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LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

In the Matter of: SOCIAL SERVICES UNION (SSU), LOCAL 535, SEIU Charging Party v. DEPARTMENT OF CHILDREN'S SERVICES Respondent	UFC 10.32 HEARING OFFICER'S REPORT, DISCUSSION and RECOMMENDATION

This matter had its first evidentiary hearing on May 4, 1988 and a second hearing on May 24,1988. The Charging Party (hereinafter "the Union" or "Local 535") was represented by James Rutkowski of the firm of Van Bourg, Weinberg, Roger & Rosenfeld. The Respondent (hereinafter "DCS" or "the Department") was represented by Donald Washington of the County's Office of Human Resources. Each side filed a Post-Hearing Brief.

The case arises from an unfair employee relations practice Charge filed by the Union on February 29, 1988. The Charge protests a memorandum DCS issued on February 24, 1988. The memo forbids employees from taking off more than five cumulative

vacation or compensatory overtime days during the period March 1 to June 30, 1988. The Charge alleges that this DCS memo constitutes a unilateral change in past practice and that DCS violated Section 12(a)(3) of the Employee Relations Ordinance by adopting this change without first bargaining with the Union. The Charge also alleges that DCS issued the memo to retaliate against the employees' exercise of protected concerted activities and thus also violated Section 12(a)(1) of the Ordinance.

ISSUES AND ORDINANCE LANGUAGE

1. Does the DCS memo violate Section 12(a)(1)?

2. Does the DCS memo violate Section 12(a)(3)?

Those Sections provide: "It shall be an unfair employee relations practice for the County:

"(1) To interfere with, restrain, or coerce employees in the exercise of rights recognized or granted in this Ordinance;

"(3) To refuse to negotiate with representatives of certified employee organizations on negotiable matters."

SUMMARY OF EVIDENCE

A. Documentary Evidence

The Union submitted 15 documentary exhibits that were received in evidence. They will be described and, where necessary, discussed at appropriate points in the summary of the Testimony. Admission of one exhibit offered by the Union was

refused. That was a video tape cassette compiled by some of the employees represented by the Union. The tape is said to record several local telecast news reports concerning some of the public meetings mentioned in the testimony. Union counsel stated that the tape was offered to demonstrate that this controversy arose out of a highly publicized matter, closely covered by the media.

DCS submitted 27 documentary exhibits that were received in evidence. They will be described and discussed at appropriate points in the summary of the the Testimony.

There were two Joint Exhibits. Joint Exhibit One is the MOU (Memorandum of Agreement) and Fringe Benefit Agreement currently in force, and Joint Exhibit Two (containing subparts "a" through "d") are the MOU's concerning Fringe Benefits for various contract years from 1979 to 1985.

B. Testimony

All witnesses testified under oath, and there does not appear to be any serious dispute concerning the facts. The parties differ more in their interpretation of the events and concerning the motivations each ascribes to the other. Consequently, it will probably be more useful to the Employee Relations Commission for this Report to present a chronological narrative rather than detailed paraphrases of each witness's testimony.

DCS is a department of the County of Los Angeles that is subject to and governed by the County's Employee Relations

Ordinance (No. 9646). That Ordinance authorizes collective bargaining and union representation for County employees. Like so many of the enactments establishing what has come to be called "public sector bargaining," the Ordinance follows the general structure, created in the 1930's, of the federal National Labor Relations Act, adapting some of the federal language to the local government situation. Thus Section 4 of the Ordinance, "Employee Rights," is analagous to Section 7 of the NLRA, and Section 12(a) of the Ordinance echoes some of the unfair labor practice provisions of Section 8(a) of the federal statute. It is generally understood that the federal experience and precedents furnish useful guides for interpreting and applying the Ordinance.

The County Ordinance first took effect in 1968. Since 1973 the bargaining unit of the approximately 1200 social worker employees involved in this case has had as its certified representative Local 535 SEIU, the Charging Party Union here. Over the years, the County and the Union have entered a series of labor agreements or Memoranda of Understanding ("MOU's").

The current MOU and its attached Fringe Benefits Agreement (Joint Exhibit 1) applies to the period October 1, 1987 to September 30, 1989. Article 17 of the Fringe Benefits covers "Vacations." The first paragraph of that two paragraph Article limits the amount of vacation time which an employee may defer, presumably in order to forestall the accrual of inordinately lengthy vacations. That first paragraph is not involved in the present dispute.

We are concerned here with the second paragraph. That second paragraph provides:

> "Nothing in this Article diminshes the department head's authority to grant, schedule and defer vacation time."

There is testimony and documentary evidence that this language dates back to MOU's entered as early as 1979 and to even earlier code provisions. There is also testimony that during the negotiations for the 1985 MOU, the Coalition representing the Unions proposed amending this second paragraph. The Union Coalition first proposed that this second paragraph be entirely deleted; failing in that, the Coalition then proposed that the word "schedule" be deleted. Both proposals were rejected by the County's negotiators, and the 1985 MOU eventually negotiated had no change in the language of the second paragraph. There was, apparently, no attempt to amend the Vacation Article during the negotiations preceding the present, 1987, MOU.

There is also undisputed testimony that until 1988 this second paragraph had been applied on an individual, ad hoc, case by case basis. It is DCS's changing of its mode of applying this paragraph, this "past practice" as the Union characterizes it, and DCS's doing so without first bargaining about the change with the Union, that have led to the unfair employee relations practice charges in this case.

DCS takes the position that it had the legal right to make the change without bargaining and that it had been impelled to do so in response to budgetary pressures. The budget originally

approved by the County Board of Supervisors for DCS for fiscal 1987-88 (July 1, 1987 to June 30, 1988) projected revenues of $114.9 million. In approximately September 1987 it was learned that the State, from whom a substantial share of the revenue was supposed to come, was changing its allocation formula and reducing DCS's share by $4.3 million. Consequently, measures by which to minimize the impact of this "shortfall" had to be considered.

One such measure was imposition of a hiring freeze in approximately December, 1987. (Some testimony indicates that there had been earlier hiring freezes, but it seems generally agreed that the freeze in response to the State's allocation change took effect in December, 1987). Without replacement for those social worker employees lost to attrition, the number of workers available for the cases needing to be serviced decreased, but without any corresponding decrease in the number of cases. The social workers and their Union felt that the workers, already overburdened, would now be assigned impossible caseloads.

A social worker's caseload is a critical issue. Article 18 of the current MOU devotes seven pages to that single heading. Section 3 of Article 18 expressly forbids management from taking adverse action against an employee for any errors or omissions in any month during which the employee's caseload exceeds a stated amount. In response to the December 1987 hiring freeze, the Union and the employees began circulating for signature an "Open Letter to Robert Chaffee, Director of Children's Services." The

purport of the letter was that the workers' "professional and ethical obligation" to the vulnerable children in their charge was already so compromised by high caseloads that the workers would henceforth refuse any new case that would increase their loads above the contractually listed amounts.

There is reference in the record to a letter on January 8, 1988 from DCS to Union representative Ansell indicating DCS's position that DCS would consider refusal of new assignments by social workers to be insubordination and ground for discipline. However, there is nothing in the record to indicate that any worker actually refused an assignment, and there is no issue in this proceeding concerning the possible propriety or impropriety of the Open Letter or of DCS's response to it.

Meanwhile, during January 1988, Director Chaffee and his staff testify that they were considering other ways to (as worded in County Ex. 5) "utilize/deploy staff so that we can provide maximum support to line operations." A memo dated February 11, 1988 (County Ex. 10) includes as one suggestion, "Cancel vacations." A memo of February 12 (County Ex. 11) elaborates this suggestion to "Vacations for <u>all</u> staff should be cancelled for the period March 1, 1988 through July 1, 1988..." Both documents also include suggestions of other measures.

February 12 was a Friday and the following Monday, February 15, was a holiday. On the next day, February 16, there was held a general meeting of the Commission for Children's Services, the agency which supervises DCS. Director Chaffee appeared, as did

Union Representative Ansell, other Union officials, and, according to one newspaper report (see Union Ex. 3) about 50 children's workers. At the meeting Ansell presented to Chaffee copies of the "Open Letter" of refusal to accept new assignments. More than 500 children's social workers had signed copies of that "Open Letter." Chaffee told the Commission that though DCS's understaffing was "serious," it was not as critical as the workers claimed. Chaffee testified at the hearing of this matter that his reaction to the "Open Letter" was that while there was a legitimate concern about the problem of staffing, he considered the employees' action inappropriate and thought it improper for them to present their case in that manner. Chaffee denies that he was "upset."

A written response by DCS took the form of a letter dated February 16, 1988 to Phil Ansell from Howard Baker, DCS's Personnel Officer (County Ex. 3). Baker's letter called upon the Union to "exercise a good faith effort to halt this proposed work action" and indicated DCS's position that the threatened refusal to accept new cases would, if carried out, be insubordinate. The letter concluded with Baker expressing his willingness to meet with Ansell "to discuss your concerns."

The next day, February 17, Chief Administrative Officer Richard Dixon mentioned the events of the February 16 Commission meeting in a general memo to each member of the County Board of Supervisors (Union Ex. 4). Dixon's memo, as well as some of the newspaper reports, say that the employees understood refusal to

accept new cases would be illegal. Ansell, in his testimony here, denies telling the media that.

Also on Wednesday, February 17 there took place a meeting of the top executives of DCS. The Agenda for that meeting is County Exhibit 7. Among the many items on the Agenda was the proposal that vacations for "all staff" be cancelled for the period March 1 through July 1, 1988. Testimony concerning the discussions at that meeting is that it was felt that cancellation of all vacations might be too severe. Consequently, the proposal was modified to prohibit only those vacations that would use more than five cumulative days. Director Chaffee also testifies that they discussed allowing exceptions to the ban for hardship cases. Probably during that meeting, although the testimony on this point is not explicit, it was also decided to extend the same ban to compensatory time off. The handwritten marginal note adjacent to the vacation item on County Ex. 7 reads, "5 days [3 letters illegible] comp/vac."

At that February 17 meeting Howard Baker said that the Union would probably object to the vacation ban. Chaffee instructed Baker to meet with the Union. Union official Ansell recalls receiving Baker's telephone call, probably on February 18, to arrange the meeting. The meeting took place on Friday, February 19, at DPCS offices. In addition to Baker and Ansell, other DCS and Union officials were present. Testimony from both sides agrees that Baker reviewed a list of the actions contemplated by DCS and that the list included the proposed limit on vacations

and compensatory time off.

Ansell testifies that he immediately voiced his opposition to the restriction "for legal and policy reasons." Ansell testifies that he also stated that DCS could not unilaterally impose the restriction and that it must first bargain with the Union about it. Baker does not contradict this testimony. Baker adds that Ansell branded the proposal as "stupid" and said it would make more sense to make the limit "five consecutive" rather than "five cumulative" days. Baker says that he asked Ansell whether that would make the vacation limit more acceptable and that Ansell responded, "I didn't say that."

Ansell testifies it was his impression that Baker was informing him of actions that DCS was contemplating, not of decisions that DCS had reached. Ansell clearly did not regard the points Baker raised as being any sort of proposals. Ansell testifies he asked Baker the rationale for the vacation limit and that Baker replied it was being developed in response to the staffing shortage because it was necessary to have people on line (i.e. workers available). The testimony of both Baker and Ansell agrees that neither made any formal request to negotiate on the issue. Indeed, each man, and each side in this case, takes the position that it was not necessary to request negotiations in order to put into effect their understanding of the MOU -- even though each side's understanding of the MOU is opposite to the other's. DCS's position is that the MOU gives it complete discretion to schedule vacations so that in imposing the vacation

restriction it was acting within its discretion. The Union's position is that the past practice embodied in the contract did not authorize any blanket restriction on vacations and so to impose such a restriction DCS must first negotiate with the Union. Thus each side takes the position that it was the other side which desired a departure from the MOU so that it was incumbent on the other side to request negotiations. The result is that neither side has requested negotiations.

Baker testifies that on the evening of February 19, after his meeting with the Union, he reported to Chaffee concerning it. It was decided to issue the memos that would establish the vacation restriction and the other measures. Chaffee's testimony is that the decision was reached at the DCS meeting of February 17 but that "final decisionmaking" had been deferred until after Baker could meet with the Union. Both agree that something was decided on February 19 to finalize the instituting of the vacation restriction.

The method that was used to communicate the decision to the employees and to the Union is probably responsible for some of the controversy in this case. Seven of the measures discussed with the Union on February 19 were put into a "Staffing Update Memo" issued on February 22, 1988 (Union Ex. 6). However, the vacation restriction, which is the subject of the present dispute, was not included in the February 22 memo. Instead, the vacation restriction was announced in a Personnel/Policy Procedure Memo dated February 24, 1988 (Union Ex. 9) and

apparently issued even later. The explanation given by Chaffee and Baker for separating the vacation restriction from the other measures is that the vacation restriction involves Personnel Policy and therefore belongs in one of those special memos called Personnel Bulletins and not in a more general Special Information Bulletin. Nevertheless, the time lag between announcement of the other measures and announcement of the vacation restriction may have contributed to a misunderstanding between the parties and to the present dispute.

On February 22, Chaffee wrote another memo, this one addressed to the Board of Supervisors (Union Ex. 13). This memo reported the February 19 meeting with the Union's representatives who, Chaffee's memo said (without describing all aspects of the Union's position), "did not believe that [DCS's] proposed actions would be adequate." The memo did not itemize the "proposed actions" and did not mention the vacation restriction. Chaffee's memo said that the Union would probably pursue its position with the Board of Supervisors at the latter's meeting on February 23. Chaffee assured the Supervisors that although there were social worker vacancies, DCS was adequately staffed to meet its requirements, including the rendering of emergency services. Chaffee's memo also stated that DCS would continue to "meet and discuss the situation with Local 535."

The Board of Supervisors met on Tuesday, February 23, 1988. DCS executives, including Chaffee, and Union representatives, including Ansell, appeared and addressed the Board. There was

more than usual press coverage. At that meeting the Board of Supervisors unanimously appropriated an additional $500,000 for DCS to use to recruit new hires.

On February 24 or 25, Ansell received a telephone call from Baker for a meeting. They and most of the other persons who had attended the meeting of February 19 met again on February 26. The February 24 Personnel/Policy Procedure memo announcing the vacation restriction had not yet been distributed nor had it been made known to the Union. Baker began the February 26 meeting by enumerating several of the changes that DCS would now make with the new $500,000. He did not mention the vacation restriction. Ansell asked whether that omission meant that DCS had withdrawn the restriction. Baker told him "No" and said that a memo was on the way. Ansell warned that the vacation restriction would violate the contract. After further discussion and the understanding that his doing so would not create any precedent, Baker handed Ansell a copy of the February 24 Personnel/Policy memo containing the restriction. After reading over the memo Ansell repeated his objections. In Ansell's view, the restriction was not only unwise on the merits, but issuing it would be illegal as involving a unilateral change on a mandatorily negotiable topic. Ansell said that the Union intended to file grievance and unfair employee practice charges.

As previously indicated, the present unfair charges were filed on February 29, 1988. There was mention during the hearings of this case that the Union has also filed grievances

and that those grievances are currently pending for arbitration. On March 2, 1988 DCS issued a memo to Office Heads to clarify several questions concerning the vacation restriction (County Ex. 13). This memo states that the "policy is not intended to penalize staff with prepaid tickets or reservations for vacation ... approved prior to March 1, 1988." On March 7, 1988 Chaffee attended the meeting of the Commission for Children's Services. He was asked to explain the vacation restriction (Union Ex. 10). On April 11 or 12, 1988 Ansell delivered to Chaffee another set of Petitions, signed by "hundreds" of DCS employees, expressing "outrage" over the vacation restriction, characterizing it as retaliatory, and demanding its immediate rescission (Union Ex. 11).

DISCUSSION

I. THE EVIDENCE FAILS TO ESTABLISH THE CHARGE OF RETALIATION.

The Union's charge of February 29 alleges that DCS put the vacation restriction into effect in order to retaliate against the employees (and the Union) "for their efforts to pressure the Department and the Board of Supervisors to hire more Children's Social Workers." It is the Union's position that these efforts were "protected activities" within the meaning of Sections 4 and 12(a)(1) of the Ordinance. It has not been disputed that the appearances of employees and Union officials before the Commission for Children's Services and before the Board of Supervisors constitute protected activities. Indeed, the County

does not contend that the circulating and signing of the Open Letter Petitions was unprotected even though Mr. Chaffee holds the opinion that such conduct was "not appropriate." However, there does not seem to be any factual basis for the Union's charge that it was those activities which provoked DCS to retaliate and impose the vacation restriction.

The Union argues in its Brief that the unnecessary extensiveness of a department-wide vacation restriction and the timing of the decision imposing the restriction "in direct response to the employees' and the Union's approaching the Board of Supervisors and the Commission," show that DCS's decision was retaliatory. However, the evidence does not bear out the Union's "direct response" argument because the timing of the various events is not consistent with the Union's theory of retaliation. To be sure, the vacation restriction was announced after the employees had appeared at the meetings of the Commission and the Supervisors. However, simply because the restriction came after does not establish that the restriction came because--that it came "in response" to those appearances.

At our hearings the Union pointed to the time lag between DCS's announcement of other measures by the memo of February 22 and its announcement of the vacation restriction in the memo dated February 24. This time lag could be interpreted to suggest that something which happened between, on February 23 perhaps, caused the vacation restriction. February 23 is, of course, the date of the Board of Supervisors' meeting.

However, the February 23 meeting would probably not be an event that would evoke reprisal. If any meeting would have been likely to provoke DCS to retaliate, it would be the meeting of February 16, not the meeting of February 23. The meeting of February 16 involved a public, and perhaps embarrassing, dumping of the sheaf of "Open Letters" into the hands of Mr. Chaffee. But the meeting of February 23 achieved a result that presumably both Chaffee and the Union desired -- a larger appropriation for DCS. Certainly, if Chaffee had been, as some testified, "upset," he no doubt found the meeting of February 16 much more "upsetting" than that of February 23. Thus, the time lag, DCS's postponing announcement of the vacation restriction from February 22 to February 24, is not strong evidence for the Union's theory that the restriction was intended to be a retaliation.

Nor does the fact that the vacation restriction was imposed on a department-wide basis, a far wider basis than was necessary according to the Union, support the view that the restriction was retaliatory. Exempting some employees from the restriction might, arguably, have been discriminatory; imposing the ban on a department-wide basis avoids its having any discriminatory impact. Furthermore, applying the restriction department wide, to non-union employees as well as to those represented by the Union, tends to suggest that it is not aimed at punishing Union adherents. If Chaffee meant to retaliate against the Union and against those loyal to the Union's position for their conduct at the public meetings, why should he punish <u>everybody</u>, his allies

who did not participate in that conduct along with his adversaries who did?

In addition to the unpersuasiveness of the Union's time lag and extensiveness arguments, there are other facts that tend to bolster the theory that the vacation restriction is not retaliatory. In the first place, there has been absolutely no showing that the restriction has had an adverse effect on any employee. Indeed, the hardship exception which DCS made part of the restriction (County Ex. 13) was expressly designed to prevent the restriction's exerting any adverse effect. A measure that does not hurt anyone, and that has been constructed so as to avoid hurting anyone, is not much of a reprisal.

In the second place, there is a great deal of undisputed evidence, both testimonial and documentary, to show that DCS had some sort of vacation restriction under consideration as early as January, well before the supposedly provoking concerted activities. The detailed nature of that evidence and its showing the development over a period of time of the precise form of the restriction tends to negative the contention that the purpose of the restriction was to get back at the Union and its loyal members.

Thirdly, the general situation and the nature of the relationship of the parties seems to make it unlikely that the restriction was retaliatory. The parties appear to have a mature collective bargaining relationship. True, they have their disagreements and their differing points of view, but there is no

evidence to indicate that the employer wishes to oust the Union or to make the employees regret their Union affiliation. The record also shows that the parties were in frequent contact during the development of the vacation restriction. While they may not have negotiated formally, they did communicate openly. One possible misleading impression occurred when, apparently for reasons of bureaucratic nicety, DCS separated the vacation restriction from the other measures and put the vacation restriction into a separate, later memo. Even that false impression was quickly dispelled by Baker's making the full text of the later memo available to Ansell. All in all, the adversaries here seem to have mutual respect for each other.

Finally, it should be kept in mind that the vacation restriction was addressed to a problem about which the Union itself had expressed concern, the shortage of staff. It is quite understandable -- indeed, the Union is clearly doing its duty and safeguarding employee benefits -- for the Union to oppose both excessive caseloads and restrictions on vacations. Nevertheless, there does seem some incongruity in the Union's first protesting against heavy caseloads and then charging that a measure which on its face appears designed to keep more staff on the job during the busy season is a "retaliation" against the first protest.

Conceivably, the Union may be absolutely correct in its contention that the vacation restriction is stupid and will not accomplish its desired purpose. Nevertheless, there is no evidence to show that the restriction is so utterly lacking in

merit that it must have been made up to accomplish something else. On its face, the vacation restriction does appear to have some plausibility. More significantly for purposes of the present case, there is simply no evidentiary support for the Union's contention in this proceeding that DCS adopted the vacation restriction for the purpose of retaliating against the Union and the members for engaging in protected concerted activities.

II. ALTHOUGH IT DID NOT NEGOTIATE WITH THE UNION PRIOR TO INSTITUTING THE VACATION RESTRICTION, DCS DID NOT COMMIT AN UNFAIR EMPLOYEE RELATIONS PRACTICE.

The general rule is that the employer's duty to bargain continues during the term of an agreement. Thus DCS did not conclude its duty to bargain after October 1987 merely by negotiating prior to October 1987 and entering an MOU effective from October 1, 1987 to September 30, 1989. Even with a contract in effect, the parties are required to discuss proposals concerning, and the employer may not take unilateral action with respect to matters not covered by the agreement, without such discussion. (See Getman & Pogrebin, Labor Relations (Foundation Press, 1988) (hereinafter "Getman") 132 et seq.)

However, the general rule is not applied on a per se basis by which the mere absence of bargaining and nothing more is deemed an unfair labor practice. Under the National Labor

Relations Act, "Unilateral action by an employer might violate section 8(a)(5) [the statutory duty to bargain], either because the contract does not deal with the matter, or because the contract prohibits the employer from taking such action and his doing so consitutes a 'modification' of the contract..." (Getman, 133) but "not every breach of contract constitutes a modification. Modification occurs only when the employer's interpretation of the contract has significant lasting consequences for its continued enforcement. The [NLRB] has defined modification as a unilateral act that 'effects a change which has a continuing impact on a basic term or condition of employment.'" Beyond that, "Employer unilateral action that would violate Section 8(a)(5) either because it modifies the contract or because of failure to negotiate may be legitimated either through the management-rights clause or else through a direct waiver of the right to bargain over it. Zipper clauses, if given literal effect, would generally permit unilateral management action with respect to items not covered by the agreement. Both the management rights clause and the zipper clause may be understood as waivers by the union of management's duty to bargain over items not otherwise covered by the agreement. Because they involve a waiver of statutory rights, the Board historically has construed such clauses narrowly ..." (Getman, 134).

Since the MOU between the parties here <u>does</u> cover vacation scheduling, we must ask ourselves whether DCS's change in its

manner of doing that scheduling constitutes a "modification" of the contract. Under the foregoing language, it is a "modification" if, but only if, the change has a "continuing impact on a basic term or condition of employment." If the change does have such an impact, then we would also have to inquire whether the MOU has a management rights clause or a zipper clause, either of which could legitimate DCS's unbargained for, unilateral action.

The foregoing general approach to post contract bargaining has been refined for California Public Sector labor relations by a recent case, Teamsters Local 216 v. Farrell, 41 Cal. 3d 651, 224 Cal. Rptr. 688, 121 LRRM 3479 (1986). This case holds that a public employer violated the "meet and confer" provisions of the statute by a unilateral decision to eliminate a bargaining unit position and reassign the work to non-bargaining unit employees. To reach that holding, the California Supreme Court relied upon a three part test derived from the federal, private sector arena. That three part test requires that the employer must negotiate (or "meet and confer") if (1) the employer's action has a "significant effect" on a statutory term or condition of employment; (2) the action adversely effects the bargaining unit; or (3) the benefit to employer-employee relations of having bargaining outweighs the employer's "need for unencumbered decisionmaking."

It should be noted that the focus of both the state and federal rules in these duty-to-bargain situations involves more than merely protecting the contract rights that have been secured

by the employees, important as protecting those contract rights may be. Whether the employer's unilateral action has violated an employee contractual right is, strictly speaking, a question for an arbitrator whose duty it is to interpret and apply the contract. The primary focus of an unfair labor practice duty-to-bargain case, however, should be the integrity of the collective bargaining process itself. The two objectives are related, of course. Obviously, if the employer is permitted to play fast and loose with the terms of the contract, the very process by which the contract was achieved can also suffer. Nevertheless, the rules discussed here aim not at vindication of contract rights but at the protection of the underlying collective bargaining process: creating and maintaining that legal climate in which the parties themselves can devise their own fair, workable and binding arrangements.

Let us attempt to apply the three part Farrell test. (1) Does DCS's vacation restriction in this case have a significant effect on any term or condition of employment?

The restriction does not purport to affect an employee's entitlement to a vacation, a very important fringe benefit, but only the less important scheduling of a vacation, saying when the employee may take the vacation. Indeed, the restriction seems to work along with and does not change Article 17, the contract provision which appears to give DCS full discretion over the scheduling of vacations. It could be said that the restriction changes only the way in which Article 17 will be applied.

Formerly, the employer's discretion to schedule operated on a "retail," case-by-case basis; but during spring 1988 the employer's discretion will operate on a "wholesale," department-wide basis, cf. Stokely-Van Camp v. NLRB, 722 F. 2d 1324, 114 LRRM 3569 (7th Cir. 1983). While that is some change, it does not seem so vast a change as to be called "significant."

Furthermore, any possible arbitrariness involved in that wholesale discretion is mitigated by the hardship exception which DCS has attached to the restriction. Indeed, the hardship exception here appears to answer the objection which Arbitrator Rappaport had to another wholesale vacation ban, that which was the subject of Union Exhibit 12. Finally, DCS's vacation restriction purports to be a temporary measure, applying by its terms only during the four spring months of 1988. All in all, it cannot be said that the vacation restriction has had a tremendously important effect upon the terms of employment for DCS social workers. That lack of significant effect seems to go along with the absence of any evidence in this case that any social worker has actually been deprived of anything as a result of DCS's vacation restriction.

(2) Does DCS's restriction adversely effect the bargaining unit?

Again, there is absolutely no evidence presented to show that any employee has actually lost anything, or is in danger of losing anything, as a result of DCS's vacation restriction. There exists only the conjectural possibility that a few

employees, who might have deferred vacation arrangements till mid-February, suddenly found themselves ineligible to request a vacation in March, April, May or June. However, the number of those whose flexibility in scheduling might have been thus affected cannot be so great as to amount to an adverse effect upon the entire bargaining unit.

The size of the bargaining unit has not been diminished by the vacation restriction, nor has the unit's work been reduced, as was the situation in Farrell. Furthermore, because the vacation restriction applies to all DCS employees, those outside the bargaining unit as well as those within the unit, the vacation restriction does not give to bargaining unit members less favorable treatment than that given to other groups of employees. From the standpoint of the bargaining unit, there seems to be no possible danger to the collective bargaining system or process.

(3) Does the benefit to employer-employee relations that would result from bargaining outweigh the employer's need for unencumbered decisionmaking?

The evidence presented in this case is absolutely clear on this point: DCS would have been imprudent had it done nothing in response to the budgetary shortfall. DCS had to make some sort of decision, and it had to make its decision within the relatively short time remaining during the fiscal year. Everyone involved in this case, whichever side they may favor, recognizes that the basic priority must be given to the important public service which DCS and its employees perform. Everyone here seems

to recognize that those who would most suffer from any reduction of this public service would be the helpless children entrusted to DCS and its workers. Thus, in this case, effective employer decisionmaking seems absolutely imperative.

On the other hand, what would employer-employee relations have gained from formal negotiations, from invocation of the meeting and confer provisions of the statute? One purpose of the meet and confer provisions is full communication between the parties, see Teamsters Local 216 v. Farrell, supra. In this case there has been ample communication even without formal adherence to the meet and confer requirements. Another purpose of the meet and confer requirement is to allow full input from the employees and their representative. That too, has occurred here.

Furthermore, it must be recognized that the maximum limit of the employer's legal obligation, both under the NLRA and in Public Sector bargaining, is to bargain. The employer is not required to make any concession. Thus, finding that DCS had a duty to bargain with Local 535 before instituting the vacation restriction would not assure any change in the restriction, although it might cause a delay in implementing it sufficient to render it moot. Meanwhile, the quality and nature of the public services for L.A. County's vulnerable children might be at risk.

Even those so strongly sympathetic to labor's position as to desire presumption of a duty to bargain, agree that "this presumption can be rebutted by a showing that bargaining would be futile, that the [employer's action] was due to emergency ...

circumstances, or that, for some other reason, bargaining would not further the purposes of the National Labor Relations Act." (see Justice Brennan dissenting in First National Maintenance Corp. v. NLRB, 452 U.S. 666, 101 S. Ct. 2573 (1981) at 452 U.S. 691.)

Thus, under the three part Farrell test, DCS's vacation restriction here would be valid even without bargaining. In addition, DCS argues that the MOU here has both a management rights clause and a zipper clause which operate to validate this vacation restriction without negotiation. As the Management Rights clause, DCS cites Article 42 of the MOU which reads:

> "It is the exclusive right of the County to ... exercise contol and discretion over its organization and operations ... and determine the methods, means and personnel by which the County's operations are to be conducted."

As the zipper clause, DCS cites Section 1 of Article 39 of the MOU which reads:

> "It is intended that this [MOU] set forth the full and entire understanding of the parties regarding the matters set forth herein and any other prior or existing understanding or agreement by the parties, whether formal or informal regarding any such matters are hereby superseded or terminated in their entirety. It is agreed and understood that each party hereto voluntarily and unqualifiedly waives its right, and agrees that the other shall not be required to negotiate with respect to any subject or matter covered herein."

As was indicated, the National Labor Relations Board has, historically, construed both management rights and zipper clauses narrowly, for such clauses involve the waiver of important statutory rights. It would appear that for California Public

Sector cases, such clauses are construed under the very narrow "clear and unmistakable waiver" test, instead of under the rather looser "totality of the circumstances" test, Public Service Employees v. County of Sacramento, 147 Cal. App. 3d 482, at 488, 195 Cal. Rptr. 206 (1983). Nevertheless, the presence of these clauses in this case clearly reinforces the conclusion reached above, using the three part Farrell test, that DCS did not commit an unfair employee relations practice by instituting the vacation restriction unilaterally and without formal meetings and conferences.

Most important is this basic question: is the unilateral imposition of the vacation restriction a setback for the general process of collective bargaining between DCS and Local 535? As Charging Party, the Union has the burden of proving and persuading on that issue. One can appreciate that every concession gained by labor, every benefit extracted, seems from its point of view to come so grudgingly and with so much difficulty that even the slightest diminution of existing rights must be vigorously opposed. Indeed, by its vigorous opposition here, the Union has probably helped to promote the health of its collective bargaining relationship with DCS. However, the Union has not persuaded that DCS's instituting the kind of vacation restriction instituted here, in the way that DCS instituted it here, has done such damage to the general process of collective bargaining as to necessitate abrogation of the vacation restriction.

CONCLUSION

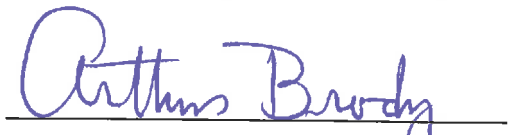
Suppose DCS had circulated a secret memo to department heads saying something like, "Do not approve any application for vacation during March through June, 1988 except for an employee who already has tickets and reservations." The language of Article 17 of the MOU gives to the employer such a broad right to "grant, schedule and defer" vacations that, arguably, it would be difficult to brand that action improper -- apart from its secrecy.

In this case, DCS has in effect issued such a memo, but it has done so openly and after consulting, albeit informally, with the Union. While the restriction does depart from earlier practice, it does so only temporarily and only during a period of emergency. Furthermore, there has been nothing to show that any employee has been harmed by the restriction except on the very abstract and remote basis that one minor advantage (a spring vacation if the employee desired one and his department head, considering the application on an individual basis, approved it) would not be available in 1988.

As between DCS's acting covertly and DCS's acting openly, the frank and honorable conduct is much to be preferred. Obviously, the collective bargaining process is enhanced and fostered by encouraging the parties to continue dealing openly and directly. For that further reason, as well as because the reasons presented for deciding otherwise are not persuasive, the

wiser course here seems to counsel dismissal of the charges of unfair employee relations practices that have been filed in this case.

Respectfully submitted,



Arthur Brody, Hearing Officer