

EMPLOYEE RELATIONS  
COMMISSION

OCT 4 - 1983

In the matter of

ASSOCIATION FOR LOS ANGELES  
DEPUTY SHERIFFS (ALADS)

Charging Party

and

SHERIFF'S DEPARTMENT, COUNTY  
OF LOS ANGELES

Respondent

UFC 14.23

October 3, 1983

Hearing Officer's Report  
and Recommended Order

I. Statement of the Case

Based on a charge originally filed on January 4, 1983 and amended on April 20, 1983, by the Association for Los Angeles Deputy Sheriffs, herein called the Charging Party or ALADS, the Executive Officer of the Los Angeles County Employee Relations Commission issued a notice of hearing on June 16, 1983 regarding the Charging Party's allegation that the sheriff's Department, County of Los Angeles, herein called the Respondent, committed an unfair employee relations practice in violation of Section 12 (a)(1) and (2) of the Employee Relations Ordinance, herein called the Ordinance, (1) by on or about October 15, 1983,

denying an employee's request for an ALADS representative during an examination in connection with an investigation that the employee reasonably believed could result in discipline, and (2) by issuing on April 12, 1983 a formal written reprimand to an employee because of his protected activity on behalf of ALADS. By letter of June 20, 1983 Respondent denied the violations alleged. A hearing into this matter was conducted by the undersigned on July 25, 1983 at which time the parties had an opportunity to present evidence and to cross examine witnesses. August 25, 1983 was set for the submission of briefs and both parties timely filed briefs. Appearing on behalf of Respondent was Kenneth Miller, Employee Relations, Office of the Chief Administrative Officer, County of Los Angeles; for the Charging Party was Stillman, Furay, Green & Shinee, by Richard A. Shinee, Esq.

## II. Findings of Fact

On October 15, 1982 Central Jail Division Deputy Sheriffs John Noel and Refugio Santos attended a court hearing in a case from which they were allegedly released at noon. Thereafter they reported to work around 4:00 p.m. that afternoon, over two hours late, and submitted overtime work reports for five and a half hours of court time. Shortly after he reported to work, Deputy Noel was counseled by Sergeant Richard Hopkinson, watch sergeant for the P.M. shift at the Central Jail Division, regarding his attendance. The counseling was not related to the deputy's reporting to work late that afternoon.

Lieutenant Michael O'Hara, P.M. watch commander at the Central Jail, had been informed that the two deputies had not reported on time to work. Later in the shift he saw the overtime slips and subpoenas they had submitted and directed Sgt. Hopkinson to check with the court clerk regarding their overtime claims. Hopkinson contacted the clerk and was told the deputies were released prior to the noon recess. He reported this to Lt. O'Hara, who asked the sergeant to have the deputies report to the lieutenant.

Deputy Noel was advised by his immediate supervisor, Senior Deputy Mack, to report to Lt. O'Hara. Deputy Noel went to the watch commander's office around 6:00 p.m. where Lt. O'Hara and Sgt. Hopkinson were. Lt. O'Hara, who was sitting behind his desk, directed Deputy Noel to sit in a chair in front of the desk. Sgt. Hopkinson was standing behind Deputy Noel by the door. Lt. O'Hara asked the deputy at what time he knew the court case that day was being dismissed. Deputy Noel asked him what he was talking about. Lt. O'Hara then said the court had been contacted and that they had been informed the case was dismissed before noon. He said Deputy Noel must have known that the case was dismissed then so he was giving him another chance to tell the truth. Deputy Noel said he was not sure what Lt. O'Hara was getting at. The discussion went back and forth like this several times. Lt. O'Hara became irate and slammed a pen onto his desk; it bounced up toward Deputy Noel. At the same time Lt. O'Hara angrily said, "God damn it, you'd better

start understanding; I'll give you one more chance to tell the truth." Deputy Noel then explained that the District Attorney had discussed dismissing the case around noon but that there were mitigating circumstances. According to Lt. O'Hara and Sgt. Hopkinson, Lt. O'Hara then directed Deputy Noel to go to the next office and to write a report on the matter. Deputy Noel left the room.

Deputy Noel saw Deputy Santos go into the watch commander's office and heard raised voices. Lt. O'Hara questioned Santos about when the court case had been dismissed and told him to write a memo. Deputy Noel saw Deputy Santos leave.

According to Deputy Noel, Sgt. Hopkinson came over to him after Santos had left and told him to get long form report memo paper and to write a report on the matter for Lt. O'Hara. After finding the paper, Deputy Noel asked Sgt. Hopkinson what the charge against him was. The sergeant said he did not know. Deputy Noel asked if there might be discipline and the sergeant said he did not know. Deputy Noel then asked to speak to an ALADS representative. According to Deputy Noel, Sgt. Hopkinson said it should be no problem but that he had to first check with Lt. O'Hara. Five minutes later the sergeant returned and said Lt. O'Hara had ordered the deputy to write the report and not to talk to anyone. Deputy Noel then completed the report and turned it over to Lt. O'Hara. Both Sgt. Hopkinson and Lt. O'Hara deny that Deputy Noel asked the sergeant for an ALADS representative at any time.

After he left the watch commander's office, Deputy Noel contacted ALADS shift representative David Campbell and informed him of what had happened and asked him to look into the matter. Noel explained to Campbell that he had not been told of the nature of the investigation and had been denied an ALADS representative. Campbell, who was under the impression that Santos was still being interviewed, went down to the watch commander's office. Only Sgt. Hopkinson was there so Campbell returned to his work location where Noel and Santos then spoke to him. Santos claimed his rights had also been violated by Lt. O'Hara because he had not been told of the nature of the investigation, had been refused representation, and had been pressured to resign by Lt. O'Hara. Both deputies asked Campbell to represent them in dealing with Lt. O'Hara on the matter.

Campbell went back down to the watch commander's office looking for Lt. O'Hara to see if he could handle the matter informally. He found Lt. O'Hara as the lieutenant was about to leave the office. He indicated that he was an ALADS representative and that he was representing Deputies Noel and Santos who claimed their rights under the Peace Officer Bill of Rights had been violated by Lt. O'Hara. Campbell said he was there to find out Lt. O'Hara's side of the story and to mediate the matter. Lt. O'Hara said there had been no violations and that he had nothing to say. Campbell said that the violations might lead to a grievance or court case against the lieutenant but that the deputies were willing to drop the grievance if he would drop the overtime investigation. Lt. O'Hara said that it was his

duty to investigate the matter and to report the facts to the commanding officer and the discussion ended. Lt. O'Hara continued with his investigation of the overtime claims.

The following evening, on October 16, 1982, Campbell again spoke to Lt. O'Hara, asking him if he had changed his mind. Lieutenant Patrick Mallon, watch commander for the Inmate Reception Center, was present. Campbell again said the grievance would be dropped if Lt. O'Hara would drop the overtime matter. Lt. O'Hara again refused, telling Campbell to do what he had to do while the lieutenant would do what he had to do. Thereafter Lt. O'Hara completed his investigation of the overtime claims and made a report to Captain Ronald Black, the Central Jail Commander.

On the following Monday, October 18, 1982, Captain Black called in Deputy Campbell and asked him whether he had threatened Lt. O'Hara with a court case and grievance over alleged Peace Officer Bill of Rights violations. Campbell said he had not threatened the lieutenant but that the matter could involve court action. The captain told Campbell to meet with Lt. O'Hara and to resolve the matter. On or about October 20, 1982, Campbell spoke to Lt. O'Hara in the briefing room and apologized for making the lieutenant feel threatened.

The overtime matter led to discipline for Deputy Noel which he has appealed to the Civil Service Commission. On April 13, 1983, Deputy Campbell received an April 12, 1983 memo from Captain Black

captioned, "CENSURABLE CONDUCT: WRITTEN REPRIMAND." Deputy Campbell was reprimanded for attempting to interfere in an inquiry preliminary to an administrative investigation, thereby violating Manual of Policy and Procedures Section 3-011030.05 - General Behavior:

A member shall not act or behave privately or officially in such a manner as to bring discredit upon himself or the Department.

### III. Contentions of the Parties

#### A. Position of the Charging Party

The Charging Party contends that Deputy Noel requested an ALADS representative in the course of the October 15, 1982 interrogation. It discredits the denials by Lt. O'Hara and Sgt. Hopkinson as self-serving and points out that O'Hara's testimony differs in one respect from the lieutenants report to Captain Black (Union Exhibit 1). The Charging Party asserts that the denial of an ALADS representative by Respondent constitutes a violation of Section 12 (a)(1) and (2) of the Ordinance. In this regard the Charging Party, citing NLRB v. Weingarten, Inc. 420 U.S. 251 88 LRRM 2689 (1975), states that the rights guaranteed employees by the Ordinance include the right to a representative, upon request, where the employee reasonably believes discipline may result from an investigatory confrontation with management representatives. In the view of the Charging Party, Deputy Noel had a reasonable fear of discipline when he made his request for representation because the topic of the inquiry, a possible fraudulent claim of overtime worked, could lead to discipline.

Turning to the reprimand received by Deputy Campbell, the Charging Party maintains that the deputy was engaged in protected concerted activity when he spoke with Lt. O'Hara about the overtime inquiry. The Charging Party argues that Deputy Campbell was acting in furtherance of legitimate union objectives in trying to mediate the overtime dispute with Lt. O'Hara. Furthermore, the Charging Party insists that Deputy Campbell's conduct did not exceed the bounds of propriety or constitute flagrant conduct so as to lose the mantle of protection accorded by the Ordinance. It follows that reprimanding him because of his protected activity - Respondent established no other basis for the discipline - constituted an unfair employee relation practice violative of Section 12 (A)(1) and (2) of the Ordinance.

B. Position of Respondent

Respondent acknowledges that its bargaining unit employees have the right under the Ordinance to representation, upon request, during an investigatory interview that may reasonably lead to discipline. Respondent also concedes that Deputy Noel had reason to believe that the inquiry into the overtime issue could lead to discipline. However, Respondent disputes Deputy Noel's testimony that he requested an ALADS representative after the October 15, 1982 interview but prior to the preparation of the memorandum requested by Lt. O'Hara. In this regard Respondent notes that this was not Deputy Noel's first infraction of departmental rules, that Deputy Noel had had a Skelly hearing before the interview at issue here,

and that consequently the deputy was fully aware of his right to representation. Respondent apparently argues that if Deputy Noel had asked for representation, he would have done it during the interview with Lt. O'Hara, not after. Respondent asserts that the deputy's failure to request an ALADS representative was not due to intimidation by Lt. O'Hara - whose use of shop talk phraseology did not rise to the level of offensive language - but to Deputy Noel's fear of discovery and punishment for the fraudulent overtime report. Since Deputy Noel failed to request representation, Respondent concludes that no violation of the Ordinance occurred in the meeting between Lt. O'Hara and Deputy Noel.

As to the allegations involving Deputy Campbell, Respondent maintains that the immunity against discipline for union activity is not unlimited where the conduct of the union representative exceeds the legitimate functions of a union representative. In the instant case Respondent contends that ALADS representative Deputy Campbell did not approach Lt. O'Hara to gather the facts surrounding the matter. Rather, it is Respondent's claim that the deputy twice approached the lieutenant in an accusatory and threatening manner in an attempt to pressure Lt. O'Hara into dropping the investigation of the overtime matter. Respondent asserts that the alleged violation of Deputy Noel's rights and the overtime issue were separate and distinct matters over which there was no obligation to bargain. Respondent concludes that Deputy Campbell exceeded the permissible limits of his role as an ALADS representative and was properly disciplined.

#### IV. Analysis and Conclusions

##### A. The alleged October 15, 1982 denial of union representation

The Charging Party contends Respondent violated Section 12 (a) (1) and (2) of the Ordinance when it denied Deputy Noel's request for representation in the course of the October 15, 1982 investigatory confrontation with Lt. O'Hara and Sgt. Hopkinson which subsequently led to discipline for the deputy. Respondent acknowledges, in line with NLRB v. Weingarten, supra, that Noel was entitled, upon request, to an ALADS representative since the October 15, 1982 meeting could reasonably have resulted in discipline for the deputy. Resolution of the issue thus turns on whether the request for representation was made. Based on the testimony and demeanor of the witnesses I am persuaded that Deputy Noel did not request an ALADS representative in the course of the October 15, 1982 incident. The record discloses that Deputy Noel was aware of his right to request representation for investigatory interviews such as the one with which he was confronted on October 15, 1982. Given this awareness it is more probable that he would have made the request at the beginning of the interview when he repeatedly evaded giving Lt. O'Hara a direct response as to when the court case was dismissed. Nor does it make sense that Lt. O'Hara would wait until after he interviewed Deputy Santos to order a written report from Deputy Noel. Deputy Noel's testimony that he was uncertain about the nature of Lt. O'Hara's inquiry and thus had to question Sgt. Hopkinson about it before requesting union representation is not

convincing. Further, if the request had been made by Deputy Noel, it is not plausible that it would take Sgt. Hopkinson five minutes to return with a denial. Moreover much of Deputy Noel's testimony, including the key testimony regarding his alleged request for union representation, was elicited through leading questions.

On the other hand, the testimony of Lt. O'Hara and Sgt. Hopkinson on this aspect of the case was straightforward and forthright. There is no doubt that both Deputy Noel and Deputy Santos subsequently complained to Deputy Campbell that their rights had been violated. The close, loud questioning by Lt. O'Hara was certainly enough to send the two deputies in search of an ALADS representative to complain to. However, the unfair employee relations practice machinery of the Ordinance, as the Charging Party recognizes, is not the forum in which to complain of possible violations of the Peace Officer's Bill of Rights. Inasmuch as I have concluded that Deputy Noel did not request union representation prior to writing the requested report for Lt. O'Hara, the failure of Respondent to provide Deputy Noel an ALADS representative during the course of the October 15, 1982 incident does not constitute an unfair employee relations practice violative of Section 12 (a) (1) and (2) of the Ordinance. It is therefore recommended that this portion of the charge be dismissed.

B. The April 12, 1983 reprimand of Deputy Campbell

The Charging Party contends that Respondent impermissibly discriminated against an ALADS representative, Deputy Campbell, when it gave him the April 12, 1983 reprimand. It is well established that an employer may not unlawfully discriminate against an employee because of that employee's protected union activity. See Magnetics International, Inc., 254 NLRB 62, 106 LRRM 1133 (1981); American Telephone and Telegraph Co., 211 NLRB 782, 86 LRRM 1645 (1974). On the other hand, both parties here recognize that the right to engage in protected activity is not without limits. Where the conduct of the employee engaged in protected activity is flagrant or beyond the bounds of propriety, the conduct is no longer protected. Thus the issue here is whether Deputy Campbell's conduct was so flagrant as to escape the protection otherwise accorded by Section 12 (a) (1) and Section 4 of the Ordinance.

It is important at the outset to set the factual parameters. The record discloses that on October 15, 1982 Deputy Campbell was sought out by one and then two deputies both of whom claimed that their rights had been egregiously violated in the course of separate interrogations by Lt. O'Hara regarding a matter that could (and thereafter did) very well lead to discipline. It is apparent that Deputy Campbell had sufficient cause to believe from the stories imparted by the two deputies that Lt. O'Hara had indeed violated the rights outlined in the Peace Officers' Bill of Rights as well as

the Weingarten right to representation under the Ordinance. It is from this reference point that he sought out Lt. O'Hara on two occasions.

When Deputy Campbell first spoke to Lt. O'Hara on October 15, 1982, he introduced himself as an ALADS representative acting on behalf of Deputies Noel and Santos who claimed Lt. O'Hara had violated their rights. Deputy Campbell indicated that he desired to learn Lt. O'Hara's side of the story but Lt. O'Hara denied any violation and declined to cooperate. In order to impress the lieutenant with the seriousness of the situation, Deputy Campbell indicated that breach of the deputies' rights could lead to a grievance. Deputy Campbell proposed to drop the potential grievance if the lieutenant dropped the overtime issue that had been the topic of the interrogation; Lt. O'Hara refused. The same essential exchange occurred the following evening. It is noted that Campbell's testimony, which is credited, that he did not demand the time slips is corroborated by Lieutenant Mallon.

From the above recitation of the facts, it is clear that Deputy Campbell was acting in the capacity of a union representative seeking to represent the interests of two bargaining unit members. It is equally certain that in that capacity Campbell proposed a deal to the lieutenant. Respondent contends that the deal went beyond the bounds of legitimate representation and constituted impermissible interference into supervisory investigatory obligations.

However, the nature of the proposal - dropping the issue which was the subject of the interrogation - was not much beyond the remedy normally imposed for a violation of the Weingarten right. Such remedy normally entails rescinding any action based on information gathered in the meeting in which representation was improperly denied. See Kraft Foods Inc., 251 NLRB No. 6, 105 LRRM 1233 (1980); U.S. Postal Service, 256 NLRB 12, 107 LRRM 1172 (1981). While it has been determined here that Deputy Noel's Weingarten right had not been violated, Deputy Campbell had a good faith belief at the time that it had been. Further, even where a Weingarten violation has occurred discipline based on other sources of information is possible (e.g., the court clerk and timecards). Nonetheless, the potential success of resort to a grievance does not determine the amount of protection the Ordinance provides to those engaged in the protected activity of invoking the grievance process; the good faith attempt to use the process is protected regardless of whether the actual grievance would succeed. Greencastle Manufacturing Company, 234 NLRB 272, 97 LRRM 1249 (1978); ARO, Inc., 227 NLRB 243 (1976). Thus Deputy Campbell in proposing to refrain from a grievance, or other action based on the perceived violation of the two deputies' rights, in exchange for the lieutenant discontinuing his investigation into the overtime matter, was in essence doing nothing more than would have happened if a grievance or unfair employee relations practice charge had been filed over the same matter at a later stage. That is, he was attempting to remediate the harm that might have flowed from the alleged violation of the deputies' rights. It must be

concluded that Deputy Campbell's conduct was within the scope of protected activity. Selwyn Shoe Manufacturing Corp., 172 NLRB No. 81 (1970) (invoking grievance procedure is protected activity). Accordingly, Respondent's reprimand of Deputy Campbell based on that protected activity constitutes an unfair employee relations practice under Section 12 (a)(1) of the Ordinance. Am-Del-Co, Inc., 225 NLRB 698, 93 LRRM 1488 (1976) (illegal layoff of employee for union activity and filing of grievance); Keokuk Gas Service Co., 233 NLRB 496 (1977) (illegal discharge of employee for threatening to file grievance over proposed discipline). The result reached here - permitting union involvement in the early stages of an investigation - is not extraordinary. The situation is analagous to the role of the union representative in a Weingarten situation, where the U.S. Supreme Court has indicated that early involvement by a union representative in the investigatory process is beneficial. The Court stated in the Weingarten case, 88 LRRM, at 2693, as follows:

The Board's construction also gives recognition to the right when it is most useful to both employee and employer. A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged

or otherwise disciplined. At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.  
(footnotes omitted)

As noted in the above quotation, the involvement of the union representative need not become adversary; the investigative process may continue, as it did here, culminating in the imposition of discipline, which may then be subject to appeal through the grievance procedure or otherwise as appropriate.

#### V. Remedy

Based on the foregoing it is recommended that the Employee Relations Commission adopt the following Final Order in Case No. UFC 14.23:

Having been found in violation of Section 12 (a)(1) of the Employee Relations Ordinance, the Sheriffs Department, County of Los Angeles, in order to further the purposes and policies of said Ordinance, is hereby ordered to:


1. Cease and desist from:

- (a) Discriminating against its employees by reprimanding them because they have engaged in protected union activity on behalf of the Association for Los Angeles Deputy Sheriffs (ALADS).
- (b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Los Angeles County Employee Relations Ordinance.

## 2. Take the following affirmative action:

- (a) Rescind the April 12, 1983 reprimand of Deputy Sheriff David Campbell and expunge from his personnel file any reference to said reprimand.
- (b) Post the attached notice signed by the Sheriff of Los Angeles county or his designee for sixty days in the Central Jail in all conspicuous places where notices to employees are normally placed and take all necessary steps to insure said postings remain posted and unobstructed.
- (c) Advise the Executive Officer and ALADS within thirty days of the date of this Final Order of the actions taken to comply with this Final Order.

Respectfully Submitted,

  
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Edgar Allan Jones, III  
Hearing Officer

Dated: October 3, 1983

NOTICE TO ALL EMPLOYEES

PURSUANT TO A

FINAL ORDER

OF THE LOS ANGELES COUNTY  
EMPLOYEE RELATIONS COMMISSION

and

IN ORDER TO FURTHER THE PURPOSES AND  
POLICIES OF THE EMPLOYEE RELATIONS ORDINANCE

PLEASE TAKE NOTICE THAT

WE WILL NOT discriminate against our employees by reprimanding them because they have engaged in protected union activity on behalf of the Association For Los Angeles Deputy Sheriffs (ALADS).

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights guaranteed by the Los Angeles County Employee Relations Ordinance.

WE WILL rescind the April 12, 1983 reprimand of Deputy Sheriff David Campbell and expunge from his personnel file any reference to said reprimand.

by: \_\_\_\_\_  
Sheriff's Department,  
Los Angeles County

Date of posting: