

JAN -7 1988

LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION

UNFAIR PRACTICE CHARGE HEARING

SOCIAL SERVICES UNION (SSU), LOCAL)	HEARING OFFICER
535, SEIU, AFL/CIO,)	RECOMMENDED DECISION
)	UFC 10.28
Charging Party,)	
)	
v.)	
)	
LOS ANGELES COUNTY DEPARTMENT OF)	
PUBLIC SOCIAL SERVICES,)	
)	
Respondent.)	

Hearing Held:

October 23, 1987
Los Angeles, California

Appearances:

For the Charging Party:

James G. Varga, Esquire
VAN BOURG, ROGER, WEINBERG, ROGER
& ROSENFELD
417 South Hill Street, Suite 770
Los Angeles, CA 90013

For the Respondent:

Robert Navarro, Employee Relations,
for Richard B. Dixon
Chief Administrative Officer
526 Hall of Administration
222 North Grand Avenue
Los Angeles, CA 90012

Hearing Officer:

Angela R. Pickett, esq.
Labor Arbitrator
Los Angeles, California 90057

PROCEDURAL HISTORY

On June 8, 1987, Social Services Union (SSU), Local 535, SEIU, AFL/CIO (hereafter "Local 535" or "the Union"), filed the instant unfair practice charge (UFC 10.28) with the Los Angeles County Employee Relations Commission (hereafter, "ERCOM" or "the Commission") against the Los Angeles County Department of Public Social Services (hereafter, "the Department" or "DPSS"), alleging violations by the Department of subsections (1) and (2) of Section 12(a) of the Los Angeles County Employee Relations Ordinance No. 9646 (hereafter, "the Ordinance"). Said Section provides in pertinent part as follows:

§12. UNFAIR EMPLOYEE RELATIONS PRACTICES.

(a) It shall be an unfair employee relations practice for the County:

- (1) To interfere with, restrain, or coerce employees in the exercise of the rights recognized or granted in this Ordinance;
- (2) To dominate or interfere with the formation of any employee organization or contribute financial support to it, provided that the County may permit the use of County facilities, make dues deductions, and permit employees who are officers or representatives of employee organizations to confer with County officials during working hours without loss of time or pay, subject to applicable regulations;

The basis of the charge is set forth in UFC 10.28 by the Union as follows:

Local 535 represents WIN Services Workers (WSW) and WIN Services Supervisors (WSSS) within the WIN Demo program. There are 52 WSW's[sic] and 7 WSSS, spread out among 21 offices. DPSS refuses to allow stewards within this program to represent employees outside their own office. As a result, these employees are denied effective Steward representation, and therefore effective Union representation as well. The Department's position would require the Union to have 21 WSW Stewards for 52 employees, and 7 WSSS Stewards for 7 WSSS, since each WSSS works in a different office. This position clearly conflicts with the basic goal of the Employee Relations Ordinance: to guarantee employees' rights to effective Union representation.

On August 4, 1987, the Chief Administrative Office of the County of Los Angeles answered each charge contained in UFC 10.28 by general and specific denial.

On October 23, 1987, a hearing on the matter was conducted by the undersigned Hearing Officer at the Commission offices located at 500 W. Temple Street, Los Angeles, California. During the course of the hearing all parties were afforded a full and complete opportunity to be heard, cross examine witnesses, develop arguments and present relevant evidence. All witnesses testified either under oath or affirmation. A written transcript was made of the proceedings. The parties elected to submit post-hearing briefs, cross service of which was effected by the Commission on November 30, 1987, at which time the matter stood fully submitted for recommended resolution by the undersigned.

ISSUE

Does the complained of policy and practice of the Department described as the basis for the Union's June 8, 1987 UFC 10.28, constitute a violation of the rights to effective representation within the meaning of Los Angeles County Employee Relations Ordinance No. 9646, Section 12(a) (1) and/or (2), and if so, what is the appropriate remedy?

FACTUAL SUMMARY

Local 535 is the certified majority representative of County employees in the Social Workers Employee Representation Unit (711), and also represents its companion unit of Supervisor Social Workers (741). The parties are signatories to Memoranda of Understanding for the two units, the term of each being from October 1, 1987, through September 30, 1989. The Memoranda in effect at the time UFC 10.28 was filed expired on September 30, 1987. At the hearing the parties stipulated to the following in connection with said Memoranda:

1. ARTICLE 32 (LOCAL 535 REPRESENTATION) of the current Unit 711 M.O.U. is identical in language to that in the ARTICLE 32 in effect at the time UFC 10.28 was filed;
2. The language contained in the parallel provisions of the Unit 741 M.O.U.s (ARTICLES regarding the Grievance Machinery [Procedure] and Local 535 Representation) is equivalent to those for Unit 711.

Included in Local 535's representation of Units 711 and 741 County employees are those employed in the Department's WIN Demonstration (Demo) program which houses them in 21 separate EDD offices (State of California Employment Development Department) located throughout Southern California in the following six geographic regions: East Los Angeles, Inglewood, Compton, West Covina, Van Nuys, and Hollywood.

The purpose of the WIN Demo program (in a nutshell) is to orient and/or assist Welfare AFDC recipients to transition into the workforce. The program has been in existence since July 1, 1985, and is slated to conclude on August 1, 1988, with a stated DPSS goal being to ensure that the DPSS WIN Demo program staff is placed in comparable level positions.

There are six Supervisor Social Workers in the WIN Demo program represented by the Union, with one each being housed at each of the six separate geographic headquarters of the EDD offices referenced above. The evidence lacks precision with respect to the total number of rank-and-file WIN Social Services Workers represented by Local 535--testimonial evidence varies the number from 42 to 52 respectively, while the Union's exhibit "BUREAU OF SPECIAL OPERATIONS WIN DEMONSTRATION PROGRAM" dated September 1987 [CHARGING PARTY EX. #1] denotes 45 total in the WIN workforce (with another three on leave of absence, though logically still part of the bargaining unit) with the following breakdown as to office location of the 45:

1. East Los Angeles region:
 - a. Pasadena office (2)
 - b. East Los Angeles office (3)
 - c. Whittier office (2)
2. Inglewood region:
 - a. Inglewood (3)
 - b. South Central (3)
 - c. South Gate (3)
3. Compton region:
 - a. Compton office (2)
 - b. Pomona office (1)
 - c. Long Beach office (2)
 - d. Norwalk office (1)
 - e. Lakewood office (1)
4. West Covina region:
 - a. El Monte office (2)
 - b. Carson office (3)
 - c. West Covina (2)

5. Van Nuys region:
 - a. Van Nuys office (2)
 - b. Glendale office (2)
 - c. Lancaster office (1)
 - d. San Fernando office (1)
 - e. North Hollywood office (1)
6. Hollywood region:
 - a. Hollywood office (2)
 - b. L.A. Central office (3)
 - c. Culver City office (3)

Based on the above figures derived from CP Ex. #1, there are six offices which house only one WSW worker, nine offices which house two WSW workers, and seven offices which house three WSW workers.

The exact number of County employees designated by Local 535 as Union stewards pursuant to Article 32, Section 1 of the Unit 711 M.O.U. as of the date that UFC 10.28 was filed (June 8, 1987) is not clear. It is established by a preponderance of the evidence that at least one, WSW Mike DeBaca (South Gate office) was so designated, by letter from the Union dated March 16, 1987. Article 32, Section 1 of the Unit 711 M.O.U. provides as follows:

Departmental management will recognize employees designated by Local 535 as representatives only upon receipt of a written list of names and locations of the employees so designated. Within thirty (30) days of the date of this agreement, Local 535 will furnish the departmental management with such a list and will keep it current. Employees not on such list will not be recognized as representatives. The number and location of representatives will be determined by agreement between the departmental management and Local 535.

The un rebutted testimony of Union Field Representative Phil Ansell (author of the above referenced March 16, 1987 letter) is that he also sent letters designating as Union stewards Mac Seng [phonetic spelling] (Compton office), as well as Ned Moore (Van Nuys office). However, Ansell's testimony in this regard made no reference to time frame for said letters. The testimony of Gil Sainz, Head of Employee Relations for the Department is that he received only the

letter regarding the DeBaca stewardship, and that customarily he [Sainz] receives all such Union designation letters for the Department. Ned Moore testified that he had served [as of the hearing date] as steward for approximately six months.

Supervisor Social Worker Karolyn Cook of the Van Nuys office testified that [as of the hearing date] she had served as Union steward for the five WIN Supervisor Social Workers (WSSS) for about four months,

Union Representative Phil Ansell testified as follows regarding why the instant unfair practice charge (which he authored) was filed against the Department. A Social Worker employee filed a grievance and contacted Ansell regarding representation in connection with same in May, 1987. Ansell then contacted Union steward DeBaca and asked him to represent the Grievant at the Step 1 Grievance meeting with the Department representative. According to Ansell, Department management would not let WIN steward DeBaca represent the Grievant at the Step 1 meeting because the steward did not work at the same office location as the Grievant: the Step 1 meeting was to take place at the WIN El Monte office; the Grievant worked at the WIN El Monte office (was not assigned to one of the EDD offices); and the steward worked at the EDD South Gate office. . .

Ansell testified that he has serviced both Unit 711 and Unit 741 including the following employee classifications: Social Workers I, II, and III, Appeal Hearing Specialists, Community Workers, the Supervisor Unit employees, and WIN employees. Ansell's testimony is that it is the Union's policy to have stewards represent employees at the pre grievance and informal levels as well as at Steps 1 and 2 of the grievance procedure contained in the M.O.U.s, and to have Union staff persons represent the employees at Step 3. However, Unit 711 stewards have not been able to provide said representation, and since January [presumably of 1987] twelve grievances have been in existence and Union staffpersons have had to represent the employees. Ansell explained that the workers are spread out and that few workers have a steward at their office location. As a consequence the alternatives are for an employee to proceed without a steward, or to use a Union staff person. The Union has been forced to waive meetings at Steps 1 and 2 of the grievance procedure and to rely on written submissions at those levels.

Additionally, Ansell testified that the recruitment of additional stewards is a priority of the Union. Further, it is his opinion that there are too many employees for two

Business Agents to represent at the lower grievance steps in addition to performing their other responsibilities, illustrating this point by reference to his own obligation to service three other contracts covering about 2500 employees.

Finally, in setting forth his reasons for filing UFC 10.28, Ansell testified that the position asserted in the charge is supported by the provisions of Article 32 of the M.O.U. More specifically, he points out that said article authorizes the Union to have stewards represent employees and in so doing the stewards may engage in an investigative process through Step 3 with stewards being authorized to leave their respective work locations as required in the process of such representation. Further, as the number of stewards is to be determined mutually by the Union and management, nothing within the provisions of Article 32 limits the number of stewards, nor imposes a limit by location. Ansell testified that the County policy of allowing a steward to represent an employee only when the steward and the grievant/employee work at the same office location would require 21 stewards for the Unit 711 WIN employees (one steward for each facility) and six stewards for the Unit 741 WIN employees, rendering application of the policy "meaningless" where there is one employee in a bargaining unit.

In connection with the practice of Local 535 in the use of stewards as opposed to Business Agents in representing grievances at Steps 1 and 2, Department management testified as follows. Gil Sainz, Head of Employee Relations for the Department for the past seven years testified that at settlement attempts at the shop floor and at Step 1 meetings Business Agents from Local 535 have provided the representation for employees, and that since the 1970s Business Agents have represented grievances. Onalee Kuziara, Welfare Administrator for the WIN Demo Program, and Step 2 designee for the Department for Unit 711 and Unit 741 employee grievances testified that Local 535 Business Agents Ansell, Baca, and Facher [phonetic spelling] have been representing grievants.

Sainz testified that the County's policy of only allowing County time for the representation of other employees of the same classification and the same location is partially set forth as follows in the October 5, 1987 cover letter to the LIST OF STEWARDS from the Personnel Division Chief.

A steward may only use County time to represent employees of the same classification or of the same representational unit...

[Page one of COUNTY EX. #1]

According to Sainz, the cover letter to Division Chiefs from which the above cited quotation is taken has been in effect since 1972. It has been an established practice to obtain the information regarding the number of stewards per bargaining unit and the location which the stewards will serve from Union Business Agents, thus in Sainz' view illustrating that Local 535 determines the number and location of its stewards. Sainz, contract negotiator for the Department, also testified that Local 535 did not ask for a different location or number of stewards within the WIN Demo project. In this regard, it should be noted that ARTICLE 6 RECOGNITION of the Unit 711 M.O.U. [CHARGING PARTY EX. #2] provides that initial written proposals for the successor M.O.U. and the request to commence negotiations be served on the other party no later than June 15, 1987, with negotiations slated to begin no later than July 1, 1987. There was no evidence presented at the hearing as to whether or not these dates were met by the parties. However, the June 15, 1987 M.O.U. prescribed date follows exactly by one week the June 8, 1987 date, the instant UFC 10.28 was filed. As referenced earlier herein, the language of ARTICLE 32 LOCAL 535 REPRESENTATION of the successor M.O.U. to that in effect when UFC 10.28 was filed, is identical.

Under the above stated County policy, where only one WIN Demo Program Social worker is located at a given facility, admits Sainz, such an employee [in the resolution of a work-related problem] would have to serve as his [or her] own steward, or contact a Union Business Agent, or be forced to have a representative of his [or her] own choice on the representative's own time, all in contrast to the scenario which pertains at facilities where a number of people [WIN Unit 711 employees] have a representative available to them on County time. Yet Sainz pointed out that the County policy operates to allow each certified union the ability to have at least one steward plus an alternate steward at each facility for each bargaining unit.

The grievance procedure provided for Unit 711 and Unit 741 employees within the M.O.U.s establishes four separate levels as forums for resolution of employee grievances: Step 1 Office Head Agent (requires the filing of a formal written grievance within ten days of the discovery or occurrence specifying the nature of the complaint and the remedy requested); Step 2 Middle Management, Step 3 Department Head; and finally Arbitration. (ARTICLE 29 GRIEVANCE PROCEDURE [CHARGING PARTY EX.#2] of the Unit 711 M.O.U. is set forth as Appendix A hereto).

A distillation of the rights to representation in matters of employee relations made available to employees in Units 711 and 741 pursuant to the M.O.U.s (ARTICLES 29 and 32) is set forth below as follows:

1. On County time (i.e., without loss of pay) Union designated employees (hereafter sometimes referred to as stewards) are afforded reasonable time off to investigate and process grievances including through Step 3;

2. Specific functions of investigation and processing of grievances acknowledged in the M.O.U.s include the following:

- a. encouraging a prospective grievant to discuss the matter of concern with his or her immediate supervisor;

- b. preparation of written grievances;

- c. leaving the steward's work location when necessary;

- d. access to the grievant's work location;

- e. meeting with the grievant at his or her work location.

3. On County time the grievant has the right to represent his or her own grievances to management.

(ARTICLE 32 [CHARGING PARTY'S EX. #2] of the Unit 711 M.O.U. is set forth as Appendix B hereto).

As regards the duties actually performed by WIN Demo Program Union stewards, testimony established the following. Sainz testified that stewards provide advice to grievants or prospective grievants regarding the grievance procedure, time limits, and grievant rights. Ned Moore, Social worker II within the WIN Demo Program from his Van Nuys office served as Union steward for WIN Demo Program Social Workers housed in five separate EDD offices (Lancaster, North Hollywood, Glendale, San Fernando, and West Covina). At the time of the hearing there had not been any grievances for him to handle within the six months following his election as steward. However, his duties have included representing the

workers in the unit in connection with problems such as discipline or "whatever". It has been necessary for him to visit offices other than Van Nuys where the Supervisor of his employees (Karolyn Cook) is housed in order to meet with a problem or a grievance. Sometimes, however, Moore considers it appropriate for the employee to travel to Moore's location rather than vice versa. The Lancaster EDD office is within his service area and is located sixty miles or one hour's travel time from Moore's Van Nuys office. Moore testified that he spent about one hour per week on his steward duties. In addition he has utilized both his break time and lunch time slots for Union matters and attends one or two Union meetings per week.

Karolyn Cook, Social Services Supervisor in the WIN Demo Program, and for four months prior to the hearing date herein Union steward for the WIN Social Workers Supervisors described as follows the grievance handling methods employed by her. Cook represents five Social Worker Supervisors each of whom is located in one of the following geographic regions: East Los Angeles, Inglewood, Compton, West Covina, Hollywood. Whenever one of Cook's employees has a grievance, Cook has a meeting with the employee's supervisor. Generally the grievance meetings take place by phone, but, alternatively, a meeting may take place at Cook's office or the office of the employee's supervisor. Prior to any such meeting it is Cook's practice to look up the employee's program, look up the employee's material, and contact the Department if the matter is out of scope. Onalee Kuziara testified that the situs for "shop floor" settlement attempts between the grievant and his or her immediate supervisor is whatever location is agreed to by the parties (including WIN Headquarters in El Monte). All other grievance step meetings take place at the WIN El Monte Headquarters office, the site of weekly [according to Kuziara, but one to two per month according to Cook] Supervisor Social Worker meetings. According to the testimony of Kuziara, the Step 1 grievances are mailed to the Department at WIN Headquarters where they are reviewed and from whence a response is issued, and there may be occasion for the Deputy Director/WIN and either Social Worker stewards or the Social Worker Supervisor steward to meet in connection with a Step 1 level grievance (which meeting takes place at WIN El Monte).

Cook also testified that she attends one or two Union meetings per month with employees of the North Valley unit and that the practice of other units is conduct one or two Union meetings per month.

Sainz testified that some grievances are resolved at the lower level such as the "shop floor" and that most

grievances do not go to arbitration. Further, according to Sainz, in the year past prior to the hearing date not many grievances were initiated by either the WIN Social Workers or the WIN Social Worker Supervisors.

Kuziara testified that whenever a Union representative is unavailable [in connection with grievance processing requirements/procedures] it is her practice to postpone the meeting until the representative is available.

POSITIONS OF THE PARTIES

In its opening statement at the hearing herein, the Union succinctly posited its position as follows. The physical size and structure of the unit[s] gave rise to the Union practice of having stewards represent outside of the limited scope of where the stewards are employed. The collective bargaining agreement is consistent with the Union's position in that pursuant thereto the Union has the right to determine steward representation service beyond the location where the stewards are employed. The County's imposition of limitations constitutes a violation of the Act [Ordinance] as a denial of effective representation and full rights for collective bargaining. The foregoing articulated position was amplified as hereafter summarized in the Union's post hearing brief.

In its brief the Union cites the entitlement under the facts presented at the hearing of Unit 711 and Unit 741 WIN employees to a bargaining unit wide steward for each unit. The rationale for this conclusion is two pronged. First, the Ordinance supports such a result because its purpose is to promote the improvement of personnel management and relations between the County as employer and its employees; said purpose is then supplemented in the Ordinance's provision of rights of employees to join organizations for representation in matters concerning employee relations; and the Commission has as one aim the responsibility of assuring employees the fullest freedom in the exercise of rights granted by the Ordinance. Secondarily, the Union argues that the limitation imposed by the County (twenty one stewards for the fifty two Social worker WIN employees and seven stewards for seven Supervisor Social Worker WIN employees) is arbitrary and unreasonable, thereby constituting a violation of both due process of law and a violation of the intent of the Ordinance. In support of this latter contention, the Union points out that its requested remedy if implemented would not impose any foreseeable hardship on the County, arguing that most

of the grievance Step meetings take place at WIN headquarters thus involving predictably negligible amounts of time, and further urging that there has been no evidence of abuse of steward time, and that there is no projected increase in steward time "by any significant amount" should the proposed remedy be adopted. In support of its characterization of the Department's policy as unreasonable and arbitrary as applied to the facts herein, the Union also points to the necessarily onerous impact on the "resources and energies of the Union if required to train and supervise so many stewards for so few a number of employees [Union brief at page 6]".

The Department's position is that its complained of policy of allowing steward representation on County time only where the aggrieved employee and the steward share the same work location, does not constitute an M.O.U. violation [either of the M.O.U. in effect at the time UFC 10.28 was filed, or of its October 1, 1987 successor]. In support of this conclusion the Department contends that the policy has been followed for several years (since at least 1972) and has therefore become a well accepted and established past practice within the meaning of arbitral parlance. In this regard the Department urges that the past practice should be afforded the status of an implied term of contract because all prerequisite elements of past practice exist under the facts herein. Based upon the foregoing the Department urges that UFC 10.28 be dismissed.

RELEVANT M.O.U. PROVISIONS AND ORDINANCE PROVISIONS

Apart from provisions previously set forth in the text herein or appended hereto, the following provisions of the Unit 711 M.O.U. in effect at the time UFC 10.28 was filed [CHARGING PARTY EX. #2] are also relevant to the resolution of this matter:

ARTICLE 35 FULL UNDERSTANDING, MODIFICATIONS, WAIVER

Section 1.

It is intended that this Memorandum of Understanding set forth the full and entire understanding of the parties regarding the matters set forth herein, and any other prior or existing understanding or agreements by the parties, whether formal or informal, regarding any such matters are hereby superseded or terminated in their entirety. . .

* * * * *

Section 5.

The waiver of any breach, term or condition of this Memorandum of Understanding by either party shall not constitute a precedent in future enforcement of all its terms and provisions.

ARTICLE 37 PROVISIONS OF LAW

It is understood and agreed that this Memorandum of Understanding is subject to all current and future applicable Federal, State, and County laws; Federal and State regulations; the Charter of the County of Los Angeles, and any lawful rules and regulations enacted by County's Civil Service Commission, Employee Relations Commission, or similar independent commissions of the County. . .

Apart from Section 12(a) of the Ordinance previously set forth, the following additional provisions thereof are also relevant to the resolution of this matter:

Section 2. STATEMENT OF POLICY

...it is the public policy of the County and the purpose of this Ordinance to promote the improvement of personnel management and relations between the County of Los Angeles and its employees . . . This policy is supplemented by provisions (a) recognizing and defining the rights of employees to join organizations of their own choosing for the purpose of representation on matters affecting employee relations or to represent themselves individually in dealing with the County . . .

Section 4. EMPLOYEE RIGHTS

Employees of the County shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employee relations . . . No employee shall be interfered with, intimidated, restrained, coerced or discriminated against because of his [or her] exercise of these rights.

Section 12. UNFAIR EMPLOYEE RELATIONS PRACTICES

(e) If the Commission decides that the County has engaged in an unfair employee relations practice or has otherwise violated this Ordinance . . . the Commission shall direct the County to take appropriate corrective action.

DISCUSSION AND CONCLUSIONS

The analysis as to whether or not violations of the Union's rights (subsection (2) of Section 12(a) of the Ordinance) or rights of WIN Social Workers or WIN Supervisor Social Workers (subsection (1) of Section 12(a) of the Ordinance) have been occasioned by the Department's steward policy begins with an examination of the discharge of the mutual obligation of the parties set forth in the relevant M.O.U.s as follows:

ARTICLE 32 LOCAL 535 REPRESENTATION Section 1.

. . . The number and location of representatives will be determined by agreement between the departmental management and Local 535.

This provision became effective on December 6, 1985 for the Unit 711 employees [CHARGING PARTY EX.#2, second page of document]. This date follows the inception of the WIN Demo Program on July 1, 1985 by about five months. Further, the provision had been in effect about one year and six months at the time UFC 10.28 was filed with the Commission on June 8, 1987.

The mandate of Section 1 of ARTICLE 32 is bilateral determination of the number and location of stewards and is in direct conflict with that portion of the Department's steward policy which unilaterally requires that in order to be afforded County time to represent a grievant or prospective grievant, the steward must be housed at the same work facility as is the aggrieved employee. Once said bilateral agreement is effected between the Department and the Union, the M.O.U.s provide for steward representation which contemplates a steward leaving his or her work location and having access to a different work facility where the concerned employee is located, and there meeting with said employee (Sections 2,3, and 4, of ARTICLE 32).

The foregoing steward representation rights conferred by Sections 2,3, and 4, of ARTICLE 32 notwithstanding, in order to effect a shift from the Department's limitation on steward representation imposed by the requirement of a shared home base of steward and grievant/prospective grievant, it would be incumbent upon the Union to propose to Department management pursuant to Section 1 of ARTICLE 32, its stated preference of steward representation such as that urged as a remedy for UFC

10.28 (unit wide stewardship for each of the two WIN units represented by Local 535). Department management would then be subject to a duty to bargain. Upon a breach of such duty by the Department, the Union could more realistically claim that the Department had engaged in conduct constituting an unfair employee practice or otherwise violated the Ordinance. The viability of this proposition appears sound to the undersigned for the following reasons:

(1) The Department's continued adherence to the complained of policy is a continuation of a policy which has been in effect since at least 1972. Thus the Department policy predated the July 1, 1985 advent of the WIN Demo Program by about thirteen years.

(2) The policy also predated the December 6, 1985 effective dates of ARTICLES 29 and 32 of the relevant M.O.U.s [CHARGING PARTY EX.#2], in effect at the time UFC 10.28 was filed, which M.O.U.s confer rights to steward representation which are not limited by the requirement of same work location of steward and grievant as is imposed by the Department's policy.

(3) The M.O.U. conferred rights to steward representation without the condition imposed by the County's/Department's policy are not self executing. The bilateral agreement as to steward number and location contemplated/mandated by Section 1 of ARTICLE 32 is a pre-requisite to invoking such rights.

(4) Although the complained of limitation on steward representation contained in the Department's policy is at odds with the rights and language of Sections 2,3, and 4 of ARTICLE of the M.O.U.s, before the Commission's jurisdiction may be invoked to order the County to take any "appropriate corrective action", preponderant evidence must support a conclusion that the Department has engaged in conduct which constitutes an unfair employee relations practice or otherwise violates the Ordinance. As discussed infra, this record does not support such a conclusion. However, assuming for purposes of argument that such a conclusion could be supported by a proper showing of the Department's refusal to bargain over number and location of stewards pursuant to Section 1 of ARTICLE 32 of

the relevant M.O.U.s, a likely proper remedy to be directed by the Commission would be an order directing the Department to bargain in good faith. The remedy requested by the Union is incongruous with the conduct complained of within the context of the rights and obligations of the parties related thereto. Further, said requested remedy of unit wide steward representation for two units would give the Union more than it is entitled to under parameters of good faith bargaining as reflected in Section 3(o) of the Ordinance which defines "Negotiation" in part as follows:

"This obligation does not compel either party to agree to a proposal or to make a concession. . . ."

In connection with the contentions (3) and (4) above raised by the undersigned, the following is apropos. The record is barren as to any attempts of either party to initiate discussions/meetings/exchange of proposals or any other prerequisites to the discharge of their mutual duty to come up with an agreement as to the number and location(s) of stewards for the two WIN units represented by Local 535. Rather, the testimony of Phil Ansell explaining why he filed UFC 10.28 essentially describes a factual triggering event (denial of County time for an attempt at representation at a grievance meeting by a steward who did not work at the same facility as the grievant) used to identify the Department's position, with ultimate application of same to the total number of WIN employees represented by Local 535. The derivative conclusions emerging from the one prototypic scenario are that the Department's position would require Local 535 to provide 21 stewards for 52 Social Workers and seven stewards for seven Supervisor Social Workers, and that the result is an infringement of the Union's rights and said employees' rights concerning effective representation which rights are conferred or recognized by the Ordinance.

Also, while not dispositive of the issues to be resolved herein, it should be noted that UFC 10.28 does not allege a violation of Section 12(a)(3) of the Ordinance for any purported refusal to negotiate with representatives of certified employee organizations on negotiable matters, which allegation would likely have been raised had the Department directly refused to bargain with the Union to reach agreement on the number and location of stewards pursuant to Section 1 of ARTICLE 32 of the M.O.U.s.

Assuming for argument purposes that the staunchness of the Department's enunciated rationale for its adherence to its steward policy is such as to provide an arguable basis to relieve the Union of its duty to exhaust the M.O.U. requirement to bilaterally reach agreement with the Department on the number and location of stewards, the same conclusion as to the impropriety of the Union's requested remedy pertains.

The evidence establishes that it is more likely than not that the Union's available and contemplated resources to provide representation for WIN employees in Units 711 and 741 through either the use of stewards or of staff Business Agents is necessarily diluted if the Union is required to adhere to the Department's current policy which results in the provision of 21 stewards for the WIN Unit 711 employees and seven stewards for the seven WIN Unit 741 employees. Additionally, the evidence establishes that the rights of employees to effective representation are currently diluted by the current policy in that in terms of currently available Union resources Step 1 and Step 2 meetings have been waived (with written submissions as substitutes on occasion), Union Business Agent staff perceiving itself as being too overladen to adequately service the representation needs which could be performed by stewards, and the fact admitted to by management of a clear disparity as to available representation for certain WIN employees:

. . . where only one WIN Demo Program Social Worker is located at a given facility, admits Sainz, such an employee [in the resolution of a work related problem] would have to serve as his [or her] own steward, or contact a Union Business Agent, or be forced to have a representative of his [or her] choice on the representative's own time, all in contrast to the scenario which pertains at facilities where a number of people [WIN Unit 711 employees] have a representative available to them on County time. [page 8, supra]

The figures identifying the numbers of WIN employees at each facility are set forth at pages 4 and 5 herein.

Based upon the foregoing it can be defensibly argued that an increased risk of negligent breach of the Union's duty of fair representation is occasioned where the scarce resource of time (here, for steward training and supervision) is unnecessarily diverted and diluted. (See Owen Fairweather, Practice and Procedure in Labor Arbitration,

(1983), Ch. XXIII Fair Representation Obligations, pages 704, 710, 712, 713).

Further, the Union is not estopped from raising the issue complained of in UFC 10.28 by virtue of its purported acquiescence in the Department's policy and thereby its alleged adoption of same as an established past practice evincing an intent to render the policy an implied term of contract as is asserted by the Union in its brief. The conclusion that the Union may take some form of affirmative action in connection with the at issue policy despite the fact that it (the Union) apparently has not done so (based upon this record) during the 1 1/2 year period between the effective date of ARTICLE 32 (December 6, 1987) and the June 8, 1987 filing of UFC 10.28, is supported by the following provision of the relevant Unit 711 M.O.U. [CHARGING PARTY EX. #2]:

ARTICLE 35 FULL UNDERSTANDING, MODIFICATIONS,
WAIVER

Section 5.

The waiver of any breach, term or condition of this Memorandum of Understanding by either party shall not constitute a precedent in the future enforcement of all its terms and provisions.

The reference to said provision is made without also making an implicit finding or conclusion that the Union has waived any rights within the meaning of accepted legal principles defining waiver.

Arbitral authority is likewise supportive of the conclusion that the Union is not estopped from challenging the Department's steward policy by virtue of the Department's past practices defense. While it is true that ample arbitral authority validates the use of evidence of custom and past practice "to support allegations that clear contract language of the written contract has been amended by mutual action or agreement," (Elkouri and Elkouri, How Arbitration Works, 3d edition, at page 389), the required standard of proof of mutuality has not been met by the Department. In fact, the recent conduct of the Union of filing UFC 10.28 and in negotiating the identical ARTICLE 32 in the October 1, 1987 through September 30, 1987 M.O.U.s which provides the vehicle for negotiating the number and location of stewards pursuant to Section 1 alternative to the complained of policy, are actions by the Union which belie the Department's claim of mutuality. Only a showing of "very strong proof" equivalent

to mutual agreement to amend the contract may be deemed to alter the clear contract language (Ibid., at page 410).

The current law governing the parties on the matter of steward representation is ARTICLE 32 of the M.O.U.s for units 711 and 741 which were negotiated and finalized during the interim between the date UFC 10.28 was filed and the hearing thereon. The remedy requested by the Union, unit wide steward representation, would not be equitable in light of the fact that when the M.O.U.s which became effective on October 1, 1987 provide for the identical bilateral agreement mechanism for determining the number and location of WIN stewards as did the predecessor M.O.U. under which the rights of representation underlying UFC 10.28 were promulgated. While the rights of representation conferred by the M.O.U.s supersede the Department's steward policy once the rights set forth in Sections 2, 3, and 4 of ARTICLE 32 [which might displace the shared home base of grievant and steward requirement of Department policy] are activated by invoking the bilateral agreement mandate of Section 1 of ARTICLE 32, the rights of representation afforded in Sections 2, 3 & 4 of ARTICLE 32 are not self executing.

Thus, notwithstanding the showing herein of the existence of an adverse impact on effective representation rights occasioned by the Department's policy, even positing a concomittant finding of a violation of the Ordinance occasioned thereby, it appears that the appropriate remedy would be an order for the Department to comply with its responsibility to take the necessary steps to effect bilateral agreement with the Union pursuant to Section 1 of ARTICLE 32 rather than to accept the unilaterally determined proposal of the Union for unit wide steward representation. However, based upon this record, the Union neither demonstrated its compliance with or excuse from compliance with the dictates of Section 1 to invoke the Department's obligation to reach bilateral agreement with the Union in response to a proposal by the Union for unit wide steward representation or any other proposal forwarded by the Union. Such element must be deemed part of the Union's burden of proof in establishing a prima facie case that a violation of the Ordinance has been occasioned. Under these facts, the foregoing pertains irrespective of whether the adverse impact on the rights to effective representation be deemed to constitute either "slight harm" or "severe harm to, or is inherently destructive of employee rights" within the meaning of N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967).

RECOMMENDED DECISION

Based upon the foregoing, the undersigned respectfully submits that the Union has failed to establish by a preponderance of the evidence that the Department has engaged in conduct which constitutes a violation of the Ordinance. Accordingly, it is respectfully recommended that UFC 10.28 be DISMISSED.

DATED: January 7, 1988

By

A large, stylized handwritten signature in black ink, reading "Angela R. Pickett". The signature is written over a horizontal line.

Angela R. Pickett, esq.
Hearing Officer

APPENDIX "A"

ARTICLE 29GRIEVANCE PROCEDURESection 1.Purpose

The purpose of the grievance procedure is to provide a just and equitable method for the resolution of grievances without discrimination, coercion, restraint, or reprisal against any employee who may submit or be involved in a grievance.

Section 2.Definitions

1. Wherever used, the term "employee" means either employee or employees as appropriate.
2. "Grievance" means a complaint by an employee concerning the interpretation or application of the provisions of this Memorandum of Understanding or of rules and regulations governing personnel practices or conditions, which complaint has not been resolved satisfactorily in an informal manner between the employee and his immediate supervisor.
3. "Business Days" means calendar days exclusive of Saturdays, Sundays, and legal holidays.

Section 3.Responsibilities

1. The Union agrees to encourage an employee to discuss his complaint with his immediate supervisor. The immediate supervisor will, upon request of an employee, discuss the employee's complaint with him at a mutually satisfactory time.

Section 5. Employee Rights and Restrictions

1. The employee has the right to the assistance of a representative in the preparation of his written grievance, and to represent him in formal grievance meetings. The grievant may be required by either party to be present in meetings with Management for purposes of discussing the grievance.
2. A County employee selected as a representative in a grievance is required to obtain the permission of his immediate supervisor to absent himself from his duties to attend a grievance meeting. The employee representative shall give his supervisor reasonable advance notice to ensure that his absence will not unduly interfere with departmental operations.
3. An employee may represent his grievance to Management on County time. In scheduling the time, place and duration of any grievance meeting, both the employee and Management will give due consideration to the duties each has in the essential operations of the department. No employee shall lose his rights because of Management-imposed limitations in scheduling meetings.

Section 6. The Parties' Rights and Restrictions

1. Only a person selected by the employee and made known to Management prior to a scheduled formal grievance meeting

from his knowledge of such occurrence, an employee shall file a formal written grievance. Three copies of the departmental grievance form shall be completed by the employee stating the nature of the grievance and the remedy he requests from his departmental management. The employee shall submit two copies to his office head agent and retain the third copy.

- B. Within five business days the office head agent shall give his decision in writing to the employee on the original copy of the grievance.

Step 2. Middle Management

- A. Within five business days from his receipt of the office head agent's written decision and using the returned original copy of the grievance form, the employee may appeal to the appropriate level of management as previously indicated by his department head. The department head has the authority to waive the middle management step if such a step is not appropriate because of the size of his department. The middle management representative shall discuss the grievance with the office head agent concerned and the employee before a decision is reached by him.
- B. Within five business days from receipt of the grievance, the middle management representative shall give a written

shall have the option of referring a grievance alleging a violation of the negotiated agreement between the parties to arbitration.

- D. On matters that are not subject to arbitration pursuant to Section 8 hereafter, the written decision of the department head or his designated representative shall be final.

Section 8. Arbitration

1. Within ten days from the receipt of the written decision of the department head or his designated representative, the union may request that the grievance be submitted to arbitration as provided for hereinafter.
2. Only those grievances which directly concern or involve the interpretation or application of the specific terms and provisions of this Memorandum of Understanding may be submitted to arbitration hereunder. In no event shall such arbitration extend to:
 - A. The interpretation, application, merits or legality of any State or local law or ordinance, including specifically all ordinances, adopted by County's Board of Supervisors, unless the arbitrator, in his discretion finds it necessary to interpret or apply such State or local law in order to resolve the grievance which has been submitted to the arbitrator.

APPENDIX "B"

ARTICLE 32LOCAL 535 REPRESENTATIONSection 1.

Departmental management will recognize employees designated by Local 535 as representatives only upon receipt of a written list of names and locations of the employees so designated. Within thirty (30) days of the date of this agreement, Local 535 will furnish the departmental management with such a list and will keep it current. Employees not on such list will not be recognized as representatives. The number and location of representatives will be determined by agreement between the departmental management and Local 535.

Section 2.

Representatives will be permitted reasonable time off without loss of pay for the investigation and processing of grievances up to and including the Department Head level. This section does not preclude the processing of a grievance by a representative at a higher level at the expense of Local 535.

Section 3.

Local 535 agrees that whenever investigation or processing of formal grievances is to be transacted during working hours, only the amount of time necessary to bring about a prompt disposition of the matter will be utilized. Time spent on the investigation and processing of formal grievances will be recorded on a form provided by Management. When required to leave his work location

undue hardship upon the department in the opinion of the department head or his designate, the latter shall explain such circumstances to the representative and will offer an alternate time most immediately following the requested time. In the event of a grievance of an emergency nature beyond the normal capacity of a representative to resolve, the Local 535 staff representative may advise the department head or his designated representative of his need to visit the facility and the reason therefore. In such instance, the 24-hour notification shall be waived. Local 535 agrees that its staff representative will make every good faith effort not to interfere with the normal operations of the department or of any facility thereof. By mutual agreement, the Office Head and the authorized Local 535 staff representative may waive the 24-hour notification.

Local 535 shall give to each affected department head and the Chief Administrative Officer of the County of Los Angeles, a written list of all authorized staff representatives, which list shall be kept current by Local 535. Access to work locations will only be granted to staff representatives on the current list.