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**EMPLOYEE RELATIONS**  
**COMMISSION**  
JUL 01 1985

LOS ANGELES COUNTY  
EMPLOYEE RELATIONS COMMISSION

IN THE MATTER OF:

SOCIAL SERVICES UNION, S.E.I.U.,

LOCAL 535, AFL-CIO

Charging Party

vs.

DEPARTMENT OF PUBLIC

SOCIAL SERVICES

Respondent

CASE NO.  
UFC 10.23

Appearances:

For the Charging Party:

Lyle R. Nishini, Esq.  
Vanbourg, Weinberg,  
Roger & Rosenfeld

For the Respondent:

Charles B. Erdich, Esq.  
Office of the Chief  
Administrative Officer  
County of Los Angeles

REPORT OF THE HEARING OFFICER

On October 12, 1984 the Social Services Union, S.E.I.U., 535, AFL-C10, on behalf of employee, Donna Smith, and all other employees similarly situated and employed in the Department of Public Social Services of the County of Los Angeles, filed an Unfair Employee Relations Practice charge against the Department of Public Social Services of the County of Los Angeles. On April 1, 1985 a Notice of Hearing was issued by the Commission designating the undersigned as Hearing Officer and fixing the time and place of said hearing as June 4, 1985 at 10:00 a.m. in Room 374-H, Hall of Administration. Copies of said Notice of Hearing were sent to all parties. On April 2, 1985, pursuant to section 6.06 of the Employee Relations Commission Rules and Regulations the County filed an Answer to the charge in which it denied generally and specifically the allegations set forth in the charge.

The hearing took place on June 4, 1985 in Room 374-H of the Hall of Administration. During the hearing the parties appeared and were given the opportunity to present evidence and argument. The County Representative did not call any witnesses to testify, resting upon the testimony of Gilbert Sainz, head of Employee Relations in the Los Angeles County, Department of Social Services, who was called as an adverse witness by the attorney for the Union. The County Representative further offered in evidence a copy of the Decision, Order and Report of the Hearing Officer in the case of Los Angeles County Employees Association, Local 660, S.E.I.U., AFL-C10 vs. Los Angeles County Department of Public Social Services (No.UFC 6.102, December 1982). The attorney for the Union objected to the introduction of the said Decision, Order and Report of the Hearing Officer in evidence. The Hearing Officer sustained the objection, but advised the parties that said Decision, Order and Report would be treated as a Memorandum of Law and that the Union would be given the opportunity to file a reply brief. After an examination of the said Decision, Order and Report, the attorney for the Union stated that the Union did not intend to file any reply brief.

The undersigned, having considered all of the evidence and arguments presented by the parties, now submits this Report in accordance with Rule 6.10 of the Commission's Rules and Regulations.

THE ISSUE

The Charging Party has alleged that the Respondent has committed an unfair labor practice under Sections 4 and 12 (a)(1) of the Employee Relations Ordinance. The Hearing

Officer has determined that the issues to be decided are as follows:

1. Did the Department of Public Social Services of the County of Los Angeles follow a practice of giving unfavorable consideration to an employee's participatory action in union activities when evaluating an employee's performance record for the purpose of promotion, retention or discipline in violation of Donna Higgins Smith's rights under Sections 4 and 12 of the Employee Relations Ordinance?
2. Did such practices violate the rights of all other employees similarly situated guaranteed by Sections 4 and 12 of the Employee Relations Ordinance?
3. If there has been a violation of Sections 4 and/or 12 of the Employee Relations Ordinance, what remedy would be appropriate and proper?

#### SUMMARY OF THE FACTS

Donna Higgins Smith is currently employed as a Supervising Children's Service Worker in the Department of Children's Services at the Pomona office having been appointed to that position on October 1, 1984. Prior thereto, she was employed as a Children's Service Worker III in the Juvenile Court Services of the Department of Children's Services which at the time of the filing of the charge was the Department of Public Social Services. For about six years prior to October 1, 1984, Ms. Smith worked in the El Monte McLaren Hall in Detention Services. Her duties there, in the Intake Detention Control Division, dealt with the procedural problems relating to children in police protective custody. At the present time as a Supervising Children's Services Worker, she supervises a unit of treatment workers that oversee court defendants. Ms. Smith is a graduate of U.C.L.A., a Registered Nurse, and a certified Spanish-speaking worker. She also completed certificate courses in alcohol and drug counseling. While employed as a Children's Services Worker III, Ms. Smith was the shop steward of the Intake Detention Control Unit, as well as Chapter Treasurer of the Union. She was an active Union member and at one time participated in a press conference in which the Union was seeking support for their demand that the County hire more workers in the Department. In May of 1985 when her probation period had passed, she became the shop steward of the Supervisor's Unit where she is currently employed. As such, in addition to her other duties as shop steward, she has continued to process grievances, a continuation of duties similar to those performed as shop steward in her former position.

Ms. Smith testified that sometime in April of 1983, she made application for promotion to the position of supervising Children's Service Worker. She took a Civil Service examination for said position and early in 1984 she was interviewed for promotion to said position in the Department where she was then employed. She was interviewed by Diana Bichler, Assistance Director of Juvenile Court Services, and Sonya Gerlach, Director of Juvenile Court Services. She was not offered the position. Subsequently, and on September 24, 1984, she was interviewed for the position of Supervising Children's Services Worker in the Department of Children's Services at the Pomona Office. She was interviewed by Carlisle George, Deputy Director of Regional Services Administration. Ms. Smith testified that towards the end of the interview Mr. George put the following question to her:

"Is there anything that if I heard about it or something we haven't discussed, that if I heard about about it later I wouldn't like it?"

After reflection, Ms. Smith answered that she was not aware of anything that would be a concern about her job activities or performance. Mr. George told Ms. Smith that he had more interviews scheduled and that he probably would make a decision on the following Wednesday. That night Mr. George called her at home. At first he was somewhat vague in his questioning. He then asked her whether there was anything that she had not told him during the interview that was pertinent? Ms. Smith told him that there was not. Mr. George then said "Well, what about grievances or Union activities?" Ms. Smith told him that she was a member of the Union. He then told her that he had spoken to Diana Bichler after the interview about her work performance and that she had indicated that her participation in grievances and other Union activities was a problem. The following Wednesday she was offered the position by Mr. George and she accepted. After her appointment and sometime in October, 1984, she had occasion to discuss this matter with Mr. George. She asked him more specifically what it was that Miss Bichler had said about her activities? He told her that he felt that she had said things she was not supposed to say. On Thursday of the same week Ms. Smith had occasion to discuss with George Wong, her Supervisor at Intake Detention Control where she formerly worked, the statements that Diana Bichler had made about her grievance and Union activities. Mr. Wong told her that grievance and Union activities were always considered when hiring new employees. He then told of an instance where he and his co-supervisor, a Mrs. Olea, had interviewed a candidate for the position of Children's Service Worker III at Intake Detention Control. Although they felt that this individual was a good candidate for the job, when they discussed the appointment with Sonya Gerlach, Ms. Gerlach told them that this employee was always filing grievances

and that they didn't want her in Intake Detention Control. Ms. Smith then told Mr. Wong that what he was doing was not right since it was everyone's right to file grievances and that such actions were not to be held against anyone who does file a grievance and she reminded him of the time when they had been present at a grievance hearing where the Hearing Officer specifically referred to the right of employees to file grievances without fear of retaliation.

Ms. Smith testified that she was quite upset with the information obtained from Mr. George and Mr. Wong. That while she was grateful that Mr. George had given her the promotion in spite of her Union activities, she did not feel like being involved in Union activities very much.

Ms. Smith testified that while a shop steward at Intake Detention Control she processed three grievances. In all three situations she dealt with Diana Bichler. Two of the grievances related to the Union's efforts to get the Department to lift a freeze on hiring workers. The first was filed in June, 1982, and was filed with the prior knowledge and silent acquiescence of Ms. Bichler. That action apparently succeeded inasmuch as the Department lifted the freeze on hiring within the section. The other grievance was filed in November of 1982 at the urging of the Unit Members, although Ms. Smith thought that it was a bit premature. The Unit Members felt that although the Unit had been told that it was alright to hire additional workers, nothing was being done to implement the hiring process. Apparently, Ms. Smith had had some differences with Ms. Bichler as to what Ms. Bichler was, or was not, doing to expedite the hiring of additional employees for the Unit. The third grievance was filed by Ms. Smith in July of 1984 and dealt with a refusal by Ms. Bichler to grant Ms. Smith a change in work schedule. Ms. Smith had gone on an Educational Leave for two months. When she returned, she requested that she have the same work schedule that she had had prior to her leave. This was denied and she filed a grievance.

Ms. Smith further testified that sometime in October, 1984, after she had started to work in the Pomona office, she asked to see her personnel file. She explained that she had taken some courses and had requested that a memorandum listing the classes which she had taken be included in her file. She wanted to check her file to be sure that the memorandum had been put into her file. When she opened her file the first thing she found on the top was the grievance which she had filed in July of 1984 requesting a change in her work schedule. She mentioned that the file also included evaluations, letters of appreciation, commendations and a list of classes she had taken, but not those which she had requested be added. She testified on cross-examination that her attendance had not suffered because of her Union activities, that her work performance was excellent and that

all of her evaluations were very good. She also stated that during her first month in her new position at Pomona, she was voted "employee of the month". Lydia Baca, Field Representative of Social Services Union, S.E.I.U., Local 535, testified at length regarding her duties which included the employees in the Department where Ms. Smith was employed. She stated that the primary group of members with whom she, and other Field Representatives work, are the shop stewards inasmuch as they are responsible for essentially representing the Union in the various offices; that the shop stewards, among other duties, are responsible for interviewing grievances and to make the decisions relative to the manner in which they can best be resolved. Having been employed as such Field Representative for three and a half years, presumably she had dealt with Ms. Smith as one of the shop stewards, although no testimony to that fact was elicited by either party at the hearing.

The Union called Gilbert Sainz, head of Employee Relations of the Los Angeles County Department of Social Services as an adverse witness. On direct examination Mr. Sainz emphatically denied that a copy of a grievance filed by an employee is placed in an employee's personnel file. He stated that the grievance form does not belong in the personnel file, but is maintained in a separate file until the expiration of the prescribed time for arbitration of such grievance, at which time they are to be destroyed. On examination by the County Representative, Mr. Sainz explained that there are three personnel files kept for each employee; one at the central location at the Personnel Division; another file at the District Office of the district where the employee works; and a documentation file which is kept by Line Supervisors to assist them in preparing their evaluations or any other supervisory action that may be required. The documentation file contains not only all of the material contained in the file at the central office, but also additional material such as master cards covering prior year employment records, copies of medical verification where an employee is out on sick leave, classes attended and completed by the employee and the such. Mr. Sainz testified that the documentation file follows the employee as they move from one position or one location to another. He indicated that the documentation file was, or should be, the most complete of all files kept, inasmuch as it is the file to which the Supervisors refer, or should refer, in preparing their performance evaluations or recommendations for commendatory or disciplinary action.

#### POSITION OF THE UNION

The Union contended that the statements made by Diana Bichler to Carlisle George on September 24, 1985, at which time Ms. Bichler, in response to questions by Mr. George

regarding the qualifications of Donna Smith for a promotional opening in his unit, to the effect that Ms. Smith's participation in grievances and other Union activities was a problem, were violative of Ms. Smith's rights as guaranteed by Section 4 of the Employee Relations Ordinance as well as her career opportunities with her employer; that the statements made by Ms. Bichler represented a policy or practice by individuals at the management level in the Department of Public Social Services or its successor departments, of giving consideration to an employee's grievance and Union activities which were adverse to the welfare and best interests of such employee. The Union argued that such policy or practice had a chilling effect upon the employees in general, and Ms. Smith in particular, wishing to exercise the rights guaranteed to them by Section 4 of the Employee Relations Ordinance and in that manner constituted interference, restraint and coercion by the Employer in the exercise of their rights in violation of Section 12 (a) (1) of the Employee Relations Ordinance. The Union pointed to the evidence adduced by Donna Smith the employee affected who was the Union shop steward in charge of processing grievances on behalf of the employees in her Unit, Union Treasurer, participating prominently in pro-Union press conferences and involved in all phases of Union activities of a general nature, wherein she stated that she had been told by Carlisle George, who was interviewing her for a Supervisorial position in his Unit, that Ms. Bichler, Ms. Smith's Supervisor at the time, had told him that Ms. Smith's participation in grievances and other Union activities were a problem. That such a statement was a violation of the Ordinance, the Union argues, is highlighted by the fact that Mr. George, her present Supervisor, told her that he felt that Ms. Bichler had said things that she was not supposed to say. The Union, in further support of the existence of such a policy or practice by management employees in the Department referred to Ms. Smith's evidence relating to a conversation had with George Wong, one of the supervising Children's Service Workers at the El Monte location at which time a recommendee for appointment had been denied the appointment by Ms. Gerlach; that Ms. Gerlach's reason given was that this employee was always filing grievances and that they did not want her in the Intake Detention Control Unit. The Union stated that it was Ms. Smith's good fortune to be interviewed by a Supervisor like Mr. George who only took into account her excellent performance record and disregarded Ms. Bichler's statement, that she was promoted to her present job; that after learning of Ms. Bichler's statement "she didn't feel like being involved very much". The Union also points to the fact that when Ms. Smith examined her personnel file it contained a copy of the grievance filed by her in July, 1984, seeking a change in her work schedule. All of the

above, the Union claims establish the existence of a policy or practice that certainly can have a chilling effect on Ms. Smith in particular, and she so testified, and upon other employees in general, who might wish to participate in the representational and general activities of the Union. The Union requested a Finding to the effect that Diana Bichler did impermissibly consider Donna Smith's prior union activity with respect to the question of promotability and the issuance of an Order directing that the County cease and desist from maintaining any policy or practice of such a nature together with a posting of the Order along with a statement advising the employees of their rights.

#### POSITION OF THE COUNTY

The County took the position that the Union has failed to prove its allegation that there has been a violation of the County Employee Relations Ordinance. The County indicated that the evidence presented was for the most part hearsay evidence; that Diane Bichler, Carlisle George and George Wong are employees of the County and were available to testify, by subpoena, if necessary; that there was no evidence that they were contacted and asked to appear and testify; that there was no evidence that Donna Smith or any other employee was discriminated against because of their Union activities. The County admitted that it is against County policy to place grievance forms in the personnel file and that it should not have been there. The County stated that the case submitted by it as precedent (Case No. 6.102) stands for the principle that no employee shall be interfered with, intimidated or discriminated against because of the exercise of their rights granted by Section 4 of the Ordinance; that the County affirms that principle; that there is no evidence in this case to substantiate the Union's claim that these rights have been violated; and that the charge should be dismissed.

#### DISCUSSION

The County is charged with having violated Sections 4 and 12 (a) (1) of the Employee Relations Ordinance. Section 4 guarantees employees the right to participate in the activities of employee organizations and that no employee "... shall be interfered with, intimidated, restrained, coerced or discriminated against because of his exercise of these rights". Section 12(a) (1) makes it an unfair labor practice for the County to "... interfere with, restrain, or coerce employees in the exercise of the rights recognized or granted in the Ordinance". The Union has argued that the County Department of Public Services followed a practice of



giving unfavorable consideration to an employee's participatory action in Union activities when evaluating an employee's performance record for the purpose of promotion, retention or discipline. This had a chilling effect upon employees who might wish to exercise their rights under the Ordinance. The only evidence relating to the alleged violation was that adduced by Donna Smith, the employee affected. Lydia Baca who was called as a witness by the Union testified generally as to her duties as a Union Field Representative handling the various Social Service Workers Units, as well as the functions of the shop steward in representing the employees on behalf of the Union. The Union also called Gilbert Sainz, head of Employee Relations in the County Department of Social Services, as an adverse witness. He testified generally as to the practices and procedures governing employee's personnel files, their contents and use. He stated that records pertaining to grievances filed by an employee are kept in a file separate and apart from the employee's personnel file and destroyed when the grievance is finally disposed of: that such records should not be in an employee's personnel file. The County agreed that if such a record of the grievance filed by Donna Smith was in her file it should not have been there.

Examining the record we find that the only direct evidence relating to the alleged violation is the uncontested evidence of Donna Smith, that she was an officer of the Union, that she was the shop steward for her unit; that she filed grievances on behalf of the employees in her unit; that she dealt with Diana Bichler in the processing of those grievances; that she had very good performance evaluations and that her attendance did not suffer because of Union activities; that when she applied for promotion in the unit where she worked she was interviewed by the Assistant Director, Diana Bichler; that she was not offered the position for which she interviewed; that approximately one-half year later she was interviewed for a promotional position by Carlisle George, Director of Juvenile Court Services and was offered and accepted the Supervisorial position she now holds. Standing alone this would not support a Finding that there had been a violation of the County Employee Relations Ordinance. All of the supporting evidence rests upon the hearsay evidence of Mr. George, Ms. Bichler and one George Wong, a Supervisor at Intake Detention Control. Evidence of the statement alleged to be made by Ms. Bichler is not only hearsay but hearsay once removed. The Hearing Officer is therefore faced with the difficult and sensitive question as to the weight to be given to the evidence offered through Ms. Smith as to the statements alleged to be made by them. There is no question in the mind of the Hearing Officer that if Mr. George, Mr. Wong and Ms. Bichler's unrebutted testimony supported Ms. Smith's version, the charge would be sustained. It is true

that Section 6.07(c) of the Rules and Regulations of the Employee Relations Commission provides that "the technical rules of evidence prevailing in the courts shall not be controlling". However, despite the provisions of Rule 6.07(c), the probative value of the hearsay evidence remains to be evaluated and properly weighed. The hearsay rule is an exclusionary rule. "The two significant questions about exclusionary rules are:

1. What evidence shall be admitted or excluded?

2. What evidence is sufficient to support a Finding?"(1)

Section 556 of the Federal Administrative Procedure Act provides that "any oral or documentary evidence may be received...". But Section 556 also provides that "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party, and supported by and in accordance with reliable, probative and substantial evidence".(2) The probative content of hearsay evidence has always been considered to be very weak. However, the tendency by administrative agencies has always been in favor of allowing hearsay evidence to be presented and used in administrative hearings subject to the requirement that the findings of the agency and any order issued or sanction imposed be supported by reliable, probative and substantial evidence. A very interesting dichotomy arises by virtue of the fact that the first portion of Section 556 of the Administrative Procedure Act permits the admission of hearsay evidence while the last portion thereof prohibits the imposition of an agency sanction or issuance of an order which is not supported by reliable, probative and substantial evidence. "Is this section suggesting that hearsay evidence can be received but not used to support hearing decisions? The use of the 'residuum rule'..... helps to answer this question. Simply, the 'residuum rule' requires that a finding cannot stand unless it is supported by evidence that would be acceptable in a jury trial..... It means that hearsay evidence can be used in helping to reach a decision, but the decision itself must not be supported by hearsay evidence alone but by substantial non-hearsay evidence".(3) "Mere uncorroborated hearsay or rumor does not constitute substantial evidence".(4) Applying this doctrine to the evidence of the case in hand, the Hearing Officer is of the opinion and must conclude that the union, based on the

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(1) Administrative Law and Government by Kenneth Culp Davis (2nd Ed.) pg. 195.

(2) Administrative Procedure Act, P.L. 404, 60 Stat. 237 (1946); 5 U.S.C.A. Sections 551-559.

(3) Administrative Law in the American Political System by Kenneth F. Warren, Pg. 295.

(4) Consolidated Edison Co. vs. N.L.R.B., 305 u.s. 197, 229 (1932).

record considered as a whole, has not adduced evidence sufficient to support the allegations of the charge. As noted by the County, Ms. Bichler, Mr. George and Mr. Wong are employed by the County and available to appear and testify, by subpoena if necessary. The union has not done so nor offered any explanation for their failure to do so. While it is true that Ms. Gerlach and Ms. Bichler did not offer Ms. Smith the promotion for which she applied we have no testimony as to their reasons for so doing other than the hearsay statement of Mr. George as to what Ms. Bichler said and even that is very vague and non-contextual in relation to the entire conversation between Mr. George and Ms. Bichler. For the reasons given, the Hearing Officer has concluded that there was insufficient evidence presented to support a finding of an unfair labor practice. Therefore, the Hearing Officer must conclude that an unfair labor practice was not committed by the County.

RECOMMENDATION

Having concluded that the action in question by the County on September 24, 1984 did not violate Section 4 or 12 (a) (1) of the Employee Relations Ordinance, it is recommended that the charge be dismissed.

6-28-85

date

A handwritten signature in black ink, appearing to read 'Irving Stone', written over a horizontal line.

Irving Stone  
Hearing Officer

**RECEIVED  
EMPLOYEE RELATIONS  
COMMISSION**

Tel: (714) 472-4664

June 26, 1985

JUL 01 1985

IRVING STONE  
491-B Calle Cadiz  
Laguna Hills, CA 92653

To: Los Angeles County Employee Relations Commission  
374 Hall of Administration  
500 W. Temple Street  
Los Angeles, CA 90012

To: Social Services Union, S.E.I.U. Local  
535, AFL-C10  
548 S. Spring, #1017  
Los Angeles, CA 90013

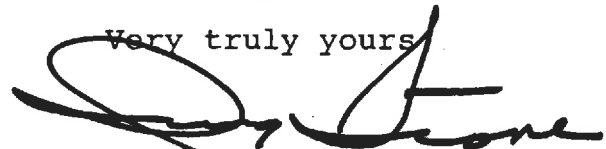
To: Charles B. Erdich, Esq.  
Office of Chief Administrative Officer  
County of Los Angeles  
526 Hall of Administration  
500 W. Temple Street  
Los Angeles, CA 90012

To: Lyle R. Nishini, Esq.  
Vanbourg, Weinberg, Roger & Rosenfeld  
875 Battery Street  
San Francisco, CA 94111

Sirs:

There is herewith enclosed my recommended Findings of Fact, Conclusions and Final Order and my reasons therefor with respect to the matter of Social Services Union, S.E.I.U., Local 535, AFL-C10 and the Department of Public Social Services, Case No. U.F.C.10.23.

Very truly yours



Irving Stone  
Hearing Officer