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

DECISION AND ORDER

This case concerns a charge filed by the Social Services Union, Local 535, SEIU (Union or Charging Party) against the Department of Children's Services (County or Respondent) alleging that the County had violated Sections 12(a)(1) and 12(a)(3) of the Employee Relations Ordinance (Ordinance) by unilaterally implementing a policy prohibiting employees from taking off more than five cumulative vacation or compensatory overtime days during the period March 1 to June 30, 1988. The Union also alleged that the policy was implemented in retaliation for the employees' exercise of rights protected by the Ordinance and as such constituted an independent violation of Section 12(a)(1).

The matter was duly referred to Hearing Officer Arthur Brody, who held hearings on May 4 and May 24, 1988. The parties appeared and were afforded full opportunity to offer argument, present relevant evidence, and examine and cross-examine witnesses. The parties submitted

post-hearing briefs. Hearing Officer Brody filed a Report with the Commission on September 15, 1988. The Charging Party submitted Exceptions to this Report on October 3, 1988. A statement in opposition to these Exceptions was received in the Commission's office on October 20, 1988.

With respect to the retaliation issue, the Hearing Officer found, and we agree, that the evidence failed to support the Union's contention that the County adopted the disputed policy for the purpose of retaliating against the affected employees.

Hearing Officer Brody further found that the County did not violate the Ordinance in its unilateral implementation of the vacation restriction. Although we agree with the Hearing Officer's ultimate conclusion, we are unable to completely adopt his underlying rationale.

In reaching his conclusion, the Hearing Officer essentially relied on a three-part test developed by the California Supreme Court in Teamsters Local 216 v. Farrell, 41 Cal. 3d 651, 121 LRRM 3479 (1986). The Union in its Exceptions asserted that the application of the third prong of this test in particular is unwarranted given the circumstances of this case. We find the Union's Exceptions in this regard to be well taken. Moreover, for the reasons set forth below, we find the application of the three-part test itself to be inappropriate in the instant factual context.

The issue before the Court in Farrell, as well as the various issues before the courts in the cases cited therein, can be aptly characterized as scope of negotiation questions. In Farrell, the Court was confronted with the unilateral elimination of a bargaining

unit position and the need to reconcile the scope of representation provision of the Meyers-Milias-Brown Act with the expressed exclusion therefrom of the "merits, necessity, or organization of any service or activity provided by law or executive order."[1] Similarly, the Court in First National Maintenance Corp. v. N.L.R.B., 452 U.S. 666, 107 LRRM 2705 (1980) was presented with an economically motivated attempt to close down part of a business which touched upon the very core of the employer's ability to operate. These cases as well as other cases cited by the Hearing Officer are clearly distinguishable from the instant matter wherein it is undisputed that the subject of vacation schedules is included within the scope of negotiation set forth in Section 6(b) of the Ordinance. As we found no basis in our review of these cases on which to extend the application of the three-part test to those disputes in which scope matters are not at issue, we find that the application of this test herein is unwarranted.

Nothwithstanding this conclusion, we find ample basis in the record evidence to support the Hearing Officer's conclusion that the implementation of the vacation restriction was not violative of the Ordinance.

It is well established that during the term of a collective bargaining agreement, negotiations are required on the implementation of a term or condition of employment absent a clear and unmistakable waiver of the union's rights to negotiate thereon. Here, the parties themselves in Section 1 of the Full Understanding, Modifications, Waiver

---

[1]Government Code Section 3504.

articles included in the pertinent Memoranda of Understanding (MOUs) have agreed to waive their rights to negotiate or to require the other party to negotiate with respect to any subject or matter covered by the MOUs. We do not hold that this language permits the County to unilaterally modify a specific term of the negotiated agreement. Rather, it precludes either party from requiring negotiations on a subject or matter on which they have previously reached agreement as reflected in the MOU.

The Union is also signatory to the Coalition Fringe Benefit MOU. Article 17 of this Agreement provides, in pertinent part, that "[n]othing in this Article diminishes the department head's authority to grant, schedule and defer vacation time." Our reading of this language compels the conclusion that the disputed vacation policy is a matter covered by the MOUs as contemplated by Section 1 of the Full Understanding articles.

The Coalition in negotiations for the 1985 Fringe Benefits Agreement attempted without success to first delete and then modify the above-quoted language (H.O. Report, p.5). Hence, the Union as a signatory to that Agreement fully explored this matter and consciously yielded to the County's demand that it retain the right to "grant, schedule and defer" vacations. It should further be noted that there is no expressed or implied restrictions in the contractual language limiting the department head's authority in vacation scheduling matters to individual employee requests. The fact that the County had not previously exercised its rights on a department-wide basis does not serve to now require the County to negotiate on rights which it had secured in the collective bargaining agreement.

For the foregoing reasons, we find that the Union has clearly and unmistakably waived its rights to negotiate on the vacation restriction policy. We therefore are compelled to conclude that the County did not violate Sections 12(a)(1) and 12(a)(3) of the Ordinance when it unilaterally implemented this policy.

The conclusions reached above with respect to both the issues of retailiation and the County's refusal to negotiate on the vacation restrictions are not entirely dispositive of the instant charge, for the policy as implemented placed similar restrictions on the use of compensatory overtime days. Although this issue was placed before the Hearing Officer, he failed to make any specific findings and recommendations thereon. When such findings and recommendations are not made and when confronted with a less than precise record as is the case herein, the Commission's usual practice is to remand the matter to the Hearing Officer. However, a number of factors weigh against either remand or the Commission making its own findings and conclusions on the compensatory overtime question. These may be enumerated in no particular order as follow: 1) Neither party excepted to the Hearing Officer's failure to address the matter, 2) the matter is pragmatically moot as the restrictions on the use of compensatory overtime days have been lifted, and 3) an arbitration filed by the Union is pending on this very issue.

For the above reasons, and particularly noting that the Union has access to arbitral review of the compensatory overtime issue, we find it appropriate to neither remand the matter to the Hearing Officer nor decide the question of whether the County's unilateral implementation of restrictions on the use of compensatory overtime was violative of the

Ordinance. Hence, the following Order is limited solely to the retaliation allegation and the propriety of the implementation of the policy with respect to vacation time.

O R D E R

The County did not violate Sections 12(a)(1) and 12(a)(3) of the Employee Relations Ordinance. Charge UFC 10.32 is therefore dismissed.

DATED at Los Angeles, California, this 2nd day of December, 1988.

JOSEPH F. GENTILE, Chairman

PAUL K. DOYLE, Commissioner

ROBERT D. STEINBERG, Commissioner

Ordinance. Hence, the following Order is limited solely to the retaliation allegation and the propriety of the implementation of the policy with respect to vacation time.

O R D E R

The County did not violate Sections 12(a)(1) and 12(a)(3) of the Employee Relations Ordinance. Charge UFC 10.32 is therefore dismissed.

DATED at Los Angeles, California, this 2nd day of December, 1988.

JOSEPH E. GENTILE, Chairman

PAUL K. DOYLE, Commissioner

ROBERT D. STEINBERG, Commissioner