

LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

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COMMISSION

MAY 28 1996

In the Matter of)

ASSOCIATION FOR LOS ANGELES)
DEPUTY SHERIFFS (ALADS))

Charging Party,)

y.)

LOS ANGELES COUNTY SHERIFF'S)
DEPARTMENT,)

Respondent.)

UFC 14.83

HEARING OFFICER'S REPORT

HEARING OFFICER: Irene P. Ayala

APPEARANCES

For the Charging Party:

Richard A. Shinee
Mitchell S. Kander

Green & Shinee, A.P.C.

For the Respondent

Cecil W. Marr, Acting Director
Susan St. Marie, Sergeant

Los Angeles County Sheriff's
Department, Advocacy Services

THE HEARING

Hearings in this matter were held on November 28, 1995, January 22, 1996, January 23, 1996 and February 5, 1996.

Following the close of the hearings, the parties submitted briefs in support of their respective positions.

THE UNFAIR EMPLOYEE RELATIONS PRACTICE CHARGE

The charge at issue in this matter was filed by the Association for Los Angeles Deputy Sheriffs (hereafter "ALADS" or "Charging Party") against the Los Angeles County Sheriff's Department (hereafter "County" or "Respondent"). ALADS alleged that Respondent denied Deputy Sheriff Dwight Kenney the right to union representation during an alleged interrogation conducted by Lt. Michael Adrid on January 11, 1995 in violation of section 12(a)(1) of the Los Angeles County Employee Relations Ordinance.

Section 4 of the ordinance reads as follows:

Employees of the County shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employee relations. Employees of the County also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the County. No employee shall be interfered with, intimidated, restrained, coerced or discriminated against because of his exercise of these rights.

Section 12(a)(1) reads as follows:

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

(1) To interfere with, restrain, or coerce employees in the exercise of the rights recognized or granted in this ordinance:

STATEMENT OF FACTS

In November, 1994, Mr. Ralph Wright contacted the Sheriff's Department to complain of the conduct of Deputy Sheriff Dwight Kenney. Deputy Kenney and his partner, Deputy J. Fletcher, were at Mr. Wright's apartment building during the eviction of one of his tenants. Lt. Michael Adrid, Kenney's second-level supervisor, interviewed Mr. Wright on November 9, 1994 regarding the incident. Mr. Wright described Deputy Kenney as having been rude, arrogant and unprofessional in his conduct. Mr. Wright wrote a letter regarding the incident to Lt. Adrid. (Ex. 1) As required by Respondent's procedures, Lt. Adrid also prepared a Watch Commander's Service Comment Report. (Ex. 2)

Lt. Adrid testified he called Deputy Kenney and Deputy Fletcher on or about January 9, 1995, informed them of the citizen complaint, and asked them to meet him to discuss their version of the incident. Deputy Kenney stated he wanted to speak to an ALADS representative prior to their meeting. Lt. Adrid allowed Deputy Kenney to call him later with a date for the meeting.

Lt. Adrid had previously been with the Marshal's Office prior to its merger with the County Sheriff's Department. He sought confirmation of the procedures to follow involving Watch Commander Service Comment Reports and was informed a few days after his discussion with Deputy Kenney that a meeting with a deputy relating to the comment report was considered a "supervisory inquiry" and there was no right to union representation.

When Deputy Kenney called Lt. Adrid to schedule a meeting on January 18, 1995, Lt. Adrid told Deputy Kenney that the purpose

of their meeting was only an "inquiry" with no right to union representation. Deputy Kenney was asked to check with the representative to determine whether his or her presence would be necessary.

In a memorandum to Captain S. Day dated February 21, 1995, Lt. Adrid wrote that he received a telephone call from Sgt. Jay Wright, Deputy Kenney's direct supervisor, on January 11, 1995 and was told that Deputy Kenney had spoken to his representative and he wished to cancel the January 18th date previously scheduled for their meeting. Deputy Kenney allegedly asked to meet with Lt. Adrid that day, instead. (Ex. 9) Deputies Kenney and Fletcher did meet with Lt. Adrid at his office on January 11th.

At the hearing Lt. Adrid stated that based on the information he had obtained regarding the incident, he recommended Deputy Kenney attend a tactical communication class which would benefit his dealings with the public. (Ex. 7,p.3) He did not consider attendance at the class as a form of discipline.

Captain Steven A. Day was the one who initially became aware of the complaint letter from Mr. Wright. He contacted Lt. Adrid and requested an inquiry into Deputy Kenney's version of the facts. At the hearing he confirmed that he was the one who informed Lt. Adrid no right to a representative existed when a supervisory inquiry was conducted. He did concede all Watch Commander Service Comment Reports, both negative and positive, were kept and reviewed to determine if repetitive conduct by an employee was occurring. He further conceded if appropriate, disciplinary measures could ensue. However, he stated no formal discipline was deemed necessary in Deputy Kenney's case.

In a memorandum to Deputy Kenney dated January 23, 1995, Captain Day concluded Deputy Kenney's conduct had been inappropriate, was a violation of policy, and the citizen complaint was "founded." Deputy Kenney was directed to attend a training class and his contact with the public was to be monitored by Lt. Adrid.

(Ex. 15)

In a memorandum to Deputy Kenney dated February 21, 1995, Captain Day revised his previous conclusion that the complaint was "founded," and instead stated that Deputy Kenney "did not choose the best course of action in dealing with Mr. Wright." (Ex. 11) He had been convinced by the employee relations department to change his conclusion having been told that the use of the word "founded" would require disciplinary action against Deputy Kenney, which had not been his intention.

At the hearing Captain Day was shown a copy of a formal grievance filed by Deputy Kenney against Lt. Adrid on February 6, 1995. (Ex. 8) Deputy Kenney alleged Lt. Adrid denied him the right to have a representative present at the January 11, 1995 meeting and requested that Lt. Adrid be disciplined. Captain Day denied his revised memorandum to Deputy Kenney of February 21, 1995 was intended to thwart Deputy Kenney's grievance. On May 5, 1995 Captain Day denied the grievance. No request for arbitration was filed.

A second grievance by Deputy Kenney was filed on February 6, 1995, in which he requested documentation in the possession of Respondent relating to the Wright incident, and that it be removed from his personnel file. That grievance was granted.

(Ex. A)

After he spoke with Lt. Adrid, Deputy Kenney tried to contact Mr. Karlzen, but was unsuccessful. He also called ALADS and was told not to answer any questions if the meeting with Lt. Adrid was an inquiry or investigation relating to the complaint.

When Deputies Kenney and Fletcher arrived at Lt. Adrid's office, Deputy Kenney immediately asked if the meeting was for an inquiry or an investigation. He was assured it was only to take a report of the incident as Lt. Adrid was their supervisor. Both deputies were questioned for about twenty minutes. At the conclusion of the meeting Lt. Adrid asked Deputy Kenney if he still wanted to meet on January 18, 1995 as previously scheduled. Deputy Kenney was angry and responded that it was no longer needed since he had already been ordered to have the meeting that day. After they left the meeting, Deputy Kenney told Fletcher he felt he had been "railroaded."

At the hearing, Deputy Kenney denied he ever waived the right to have a representative present with him, nor did he ever say that he had been given permission to attend the meeting without a representative.

Deputy James Fletcher testified that the meeting with Lt. Adrid was cordial and that he did not feel intimidated, nor that he was the subject of an investigation.

Commander Patrick Holland participated in the grievance hearing pertaining to Deputy Kenney's claims of improper conduct by Lt. Adrid and the removal of documents from his personnel file. He explained that a supervisory inquiry is necessary when a complaint has been filed in order to determine the basic facts of the incident. If during the inquiry it appears that a violation

Deputy Kenney testified at the hearing. He stated that on January 9, 1995 he was informed of the citizen complaint and was told to see Lt. Adrid that day in Inglewood. He first called ALADS and was told not to answer any questions if the meeting was for purposes of an inquiry or investigation without having a representative present.

When Deputy Kenney arrived at Lt. Adrid's office, Lt. Adrid said he wanted to ask him questions about the citizen complaint. Deputy Kenney asked to have the meeting rescheduled so that his representative could be present. Lt. Adrid did not object and gave him dates for a future meeting.

When Deputy Kenney returned to this office he called Mr. Peter Karlzen, an attorney with Green & Shinee. Mr. Karlzen agreed to meet with Deputy Kenney and Lt. Adrid on January 18, 1995. Mr. Karlzen's letter to Deputy Kenney confirming their conversation, dated January 9, 1995, specifically instructed him not to discuss the facts of the incident with anyone, especially supervisors. (Ex. 4) Deputy Kenney then called Lt. Adrid to advise him of the January 18, 1995 date for their meeting.

On January 11, 1995, Lt. Adrid called Deputy Kenney and told him to meet with him at his office that day. Deputy Kenney insisted he wanted to keep the January 18th date. Lt. Adrid said he had been told the matter had to be taken care of "this week." He also said, "If I have to, I can order you to meet me today." Based on Lt. Adrid's statements, Deputy Kenney believed he was being ordered to attend the meeting irrespective of his desire to have a representative present, and a refusal to meet with Lt. Adrid that day would be considered insubordination.

of procedures or policy has occurred, the supervisor must cease the interview and a full investigation will be initiated which may lead to disciplinary measures against the employee. If an employee refuses to answer questions posed by the supervisor during an inquiry, he or she could be disciplined for the failure to answer the questions. Commander Holland concluded Lt. Adrid's meeting with Deputy Kenney on January 11, 1995 was only an inquiry with no right to have a representative present.

SUMMARY OF POSITIONS

Charging Party's Position

The Charging Party alleges Deputy Kenney was denied the right to union representation during his meeting with Lt. Michael Adrid in violation of section 12(a)(1) of the Employee Relations Ordinance.

It asserts that irrespective of Respondent's description of the meeting as a "supervisory inquiry" and not an "investigation," the protections afforded to an employee under National Labor Relations Board v. J. Weingarten, Inc. (1975) 420 U.S. 251, 43 L.Ed.2d 171, apply to Deputy Kenney in this case.

The Charging Party cites as evidence of its position the fact that Lt. Adrid agreed to allow Deputy Kenney the opportunity to reschedule their meeting to January 18, 1995 when a representative could be present, thus acknowledging Deputy Kenney's right to such representation. Yet, despite protest of the rescheduling of the meeting to January 11, 1995, Lt. Adrid ordered Deputy Kenney to come to his office for the purpose of answering questions regarding the citizen complaint.

The Charging Party also argued Deputy Kenney never requested nor received permission from ALADS or his attorney to attend the meeting without a representative. Nor, did his attendance at the meeting indicate his waiver of a representative. Deputy Kenney believed he was being ordered to the meeting and failure to do so would constitute insubordination.

It is also asserted the unfair practice charge is not subject to the doctrine of collateral estoppel. Relying upon the decisions in the cases of People v. Simms (1982) 32 Cal.3d 468, 186 Cal.Rptr. 77; Imen v. Glassford (1988) 201 Cal.App.3d 909, 247 Cal.Rptr. 514; and Carmel Valley Fire Protection District v. State (1987) 190 Cal.App.3d 356, 234 Cal.Rptr. 795, the Charging Party points to specific factors absent in Respondent's proceedings which preclude the application of the doctrine to this case.

For the foregoing reasons, the Charging Party requests a finding that Respondent committed an unfair labor practice by denying Deputy Kenney his right to union representation, and that Respondent cease and desist from denying Deputy Kenney's right to representation as charged.

Respondent's Position

Respondent maintained it has a long-standing practice of conducting supervisory inquiries where there is no right to union representation for an employee. It asserts the meeting conducted by Lt. Adrid on January 11, 1995 was such an inquiry and that Deputy Kenney was not ordered to attend that meeting but did so voluntarily.

Further, Respondent claims if Deputy Kenney wanted a representative present at the January 11th meeting he could have availed himself of the person at ALADS whom he contacted on January 11, 1995, but did not do so thus waiving any alleged right to representation.

It is further alleged that the Charging Party is bound by the final decision rendered in Deputy Kenney's grievance procedure under the contract (MOU, Appendix B, Third Step) and the doctrine of collateral estoppel applies in this matter.

Based on the foregoing, Respondent requests that the instant charge be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Charging Party in this matter asserts Respondent engaged in an unfair employee relations practice by denying Deputy Kenney the right to union representation during the January 11, 1995 meeting with Lt. Adrid. Respondent claims there is no right to union representation during a supervisory inquiry. Even assuming such a right existed, Deputy Kenney waived the right. Further, the issue was the subject of a grievance brought by Deputy Kenney on February 6, 1995, which was denied and the decision was final. No request for arbitration of that decision was made on his behalf by the Charging Party. Respondent thus concludes the doctrine of collateral estoppel precludes the relitigation of the issue.

First, the doctrine of collateral estoppel does not apply in this case. Collateral estoppel bars the relitigation

of an issue which has been decided in a prior judicial proceeding.

The reason for the doctrine is to bring finality to a dispute between parties, and to conserve judicial resources. The doctrine may be asserted when the final decision is of an administrative agency, assuming specific guidelines have been met. People v. Simms (1982) 32 Cal.3d 468, 186 Cal.Rptr. 77; Imen v. Glassford (1988) 201 Cal.App.3d 909, 247 Cal.Rptr. 514.

The administrative agency must have acted in a "judicial capacity" where the parties had adequate opportunity to litigate the issues. A determination of judicial capacity requires that 1) the administrative hearing be conducted in judicial-like adversary proceedings; 2) the proceedings required witnesses to testify under oath; 3) the agency determination involved the adjudicatory application of rules to a single set of facts; 4) the proceedings were conducted before an impartial hearing officer; 5) the parties had the right to subpoena witnesses and present documentary evidence; and 6) the administrative agency maintained a verbatim record of the proceedings. Imen, supra.

In this case the third-step review board which considered Deputy Kenney's grievance of Lt. Adrid's conduct did not meet the criteria for a determination of judicial capacity in that it is arguably not an adversary-like proceeding, no impartial hearing officer presides over the proceedings to weight the evidence and render a recommendation or decision, and there is no evidence the witnesses at the review board were under oath. Thus, collateral estoppel may not apply in this case and the issue of a failure to request arbitration of the board's decision is of no legal consequence.

Respondent's argument that Deputy Kenney was not entitled to a union representative during a supervisory inquiry, and that as a matter of practice ALADS has accepted a lack of representation at such proceedings, is also without merit.

In the December, 1993, ALADS Dispatcher, Richard Shinee, ALADS chief legal counsel, wrote of the perils involved in participating in a supervisory inquiry and advised deputies to seek representation. (Ex. 16) When Deputy Kenney called ALADS prior to his meeting with Lt. Adrid he was instructed not to answer any questions if the meeting was an inquiry or an investigation. Clearly, ALADS and its counsel do not find the practice of inquiries without representation acceptable, irrespective of the fact the issue has not been the subject of negotiation.

Further, whether Lt. Adrid's meeting with Deputy Kenney was an inquiry or an investigation is not clear. What is clear is that both proceedings may lead to disciplinary measures on the basis of critical factual information provided by the employee. The number of supervisors present, whether the meeting was tape recorded, and whether discipline was imposed are irrelevant. The questioning of the employee and the information sought are identical in either proceeding. The supervisor wants to know the facts of the incident and the employee's role in that incident.

What is critical in this case was Deputy Kenney's reasonable belief his interview with Lt. Adrid could result in discipline. If the facts presented by the complaining party,

Mr. Wright, in his letter of November 9, 1994 were true, Deputy Kenney had good reason for concern. Lt. Adrid concluded and Captain Day concurred Deputy Kenney's conduct was inappropriate and a training class to enhance his people skills was justified.

Deputy Kenney's fear of the possibility of discipline was evidenced by his refusal to meet with Lt. Adrid on January 9, 1995 without a representative and to immediately contact ALADS and the attorney, Mr. Karlzen, to make arrangements for representation. He protested the sudden rescheduling of the meeting on January 11th and tried unsuccessfully to have representation for that day. He described himself as being angry and feeling "railroaded", and made it very clear to Lt. Adrid at the beginning of the meeting that he was there to give a report, not to participate in an inquiry or an investigation.

Irrespective of the classification of the meeting, Deputy Kenney had a strong and justified belief he needed the assistance of a representative. He testified his attendance at the meeting was not a voluntary waiver of his right to representation, but his belief that he had been ordered to attend and his failure to do so would be construed as subordination. The fact that his partner, Deputy Fletcher, did not feel he needed a representative at the meeting and described it as cordial has no bearing on Deputy Kenney's claim that he felt coerced and intimidated into attending the meeting. Of note, Deputy Fletcher was not the one who had dealings with Mr. Wright and knew he had done nothing that might result in discipline. His expectations of the meeting were very different of those of Deputy Kenney.

In its closing brief, the Charging Party cites specific cases to support its position that Deputy Kenney had a right to representation even if the meeting was a supervisory inquiry.

It relies on N.L.R.B. vs. J. Weingarten, Inc. (1975) 420 U.S. 251, 43 L.Ed.2d 171; Quality Manufacturing Company (1972) 79 L.R.R.M. 1296; and Mobil Oil Corporation (1972) 80 L.R.R.M. 118. Those cases appear to stand for the proposition that when an employee has a reasonable belief that an interview will adversely affect his employment he or she has a right to representation during that interview.

Respondent argued the right to representation is not dependent solely on the employee's "subjective reaction." It cites from federal decisions as follows:

"The right of representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or that is seriously considered."

AAA Equipment Service Co. v. N.L.R.B., 598 F.2d 1142, 2246 (8th Cir. 1979) quoting Alfred M. Lewis, Inc. v. N.L.R.B., 587 F.2d 403, 410 (9th Cir. 1978).

Yet, it appears that Respondent's cases support the Charging Party's position in that based upon the evidence presented at the hearings, Lt. Adrid did seriously consider imposing some discipline against Deputy Kenney for his conduct and only needed additional factual information from Deputy Kenney in order to make his final determination.

Even a review of Mr. Wright's written description of his encounter with Deputy Kenney, if true, indicated Deputy Kenney was arrogant, unprofessional and used poor judgment in the

manner in which he handled the situation. Lt. Adrid was sufficiently concerned that he not only interviewed Mr. Wright, but also made the effort to speak with an attorney's representative who was with Mr. Wright at the scene of the incident. Both of these efforts took place prior to the meeting with Deputy Kenney. Since the incident only involved Mr. Wright, the witness, and Deputies Fletcher and Kenney, in effect, Lt. Adrid had already conducted his own investigation of the matter prior to hearing the statements from Deputy Kenney.

Even after hearing Deputy Kenney's version of the facts, Lt. Adrid still concluded Deputy Kenney acted inappropriately. Perhaps not to the level of requiring formal discipline, but certainly to the level where remedial measures (a training class and monitoring by Lt. Adrid) were imposed.

As previously noted, Deputy Fletcher's perception of the meeting as cordial is irrelevant. He was not facing the prospect of discipline. Having observed Lt. Adrid at the hearings, his personal demeanor would suggest that any interview with an employee would be straightforward, and not necessarily abusive in nature. Nor is the outcome of an interview significant. The results and ambiance of an interview do not dictate when the right to representation exists.


In conclusion, the evidence presented at the hearings in this matter has established that Respondent violated Deputy Kenney's right to representation during his meeting with Lt. Adrid, in violation of section 12(a)(1) of the Employee Relations Ordinance.

RECOMMENDED ORDER

It is respectfully recommended that charge UFC 14.83 be sustained in that Respondent committed an unfair labor practice by denying Deputy Sheriff Dwight Kenney the right to union representation during his meeting with Lt. Michael Adrid on January 11, 1995.

Dated: May 28, 1996.

Respectfully submitted,


Irene P. Ayala
Hearing Officer