LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

In the Matter of	)	
COUNTY OF LOS ANGELES	)	
Charging Party	)	UFC 12.1
and	)	
LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, SEIU, LOCAL 660, AFL-CIO	)	
Respondent	)	DECISION AND ORDER

APPEARANCES: JOHN D. MAHARG, County Counsel, by Larry A. Curtis, Deputy County Counsel, Attorneys for Charging Party

GEFFNER & SATZMAN, by Leo Geffner, Attorneys for Respondent

BACKGROUND

This Commission has been asked to determine the validity of an unfair employee relations practice charge filed under the Los Angeles County Employee Relations Ordinance by the County of Los Angeles against the Los Angeles County Employees Association, SEIU, Local 660, AFL-CIO. The respondent Union has been certified by the Commission as the majority representative of certain clerical employees and as part of a joint council representing social service investigatory employees of the Los Angeles County Department of Public Social Services (DPSS).

The essence of the County's charge is that the Union, instead of negotiating with County management at the bargaining table, brought about

a work stoppage in the form of a concerted sick-out on March 13, 1972 and thereby unlawfully refused to negotiate with the County. Section 12 (b)(2) of the Ordinance[1/] is cited by the County as having been violated by the Union's conduct.

The Union filed an answer denying all allegations in the charge and alleging, by way of an affirmative defense, that the County violated Section 12(a)(3) of the Ordinance by unlawfully refusing to negotiate with the Union.[2/] A hearing was held before the Commission and both sides subsequently filed briefs.

The Issues

The record before us suggests the following issues for the Commission's consideration:

(1) Was there a sick-out?

(2) If so, did the Union precipitate, take part in, or encourage the sick-out?

(3) If so, did the Union thereby unlawfully refuse

1/ Section 12(b)(2) of the Ordinance provides:

(b) It shall be an unfair employee relations practice for employee organizations or their representatives or members:

...

(2) To refuse to negotiate with County officials on negotiable matters, when the employee organization involved has been certified as the majority representative.

2/ Section 12(a)(3) of the Ordinance provides:

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

...

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

to negotiate within the meaning of Section 12 (b)(2) of the Employee Relations Ordinance? 3/

The "Sick-Out"

We think the evidence clearly establishes that a sick-out occurred in the Department of Public Social Services on Monday, March 13, 1972 when a total of 1,123 employees of various bureaus within the department were absent on grounds of sickness. The average number of absences due to sickness on the four previous Mondays was 679. Thus, the DPSS absentee rate on March 13, 1972 was 39.5 percent above normal, with absenteeism due to reported sickness in various bureaus of the department ranging from 18.8 to 44 percent above normal.

While vigorously denying responsibility for the sick-out, the Union scarcely denies that a sick-out took place. Only in its brief to this Commission did the Union contend that the County's absentee records do not satisfy the County's burden of proving that a sick-out occurred on March 13, 1972. The Union's answer neither denies nor admits this aspect of the charge, but Union correspondence to its members, justifying the sick-out on the basis of employee discontent over the County's failure to negotiate on the subject of workloads for DPSS Eligibility Work-

3/ The Union's affirmative defense, accusing the County of unlawfully refusing to negotiate, is also at issue, but only insofar as it might constitute a defense to the County's refusal-to-negotiate charge against the Union.

ers,[4/] constitutes more than a tacit admission that a sick-out occurred. We accordingly find that a concerted sick-out did take place on March 13, 1972 and we next determine what role, if any, the Union played in encouraging, assisting or instigating it.

Albert Plotkins, a field representative for the Union, testified that while attending a Union meeting of County Eligibility Workers at the Embassy Auditorium in Los Angeles the evening of Thursday, March 9, 1972, he received copies of a leaflet with the word "MONDAY!" in large block letters at the top and a drawing of 32 empty desks in a room. The undisguised import of the leaflet was to strongly suggest that DPSS employees should absent themselves from work the following Monday, March 13.

4/ A Union newsletter of March 15, 1972 entitled "FLASH" was received in evidence without objection. It reads as follows:

LET'S GET IT STRAIGHT

County Management says that your sickout was insulting, uncalled for, and a breach of good faith. Nonsense. That's pap for the press. Management knows better. They know it's their own unwillingness to negotiate caseloads despite orders from the Employee Relations Commission and the Superior Court .....their nickel an hour wage offer .....and the song and dance they're trying to pass off as negotiating that's insulting and a breach of good faith.

It's no secret where the fault lies--it lies with Management. When the employees called in sick they put Management on notice: No longer will evasion, negation, and callous disregard be tolerated.

The issues are clear. Caseloads and wages. DPSS went out in support of no one--they went out for their OWN concerns.

So forget about the rumors and misquotes. Local 660 unequivocally backs the employees 100%. It always has, it always will. Period.

Plotkins testified that the Eligibility Workers attending the March 9 meeting were upset because of the County's position of refusing to negotiate with the Union on the subject of Eligibility Workers' caseloads. Plotkins admitted distributing a three-inch-thick sheaf of the leaflets the following day, Friday, March 10, at DPSS offices in West Los Angeles, Panorama City and Burbank. He further admitted discussing the leaflet with DPSS employees at the Burbank office and telling them what had taken place at the Eligibility Workers' meeting the evening before. We think this evidence falls short of proof that the Union instigated the sick-out. At the same time, however, it clearly establishes that the Union took part in the preparations for the sick-out. The Union is responsible for the conduct of its agents acting within the scope of their employment, as was Field Representative Plotkins when he collected and distributed sick-out leaflets, and when he spoke to DPSS employees about the leaflets. We accordingly find that the Union encouraged and induced employees to participate in the sick-out and thus bears at least partial responsibility for it. It remains to be determined whether, under that circumstance, the Union violated Section 12(b)(2) of the Ordinance by refusing to negotiate with the County.

DECISION

I

We note at the outset that the Commission's authority to resolve

unfair employee relations practice charges under the Employee Relations Ordinance is limited to an interpretation of that Ordinance. It is for the courts, and not this Commission, to decide whether the sick-out violated California State decisional or statutory law.

Because strikes and work stoppages by public employees have been declared illegal under California common law,[5/] the County might have petitioned a court for injunctive relief but chose not to do so. This Commission is not only without authority to determine what violates the common law of California; it is also without authority in any case to grant injunctive relief to anyone. Injunctive power is vested exclusively in the courts and uniformly denied to all administrative agencies, including those, such as this Commission, of a quasi-judicial nature. Nor have we been asked to decide whether the Union's responsibility for the sick-out violated any provision of the Employee Relations Ordinance other than the refusal-to-negotiate provision found in Section 12(b)(2).[6/] Thus, the record presents us with a finely circumscribed question of law.

5/ California appellate courts have consistently held that even in the absence of a prohibitory statute, California public employees have no right to strike. See City of San Diego v. Local 127, American Federation of State, County and Municipal Employees, 8 Cal.App.3d 308, 74 LRRM 2407 (1970); Almond v. County of Sacramento, 276 Cal.App.2d 32, 72 LRRM 2182 (1969) (hearing den.); City of Los Angeles v. Los Angeles Building and Construction Trades Council, 94 Cal.App.2d 36, 25 LRRM 2008 (1949) (hearing den.).

6/ The County's original charge alleged that the Union's participation in the sick-out violated Section 12(b)(1) of the Ordinance in that:

> [T]he actions of the Union in urging concerted activities by employees of the County of Los Angeles have intimidated non-union

(continued)

II

On June 25, 1971 this Commission held that the County violated the Ordinance by refusing to negotiate with this union and another local of the SEIU on the subject of Eligibility Workers' caseloads.[7] The County refused to comply with the Commission's order and has since appealed from a decision of the Superior Court ordering the County to comply with our order in that case.[8] This background is important to an understanding of what we decide in this case. For the County argues here that the Union's participation in the sick-out was for the purpose of giving support to an "unlawful bargaining demand" that the County negotiate with the Union on the subject of Eligibility Workers' caseloads; and that union participation in a work stoppage in support of an unlawful bargaining demand is an unlawful refusal to negotiate under Section 12(b)(2) of the Ordinance. We are unable to agree with the County's theory.

> members in the exercise of their rights of self-representation as guaranteed by . . . the Employee Relations Ordinance. Pressures placed upon these employees by the oral statements of the union and by its circulation of flyers urging concerted activities on Monday, March 13, 1972, having induced in non-members the fear of reprisals or censure from members or officers of the union if such non-members did not join or participate in the concerted action as urged by the union.

At the hearing before the Commission on April 17, 1972, the County's charge was amended to delete all references to a Section 12(b)(1) violation based on the sick-out's coercive effect on other employees. The amended charge left standing the County's charge that under Section 12(b)(2) of the Ordinance the Union's conduct was an unlawful refusal to negotiate.

7/ Joint Council of Los Angeles County Employees Association and SEIU, Local 535 and Los Angeles County Department of Public Social Services, UFC 55.3 (1971). The decision is reported in California Public Employee Relations, CPER Series No. 10 (Aug. 1971) pp. 49-52.

8/ Superior Court No. C-16791 (January 31, 1972).

To support it, private sector cases decided by the National Labor Relations Board and federal courts interpreting the National Labor Relations Act[9] are cited by the County.[10] We agree with County Counsel's view that similarities between the refusal to negotiate sections of the County Employee Relations Ordinance[11] and the National Labor Relations Act[12] require that we look to that Act's decisions as nonbinding precedents that are nonetheless useful as threshold analogies.

The NLRB and the federal courts have held that a strike or work stoppage in support of an unlawful bargaining demand is an unlawful refusal to bargain under the National Labor Relations Act. Thus, a union has been held in violation of the refusal to bargain section of the National Labor Relations Act by engaging in a strike to compel an employer to include in the collective bargaining agreement a clause (invalid under Section 8(e) of the same Act)[13] that the employer will not handle or purchase goods produced

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9/ The parallel sections of the National Labor Relations Act are Section 8(a)(5), 29 U.S.C. § 158(a)(5), which provides:

> It shall be an unfair labor practice for an employer . . .
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

and Section 8(b)(3), 29 U.S.C. § 158(b)(3), which provides:

> It shall be an unfair labor practice for a labor organization or its agents . . .
> (3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

10/ Charging Party's Hearing Memorandum, p. 8.

11/ Notes 1, 2 supra.

12/ Note 9 supra.

13/ Section 8(e) of the National Labor Relations Act, 29 U.S.C. § 158(e) provides in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express

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by nonunion labor.[14/] We think that under the Los Angeles County Employee Relations Ordinance, a strike in support of an unlawful union bargaining demand would similarly constitute an unlawful refusal to negotiate. But in this case we find no unlawful bargaining demand by the Union. The sick-out was carried out in support of the Union's longstanding request that the County negotiate with the Union on the subject of caseloads for Eligibility Workers. Having already held that the County unlawfully took the position that the subject of caseloads for Eligibility Workers is not negotiable, [15/] we reject the argument that the Union's request to negotiate Eligibility Workers' caseloads was an unlawful bargaining demand.

In that decision we said that caseloads for Eligibility Workers was a negotiable matter within the meaning of Section 6(b) of the Ordinance, which defines the "scope of negotiation" under the Ordinance as including "wages, hours and other terms and conditions of employment . . . ." We explained the reasons for our view as follows:

> We think that the subject of a maximum caseload has a clear and direct relationship to an Eligibility Worker's conditions of employment. The rate at which their work is performed as well as the amount of work they perform within a given unit of time depend upon the number of cases assigned to them.

> or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

14/ Retail Clerks International Association, Local No. 1288, AFL-CIO v. NLRB, 390 F.2d 858 (C.A.D.C.1968), 67 LRRM 2295; NLRB v. Muskegon Bricklayers Union No. 5 (C.A. 6, 1967), 378 F.2d 859, 865; 65 LRRM 2563.

15/ Note 7 supra.

> Whether and to what extent that number might be beyond the capacity of the average Eligibility Worker to perform, whether that number is generally equitable or inequitable, excessive or moderate, are matters which are inseparable from the concept of working conditions. These are but examples of the kinds of questions concerning which the Ordinance binds the parties in this dispute to attempt to resolve through negotiations. The subject of workloads for Eligibility Workers may not be equated with routine job directions or detailed decisions relating to the manner in which work is to be performed. In those areas and of course other areas, there is no duty to negotiate.16/

We also pointed out that our decision did not mean that the County was bound to make a concession to the Union on the subject of caseloads, but did mean that the County was bound to make a good faith attempt to reach an agreement with the Union on the subject.17/ The County now argues that the effect of its appeal from the Superior Court's decision was to stay the writ of mandate pending the outcome of the appeal; that the stay means that the Union's caseloads demand "amounted to coercion of [the County] to undertake an act which it had no legal obligation to do."18/

We think the effect of the stay was to maintain the status quo pending resolution of the County's appeal.19/ To us, this means that the enforcement of our order in the Eligibility Workers' case has been held in abeyance; it does not mean that that decision has been set aside in advance of the outcome of the appeal. Nor do we see the stay as affecting our view of the present case, where the issue of the negotiability of caseloads is not before

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16/ Note 7 supra at 51.

17/ Note 7 supra at 52. Section 3(o) of the Ordinance provides that the obligation to negotiate "does not compel either party to agree to a proposal or to make a concession."

18/ Charging Party's Closing Brief, p.6.

19/See Barnhart v. Edwards, 128 C. 572, 61 P. 176 (1900) and CCCP §1094.5(f).

us in the posture of a charge by the Union but in the entirely different posture of an element of the County's case against the Union. We conclude that the stay does not affect our view that the Union made no unlawful bargaining demand.

III

The County has a second major argument in support of the charge. It maintains that the Union unlawfully refused to bargain by taking concerted action "for the purpose of coercing the employer's posture during negotiations."[20/] This argument differs materially from the County's first in that it is not based on the Union having made an unlawful bargaining demand. It presupposes, for argument's sake, that the Union's demand was lawful but that the concerted action to require the County to bargain on such demands was unlawful. The County concludes that the combination of the Union's caseloads demand and an unlawful sick-out to support it constitutes an unlawful refusal to bargain.

Even if a court agreed with the County's argument that this sick-out was unlawful under California common law,[21/] we would be unable to agree that the Union unlawfully refused to bargain by engaging in that action. In support of its position, the County relies heavily upon a private sector

20/ Charging Party's Closing Brief, p. 5.

21/ See City of San Diego v. American Federation of State, County and Municipal Employees, 8 Cal.App.3d 308, 74 LRRM 2407 (1970).

precedent, Local No. 2, Amalgamated Lithographers of America, Buffalo, New York,[22] a 1959 National Labor Relations Board decision, holding that a union unlawfully refused to bargain by engaging in harrassing tactics for the purpose of compelling the employer to accept the union's legitimate bargaining demands. Had this decision remained viable we might well have been persuaded by it. But Amalgamated Lithographers, the NLRB case cited by the County, was later squarely overruled by the United States Supreme Court in NLRB v. Insurance Agents' Union.[23] There the Supreme Court held that a union did not violate Section 8(b)(3), the refusal to bargain section of the National Labor Relations Act, by engaging in "slow-down" and "sit-in" tactics in support of its bargaining demands, even though the employees' conduct was such that the employer "could have discharged or taken other appropriate disciplinary action against the employees . . . ."[24] In part, the Supreme Court reasoned:

> The [NLRB] contends that the distinction between a total strike and the conduct at bar is that a total strike is a concerted activity protected against employer interference by §§ 7 and 8(a)(1) of the Act, while the activity at bar is not a protected concerted activity. We may agree arguendo with the Board that this Court's decision in the Briggs-Stratton case, International Union, U.A.W., A.F. of L., Local 232 v. Wisconsin Employers Relation Board, 336 U.S. 245 . . . establishes that the employee conduct here was not a protected concerted activity. On this assumption the employer could have discharged or taken other appropriate disciplinary action against the employees participating in these "slow-down," "sit-in," and arguably unprotected disloyal tactics . . . . But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith. The reason why the ordinary economic strike

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22/ 124 NLRB 298, 44 LRRM 1360 (1959).
23/ 361 U.S. 477, 45 LRRM 2704 (1960).
24/ 361 U.S. 477 at 493, 45 LRRM 2704 at 2711 (1960).

> is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining.[25/]

In that case, as well as the one before us, the Union remained at the bargaining table during the concerted action in an effort to reach an agreement with the employer.[26/]

We might perceive a meaningful distinction between NLRB v. Insurance Agents' Union and this case on the theory that here the Union's conduct may have been in violation of California law[27/] and hence something more than conduct merely unprotected from employer disciplinary action. We think, though, that this case need not be decided on the basis of that subtle distinction and we do not so decide. We think the Union's affirmative defense controls this case.

Our caseloads decision is more than a negation of the County's assertion that the Union's caseloads demand was unlawful; it also constitutes a defense to the County's allegation that a concerted sick-out in support of a lawful bargaining demand is an unlawful refusal to negotiate. We think it is a complete defense to the County's charge. The Ordinance pro-

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25/ 361 U.S. 477 at 392, 45 LRRM 2704 at 2710 (1960).

26/ Pursuant to Commission rule 7.03, a notice of impasse was filed by the Union on March 15, 1972 for the unit of Clerical and Office Services employees. It indicates that the parties met at the bargaining table on January 31, February 7, 14 and 28, March 6 and 13, 1972. A notice of impasse was filed by the Union on March 23, 1972 for the Social Services Investigatory employees. It indicates that the parties met for negotiations on March 7, 16 and 23, 1972.

27/ See City of San Diego v. American Federation of State, County and Municipal Employees, 8 Cal.App.3d 308, 74 LRRM 2407 (1970).

vides for mediation and fact finding as strike-substitute devices through which deadlocks at the bargaining table might be resolved peacefully.[28/] But mediation and fact finding may not be invoked until both the County and a union representing County employees at the bargaining table first make a mutual attempt to negotiate and then find that despite their efforts they are at impasse. In this case there was no such mutual effort because the County refused to begin negotiations on the subject of Eligibility Workers' caseloads. Thus, there was no threshold basis upon which mediation or fact finding might have been invoked as a possible means of resolving the merits of that dispute.

We are unprepared to say that the Union unlawfully refused to negotiate by engaging in conduct stemming directly from the County's unlawful refusal to negotiate.[29/] It follows that the charge should be dismissed.

ORDER

The charge is dismissed.

Dated: August 25, 1972

Ben Nathanson, Chairman

Reginald H. Alleyne, Jr., Commissioner

Irving Helbling, Commissioner

28/ Los Angeles County Ordinance No. 9646, Section 13.

29/ Even in jurisdictions where, unlike Los Angeles County, laws governing (continued)

employee relations explicitly make a strike or work stoppage an unfair employee relations practice, a strike or work stoppage precipitated by the public employer's violation of the governing employee relations law is a defense to a charge that the strike or work stoppage violated the law. See, e.g., Board of Trustees of Ulster County Community College and Ulster County Legislature and Ulster County Community College Faculty, Case Nos. U-0144 and D-0046 (N.Y.PERB, December 13, 1971), GERR No. 440, B-9 (Feb. 21, 1972).