

LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

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EMPLOYEE RELATIONS
COMMISSION
APR 5 1983

In the Matter of)	
)	
ASSOCIATION FOR LOS ANGELES)	
DEPUTY SHERIFFS (ALADS),)	
)	
Charging Party)	
)	
v.)	UFC 14.21
)	
SHERMAN BLOCK, SHERIFF OF)	
LOS ANGELES COUNTY,)	
)	
Respondent)	
)	
)	

Appearances:

For the Charging Party:	Richard A. Shinee Stillman, Furay, Green & Shinee
For the Respondent:	Alan K. Terakawa Deputy County Counsel Labor Relations Department County of Los Angeles

REPORT OF THE HEARING OFFICER

The Undersigned was appointed to serve as Hearing Officer in the above styled matter in which the Charging Party alleges the commission of an unfair employee relations practice by the Respondent. The Charging Party on May 6, 1982, filed an Unfair Employee Relations Charge against the Respondent. The Respondent on August 26, 1982, pursuant to the Commission Rules and Regulations, filed an answer to the charge, denying that it committed an unfair employee relations practice. Specifically, the answer denies that the County refused to negotiate with ALADS on negotiable matters, and denies that it made a change in

past practice as set out in ALADS' charge. The Respondent in its answer admits to implementation of shift rotation. On August 16, 1982, the Commission, through its Executive Officer, Walter F. Daugherty, executed a notice of hearing in the matter, and said hearing took place in Room 374-L, of the Hall of Administration, Los Angeles, California, on November 30, 1982, at which time the parties appeared and were afforded opportunity to offer evidence and arguments. Upon agreement of the parties, the time for filing briefs of the parties was extended to February 28, 1983. Briefs were transmitted to the Hearing Officer via the Executive Officer with the Hearing Officer receiving the Respondent's "Reply to Charging Party's Post-Hearing Brief" on March 11, 1983. Upon the receipt of this last post-hearing brief, the hearing was considered officially closed with the Hearing Officer's report being due on or before April 11, 1983. The Undersigned, having considered all the evidence and arguments offered by the parties, submits this report in accordance with Rule 610 of the revised Commission's Rules and Regulations.

The Issues

While the parties did not specifically indicate an issue to be decided by the Hearing Officer, it is apparent that the appropriate issue addresses whether the action of the Respondent in instituting a mandatory rotating shift assignment plan violated Section 12 (A)(3) of the Employee Relations Ordinance. This particular section of the ERO states that it shall be an unfair employee relations practice for the County "To refuse to negotiate with representatives of certified employee organizations on negotiable matters."

Summary of Facts

While there is radical difference between the positions of the parties in characterizing certain factual aspects of this matter, it appears that the primary action that precipitated the Unfair Employee Relations Charge is not basically disputed. In 1977, the Sheriff's Department assumed the responsibilities for law enforcement in the City of Lynwood, and at this time a Sheriff's Substation was established and manned by Sheriff's Department personnel.

In March, 1982, the Sheriff's Department communicated its plans to initiate a mandatory shift rotation policy where all employees would work on rotating shifts. The plan did provide for adjustments to the rotating shift schedule in the event of hardship or special circumstances. The ALADS indicated by letter on April 2, 1982, to Sheriff Block that it considered the proposed institution of the mandatory rotating shift schedule to be a unilateral change in working conditions in violation of the pertinent government code sections without the ALADS being afforded an opportunity to meet and confer prior to the implementation of the new plan. The Sheriff's Department indicated that it did not consider the matter to be a "meet and confer" item but did indicate a willingness to consult concerning the matter. The ALADS did not file a grievance in this regard but filed the Unfair Labor Practice Charge alleging refusal to negotiate in violation of the ERO. The mandatory rotating shift plan was put into effect in May, 1982.

Position of the Charging Party

The change in working hours relating to shift assignment is a mandatory subject to bargaining and requires prior notice and an opportunity to meet and confer prior to implementation of said change. The Charging Party indicates that the action is in violation of the Employee Relations Ordinance and since the action by the Sheriff fell within the scope of representation as defined in

Government Code 3504 and the prior notice was not given as required in Government Code §§ 3504.5 and 3505. The Charging Party presented evidence to indicate the impact of the change on the scheduling of employees at the substation. Such evidence was designed to show that, prior to the implementation of the mandatory rotating shift scheme, employees were given a wide berth in requesting shifts of their choice, and that generally a flexible plan was exercised by the substation in scheduling of employees. The effect of such change in the scheduling plan indicated that many employees were no longer able to work their shifts of preference and that such caused hardships in regard to various aspects of the personal lives of the affected employees.

Shift assignments are within the scope of representation and, as such, become a mandatory subject for "meet and confer." Further, the requirement of mandatory shift rotation has a material and significant effect on the hours and working conditions of the Bargaining Unit employees. The Charging Party had no duty to seek negotiations over the impact of the change after the Sheriff's Department had failed to notify or meet and confer with the Charging Party as required by the various statutory provisions.

Article 24 (B) of the MOU did not waive the Charging Party's rights to bargain regarding wages, hours and working conditions during the term of the contract when the Respondent unilaterally changed these working conditions. In view of the nature of the unilateral action of the County in changing the past practices and working conditions involved, the Union had no obligation to file a grievance or to pursue the matter to arbitration since it was clearly an Unfair Employee Relations Practice.

Position of the Respondent

Establishing a mandatory shift rotation policy is not a "meet and confer" matter and is not within the scope of representation. Such action by the County in changing the shifts is a management prerogative, and even the impact of such changes is not subject to the "meet and confer" provisions of the appropriate statutes. At most, the impact of the management decision, if there was any, would be the only issue subject to negotiation and not the decision to institute the mandatory rotating shift plan itself. Under the evidence as presented at the hearing no such material impact can be shown on the affected employees.

Even if the establishment of a mandatory shift rotation policy were within the scope of representation, any obligation to negotiate was unequivocally waived by the Charging Party under the pertinent Memorandum of Understanding. Even if there were no waiver, the only requirement to negotiate under the Employee Relations Ordinance has already been fulfilled as reflected by the work schedule article in the MOU, with which the mandatory shift rotation policy is consistent. Since an interpretation of a clause of the Memorandum of Understanding is affected, the appropriate action for the Charging Party was to file a grievance and to seek resolution by the arbitration process. The Charging Party precluded itself from any meaningful opportunities to lessen the impact on the Bargaining Unit by virtue of the fact that the Charging Party elected to stand on its rights and pursue an Unfair Labor Practice Charge.

There was no material impact on the working conditions involved since evidence did not establish any past practice that was altered by the Respondent's change in instituting the mandatory rotating shift plan. The Respondent had been willing to consult with the Charging Party, but this offer was ignored. If the Charging Party had chosen to consult, any legitimate grievance in terms of the "impact" of the mandatory shift rotation policy could likely have been resolved.

Only the "impact" of Management's decision to assign its employees to meet departmental needs must be negotiated and only if such impact materially affects the rights of departmental employees under law by virtue of the Meyers-Miliias-Brown Act. The mandatory shift rotation policy had no such effect if it has any impact at all.

Discussion

Initially, it is observed that the reasons behind the Respondent's decision to institute the mandatory rotating shift plan appear to be valid. These address training, opportunity of evaluation, and overtime distribution. At issue here, however, is the right of the Respondent to institute these changes without first giving notice as required under the appropriate statutes and meeting and conferring concerning the impact of the change.

A threshold consideration is whether the change to a mandatory rotating shift plan would be an area that would be of a mandatory nature from the standpoint of negotiation and would be within the scope of representation. The Respondent indicates that this is a "management" type decision that is outside the scope of duty to negotiate.

Government Code 3504 dealing with the scope of representation addresses the familiar terms in describing the duty to negotiate as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment."

It appears clear to the Hearing Officer that the change to the mandatory rotating shift plan would be one that would squarely fall within the "hours" provision of the statute as well as the more general terms involving "other terms and conditions of employment." This type of matter is not eliminated from the negotiable area of items under the provision of Section 3504 that indicates

"the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

The matter of the hours of assignment of work shifts and how they will be assigned fall traditionally within the area of negotiable items. Indeed, such matters are frequently addressed in collective bargaining agreements or in other results of collective bargaining.

The only section of the Memorandum of Understanding (Joint Exhibit #1) that appears to be close to addressing this is Article 11, which is entitled "Work Schedule." However, this particular section only addresses the number of hours that shall be in the work days and an indication of the one half-hour meal break. This section of the Memorandum of Understanding does not preempt the actual scheduling of employees from being considered as a negotiable item. The actual scheduling of the employees is simply not addressed in the Memorandum of Understanding. The fact that it is not addressed does not give the Respondent the unilateral right to make changes in this negotiable area without meeting the statutory requirements concerning notice and "meet and confer." Such decisions are not "management" decisions that are eliminated from the purview of the duty to negotiate.

A pertinent issue is whether there is really a material impact on the working conditions which would indicate that the matter was subject to being negotiated. There was a great deal of evidence presented at the hearing relative to the various effects of the new plan as opposed to the previous arrangement. Without going into minute detail contrasting the two plans, it appears apparent to the Hearing Officer that there was indeed a significant effect or impact upon the working conditions resulted from the institution of the mandatory shift rotation plan. At the minimum, the plan that existed prior to the institution

of the new plan, was one that provided a maximum of flexibility in which great emphasis was given upon allowing employees to work their preferred shift. Testimony indicated that approximately 50% of the employees were able to work their preferred shift under the old plan. Obviously, this degree of flexibility was not possible under the new mandatory rotating shift plan. Further, in connection with this, there appears to be little doubt that under the old plan some employees were able to gain more overtime than others. This is not to suggest the old plan was necessarily a bad plan but merely to indicate that the change that was effected by the new mandatory rotating shift policy did make a dramatic change in the working conditions in connection to shift assignments. This is true even though the new plan made some allowances for alleviating hardship or special circumstances. At the minimum there was a basic and fundamental and material change in the working conditions of the affected employees that resulted from the new mandatory shift rotation system.

Next in consideration should be the effect of the "waiver" or "zipper" clause set out in Article 24 of the Memorandum of Understanding. Specifically, Article 24 (B) indicates "except as specifically provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its rights and agrees that the other party shall not be required to negotiate with respect to any other matters within the scope of negotiations during the term of this Memorandum of Understanding."

The interpretation of the Respondent in this matter is that even if the action were found to be in the negotiable area and to have a material impact on the working conditions of the employees, the Charging Party had waived any right it had to negotiate concerning the unilateral change because of Article 24 (B). To support this particular position the Respondent has cited an unpublished Court of Appeal decision, which on the face of it, substantiates the position

that was taken in regard to the interpretation of the waiver clause. While the same parties were involved, this matter arose under a different Memorandum of Understanding. The Court in that case, in upholding a broad interpretation of the zipper clause, made that following statement: "The trial court specifically found that the agreement was openly arrived at and fairly bargained, and the County made both economic and non-economic concessions in exchange for the Association's acceptance for a 'tight zipper [waiver] clause.' We agree that the trial court under the language of the 'zipper clause' and the County and the Sheriff's Department were relieved of any duty they may have had to negotiate the conditions of terms of the incumbent deputies' employment in April or May 1977." (Association for Los Angeles Deputy Sheriffs v. Peter J. Pritchess, Sheriff, Los Angeles County Sheriff's Department; County of Los Angeles, Court of Appeal of the State of California, 2nd Appellate District, District 2, 2 Civil No. 56698 (June, 1980))).

On the other hand, the Charging Party indicates that this is an improper interpretation of the waiver clause and contests the res judicata claim that the Respondents have indicated as to the effect of the Court of Appeal decision. The Charging Party quotes a 1979 decision by the Los Angeles County Employee Relations Commission (UFC 9.11, Los Angeles County Professional Police Officers Association v. County of Los Angeles Sheriff's Department and Director of Personnel). In this decision, the Commission noted:

As we have heretofore held, the basic policy of the Ordinance is to promote a "meet and confer" process concerning terms and conditions of employment and no clause of an MOU may be interpreted to abandon or waive that process in the absence of clear and convincing evidence that the parties intended to restrict that process. Court decisions have upheld such waivers when the intention of the parties and the language used has been unequivocal. In this instance, there is no evidence whatsoever that the parties intended to waive negotiations on the physical agility test; and the language employed in the waiver clause (Article 24 B) referred to

matters "within the scope of negotiation." The interpretation of the PPOA that those words waive only matters previously negotiated appears reasonable and the record is devoid of any proof to the contrary. That interpretation is consistent with the policy of the ordinance, hence the Commission adopts it.

The effect of "waiver" or "zipper" clauses has been the subject of considerable controversy in both the private and public sectors. There are different interpretations that can be given to them. Generally, under the scheme of collective bargaining, the duty to bargain during the term of the collective bargaining continues concerning negotiable matters that are not "contained" in the agreement, i.e., matters that are specifically in the contract and those that were discussed at the negotiation table. The interpretation of the clause to achieve this effect provides that the parties put an end to the negotiation process at least for the term of the contract, and the clause primarily is aimed at the parties' not bringing up other items to negotiate during the term of the contract which were not negotiated. The interpretation that is adopted by the Commission treats the clause as waiving only matters previously negotiated.

On the other hand, the Respondent contends that the parties have no obligation to negotiate for any reason. Under this interpretation, the employer may make unilateral changes in working conditions that would normally require negotiations under the appropriate law or statute and the union cannot demand negotiations, even though such that would normally be a right guaranteed under the appropriate statute or ordinance. Of course, this particular viewpoint involves a waiver of an important statutory right that is found under the statutes or ordinances. While various administrative and judicial bodies have interpreted such clauses in different ways, it has frequently been held that before a waiver of such a basic right under the appropriate law is recognized, there must be clear and convincing evidence that the employees' representatives were cognizant

of the fact that they were negotiating away a basic statutory right. This is the policy that is addressed in the 1979 decision of the Commission previously mentioned. The Commission recognizes a strong basis for the purpose of the ordinance is to promote a "meet and confer" process and a waiver of the rights in that regard will only be recognized where it is unequivocal and there is clear and convincing evidence that the parties intended to so restrict that process.

It appears that since a different matter is involved in the Court of Appeal decision that was cited by the Respondent, and a separate MOU was involved, that there is no solid basis for arguing that it is res judicata in this particular matter. Further, the Court of Appeal in its decision takes specific note that evidence was received that the waiver was arrived at openly and fairly bargained for and that both economic and non-economic concessions were made in exchange for the sweeping "zipper" clause. It is noted in this particular case that a separate Memorandum of Understanding is involved, and there was no showing of any evidence in the collective bargaining process that the Charging Party willingly or at least even knowingly negotiated away the basic "meet and confer" rights that are its under the appropriate statutes and ordinances. It occurs to the Hearing Officer that the burden of showing such clear and convincing evidence in regard to the actual effect of the waiver clause in the bargaining process is upon the party that is seeking to use it to substantiate its position that the rights have been waived. The burden is not upon the Charging Party to show that such clear and convincing evidence did not exist in connection with the waiver of the basic "meet and confer" rights under the Agreement. For this reason alone, it would appear since a separate Memorandum of Understanding was involved in this case, involving a separate period of collective bargaining, that the Court of Appeal case could not be held to be binding in this particular matter

in view of the specific basis upon which the judge in that case based his holding, i.e., the clear and convincing evidence of the understanding of and bargaining for the broad waiver by the Charging Party.

For this reason, the Hearing Officer does not find that the Respondent had a right under the Memorandum of Understanding to take unilateral actions that materially affected the working conditions of the affected employees without satisfying the various "meet and confer" and notice provisions of the appropriate statutes and ordinances.

Further, it would appear in this matter that the Charging Party did not waive any of its rights or proceeded in an improper way in filing the Unfair Labor Practice Charge as opposed to filing a grievance and pursuing the matter to arbitration. Arguably, almost any Unfair Labor Practice Charge could involve the interpretation of the application of some aspect of the collective bargaining agreement. Yet, few would contend that all Unfair Labor Practices disputes should be resolved in the arbitration forum. It is noted that the Commission now has a arbitral deferral policy which is spelled out in detail in its revised Rules. If the Commission, in its wisdom, wishes to defer this matter to arbitration it will be free to do so. However, it cannot be indicated that the Charging Party acted improperly in filing the Unfair Labor Practices Charge in this matter, since it was apparent that the question of failure to negotiate a negotiable item is clearly the type of matter that is traditionally resolved in the Unfair Employee Relations Practice procedure rather than the forum of arbitration.

For the reasons heretofore stated, the Hearing Officer does find that the mandatory rotating shift plan that was instituted by the Respondent was a negotiable item about which it had a duty to give notice and to negotiate with the Charging Party. In this finding, the Hearing Officer specifically notes

that the mandatory rotating shift institution was not a matter that was exclusively within the prerogative of Management. Further, the Hearing Officer finds that the impact on the affected employees in instituting the plan was of a material nature, further indicating the obligation of the Respondent to "meet and confer." The Hearing Officer further finds and decides that it was improper for the Respondent to refuse to negotiate or meet and confer in regard to its decision in this matter since the Charging Party had not waived its rights in regard to the duty of the Respondent to meet and confer when the Respondent made unilateral material changes in working conditions. The Hearing Officer further finds that the matter was properly approached as an Unfair Employee Relations Practice Charge and that the Charging Party waived no rights and did not proceed improperly in filing it in this form as opposed to arbitration.

Recommendation

Having concluded that the action of the County-Respondent did violate Section 12 (A) (3) of the Employee Relations Ordinance, it is recommended that the Commission direct the Respondent to restore the status quo ante and issue a cease and desist order requiring the Respondent to meet and confer concerning the mandatory shift rotation policy.

Respectfully Submitted,

Date

April 1, 1983

R. Wayne Estes

R. WAYNE ESTES

Hearing Officer