lost as a result of his improper demotion.

(2) All other allegations set forth in the charge are dismissed.

DATED at Los Angeles, California, this 23rd day of February, 1990.



JOSEPH F. GENTILE, Chairman



PAUL K. DOYLE, Commissioner



ROBERT D. STEINBERG, Commissioner