LOS ANGELES COUNTY

EMPLOYEES RELATIONS COMMISSION

In the Matter of: LOS ANGELES COUNTY LIFEGUARD ASSOCIATION, Charging Party, vs. COUNTY OF LOS ANGELES, DEPARTMENT OF BEACHES, Respondent. Unfair Labor Practice 19.6	OPINION AND FINDING OF HEARING OFFICER

The Charging Party, hereinafter referred to as the Association, filed an Unfair Labor Practice charge, claiming the Respondent, hereinafter referred to as the Department, violated the County Employee Relations Ordinance and the Meyer-Milias-Brown Act by failing to meet and confer before discontinuing the policy and practice of a four-day, ten-hour-day work week, hereinafter referred to as 4/40. The Department denied the charge. A pre-hearing Bill of Particulars was filed by the Department and, upon order of the Hearing Officer, the Association filed its responses. A hearing was held on January 6, 1982 concerning these charges before the Hearing Officer, appointed by the Commission, attended by Lester G. Ostrov, Esquire, representing the Association, and by Donna Hill, representing the Department. At the opening of

the hearing, the Association entered a motion of dismissal of the charges which was denied by the Hearing Officer. Witnesses were heard, and various exhibits entered into the record. The parties thereafter submitted post-hearing briefs, and the matter was submitted.

THE ISSUE

Did the Respondent, the County of Los Angeles and the County of Los Angeles Department of Beaches, violate the Los Angeles County Ordinance, Section 12(a) 1 and 3, and the Meyers-Milias-Brown Act, Sections 3500, et seq, by failing to meet and confer with the Los Angeles County Lifeguard Association regarding its discontinuation of the existing four-day, ten-hour-day work week? If so, what is the remedy?

THE CONTRACT PROVISIONS

ARTICLE 14 WORK SCHEDULE

Any change of work location, workweek or daily shift time shall require a prior notice of five (5) working days to the concerned employee who is scheduled on a minimum 40-hour workweek.

Nothing herein shall limit the authority of management to make assignments to different shifts for the purpose of meeting emergencies. However, such emergency assignments shall not extend beyond the period of such emergency.

Nothing herein shall limit the authority of management to make temporary assignments to different work locations for the purpose of meeting varying crowd, surf or weather conditions.

ARTICLE 23 FULL UNDERSTANDING, MODIFICATIONS, WAIVER

A. This Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the

matters set forth herein. Any other prior or existing understanding or agreements by the parties, whether formal or informal, regarding any such matters are hereby superseded or terminated in their entirety.

B. Except as specifically provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its right and agrees that the other shall not be required to negotiate with respect to any matter covered herein or with respect to any other matters within the scope of negotiations, during the term of this Memorandum of Understanding.

ARTICLE 27 MANAGEMENT RIGHTS

It is understood and agreed that Management reserves and retains all its inherent managerial rights, powers, functions and authorities as defined in Section 5 of the Employee Relations Ordinance of the County of Los Angeles, which Management had prior to entering in this Memorandum, unless and only to the extent that the provisions of this Memorandum specifically curtail or limit such rights, powers, and authority, subject to the right of an employee to grieve the practical consequences of a Management rights' decision on wages, hours and other terms and conditions of employment.

CONTENTIONS OF THE PARTIES

Contention of the Association

The Department entered into an agreement in 1979, with the Association, to institute and maintain the 4/40 work. This agreement was carried out for more than two years. In 1981, without prior negotiations with the Association, this agreement and practice were unilaterally discontinued, the County reverting to a five-day, eight-hour-a-day work week. This was a violation of the County's obligation to meet and confer before changing working conditions. The County should be required to return to the four-day work week and reimburse the lifeguards for any expenses or wages lost by this breach of statutory obligation.

Contention of the County

Although work schedules are mandatory subjects of bargaining, the Association waived any right to prior negotiations concerning changes in the work week by the provisions of the current Memorandum of Understanding. The Employee Relations Ordinance expressly reserves to the County the right to determine conditions of employment. Required prior notices were given before the change was made, and no ordinance, statute, or contract provision was violated by the County's action. The charge should be dismissed.

FINDING OF FACT

In 1973, County management instituted, with the approval of the Board of Supervisors, the 4/40 week as a pilot program to last one year. The practice was not continued after the test. In May of 1979, concerned with the problems created by the gasoline shortage, management again reinstituted the 4/40 week, notifying its employees that the practice would be rescinded when the gasoline shortage would be over.

During that same year, formal negotiations commenced between the County and the Association concerning their MOU (Memorandum of Understanding). At these sessions, the Association presented a demand for a provision requiring the 4/40 week as a permanent policy. They were advised by the County negotiator to discuss this demand at the departmental level rather than at these sessions. Thereafter, commencing in July, the Association, represented by Tom Viren, negotiator for the Association, and Robert Buchanan, Association President, met with Howard Lee, Chief Lifeguard, and at different times also with the

Department Director and Deputy Director to discuss several requests raised by the Association. At these several meetings, the Association requested the right of employees to trade assignments, the establishment of a procedure for assigning posts temporarily vacated, a 48-hour work week for headquarter employees, and the permanent institution of the 4/40 week.

According to Mr. Viren, an agreement was reached granting each of these demands, but limiting the 4/40 week to the daylight-saving hours of the year. The agreement was made in consideration of the Association's concession, agreeing to support the County's request for the discontinuance of overtime after forty hours of work per week. Pursuant to this concession, the Association supported the County's request during the formal negotiations and agreed to a written provision in the MOU giving up the right to overtime pay after forty hours of work per week.

The County management witnesses who were present at these department level meetings deny any agreements were reached and testified these meetings were only consultations and not meet-and-confer sessions. However, there was no denial that the Association agreed to support the County's demand for straight-time rates after forty hours, if the County would concede the Association's demands (see the cross-examination of Mr. Lee, Tr. p. 152). In support of a finding that an agreement had been reached after bargaining, we note the consistent implementation of the agreement concerning each of the demands by the Association after these meetings up to the middle of 1981, when only the 4/40 was discontinued. These meetings and the description of the

content of discussions during which both sides presented, discussed, and agreed to demands indicate bargaining occurred and that a verbal agreement between the parties was reached. These were bargaining sessions concluded by the agreement reached.

Thereafter, during the remainder of 1979 and during all of 1980, the 4/40 work week was scheduled by the department during daylight saving hours for all employees covered by the agreement. During the meetings leading to this agreement, the parties also discussed and agreed to exclude from the 4/40 policy headquarter employees, captains, and guards assigned to rescue boat crews at Catalina Island. These latter employees were thereafter scheduled to work a five-day work week.

In February of 1981, negotiations again commenced between the County and the Association concerning the terms of their MOU, which expired June 30, 1981. At these sessions, the Association proposed establishing the 4/40 week for the entire year and the extension of the policy to apply to the rescue boat crew. They were advised by Donna Hill, County negotiator, to discuss these matters at the department level and, when raised again, she informed them the matter was not negotiable, and the matter was dropped.

On April 6, 1981, Viren and Buchanan met with Robert William, Deputy Director of the department, who informed them the department intended to discontinue the 4/40 week. The Association representatives objected and asked for further meeting. On April 15, 1981, Viren and Buchanan met with Jerry Cunningham, Department Director, Ken Johnston, Assistant Director, and Robert Williams, Deputy Director, to discuss

this matter. The Association argued for retention of the 4/40 policy. According to Viren and Buchanan, the Department representatives agreed to continue the policy. Williams testified, however, that no agreement was reached at this meeting and that the meeting was not a "meet-and-confer" session. Williams further testified that he advised the Association representatives that management would consider the 4/40 week, would further consult with the lifeguard division, and would notify the Association, Tr. pp. 101, 102, see Tr. 116.

When daylight savings hours commenced April 26, 1981, the department continued scheduling employees on the 4/40 basis. In late May, the department distributed a notice, dated April 24, stating the 4/40 week would continue only to June 15. Viren phoned Johnston, Assistant Director, complaining this was in breach of the agreement reached at the April 15 meeting. According to Viren, Johnston agreed and said the notice was issued in error and to forget it. On June 15, possibly because of Johnston's promised intercession, there was no change in scheduling, the 4/40 week remaining in effect. It is significant that Johnston did not appear as a witness to refute this testimony by Viren, and Viren's testimony concerning Johnston remains unrebutted and is accepted.

When the department posted its work schedule for the week commencing July 5, 1981 for the first time that year, the work week was changed to a five-day week rather than the prior four-day week. The only meetings between the parties were those discussed above. Protesting the change in practice and agreed-upon policy, the Association filed the charge in this matter.

OPINION AND CONCLUSIONS

In defense of its action, the County relies on Section 5 of the County Ordinance, providing:

> It is the exclusive right of the County to determine the mission of each of its constituent departments...set standards of services to be offered to the public, and exercise control and discretion over its organizations and operations. It is also the exclusive right of the County to...determine the methods, means and personnel by which the County's operations are to be conducted; provided, however, that exercise of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.

It claims this section and management's reservation of rights, provided for in Article 27 of the MOU, reserves to management the right to control its operations, including the right to change work schedules and the work week, without prior negotiations with the Association. In support of this contention, it cites the arbitration case of Kimberly-Clark, 42 LA 982, upholding the right of management in private industry to unilaterally change work schedules. It is true that most arbitrators would agree that management has the exclusive right to set and change work schedules, unless restricted by agreement. However, in the public sector, both Section 5 of the County Ordinance and Meyer-Milias-Brown require management to meet and confer with representatives of employees over any change that would impact on their working conditions, or that have "practical consequences" on working conditions, L.A. City Employees Association, Local 660 v. County of Los Angeles, 33 Cal.App. 3d, 1. This obligation must be met unless the employees have expressly waived the right to confer.

The principle contention of the County is that the employees have, in fact, waived their right to obtain prior negotiations concerning changes in scheduling because of the terms of Articles 14 and 23 of the MOU. The impact of Article 23 was discussed by Leo Kotin, the Hearing Officer, in his decision in the Unfair Labor Practice Case 14.4, January 30, 1978, cited by the County, who found that any matter subject to the meet-and-confer process not covered in the MOU, as well as covered matters, is not subject to the meet-and-confer process because of the express language of Article 23. This conclusion, however, was rejected by this Commission in their Decision and Order in the same case, April 17, 1978. The Commission reasoned it could not imply from this general waiver the intent of employees to abandon the right to negotiate concerning any change in working conditions, during the term of their MOU, particularly if the working condition changed by management's unilateral action was not a subject of prior discussion between the parties.

This ruling of the Commission, requiring an express and unequivocal waiver of the right to bargain concerning a specific change in working conditions, is consistent with the policy in the Federal sector as declared by the Courts and the National Labor Relations Board, who have refused to find such waiver of the right to prior negotiations because of the existence of similar broad language in a labor agreement or if the language relied upon as a waiver was ambiguous, Metromedia, Inc. KMBC v. N.L.R.B., 586 F. 2nd 1182, and see Delaware Coca-Cola Co. v. Teamsters, Local 326, 624 F. 2nd 1182, 1184 (cases cited by the Association).

In support of its claim that Article 23 constitutes an unambiguous

waiver by the Association of its right to prior negotiations concerning the change in the work week, the County further cites and relies on NLRB v. Southern Materials Co., 447 F. 2d 15 (1971). In this case, the Board found management's unilateral discontinuance of a Christmas bonus violated the act. The Court, on appeal, relying on a contract provision by which the parties waived the right to bargain concerning "any subject matter referred to or covered in this Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement," reversed the Board's decision and found this waiver provision clear and deprived the Union of the right to prior negotiations before the practice could be discontinued. However, the Court remanded the matter to the Board to determine whether or not a maintenance of benefits clause protected the right to the bonus. If it did, the employer could not discontinue the bonus during the term of the contract. The Court thus held that if there was any evidence of the intent of both parties to continue the bonus, it would be protected by the maintenance of benefits clause. In our case, we have found there was a specific agreement evidencing the intent of the parties to continue the 4/40 week, and this agreement was made after considerable discussion between the parties. In Southern Materials, the Court suggested that because there was a possibility the company may have led the Union to believe the bonus would continue, the Union would be relieved of its waiver. It remanded the case to require the Board to hear evidence as to this possibility. There is no question but that the County, in this case, led this Association to believe the 4/40 week would be continued, and even under Southern Materials our circumstances

indicate the waiver, if it existed, should not be applied because of this prior agreement.

There is also a material difference between the waiver provision considered in Southern Materials and the provisions of Article 23 in our agreement. In Southern Materials, the waiver clause applied to all matters covered in the contract and to matters not referred to or covered. Article 23 waives the right to negotiate concerning covered matters and matters within the scope of negotiations (emphasis added). We presume, under Article 23, employees have the right to negotiate concerning the impact on working conditions of changes made by management which are outside the scope of bargaining and that such right is not waived by this Article. This is at least a reasonable interpretation of this language. Thus, if the County sought to change the work week on the premise this was their exclusive right, their employees could obtain bargaining concerning the impact of such change unless, of course, they expressly waived such right. At least it could be reasonably argued that Article 23, by itself, does not constitute a waiver of such right. There is at least some uncertainty concerning the reach of Article 23 as applied to these circumstances.

This lack of certainty concerning the extent of Article 23, as applicable to our circumstances, renders our case distinguishable from Southern Materials where the Court, considering broader language, found its contract, unlike ours, unambiguous and clearly applicable so as to constitute a waiver of the right to negotiations concerning the continuance of the Christmas bonus. The decisions of this Commission, in cases cited by the Association, finding Article 23 not applicable to

situations similar to our own, are more relevant and their rationale more acceptable, Los Angeles Professional Peace Officers v. County, U.F.C. 9.6 (October 1975), and the same parties in U.F.C. 9.11 (1979).

It may also be argued that the subject of the 4/40 week was, in fact, discussed at the 1979 negotiations and therefore does come within the ambit of Article 23. The Association did raise a demand during those negotiations for the 4/40 week, but the County's response was to advise them to take the matter up at the departmental level. The matter was fully discussed there, and an agreement was reached to institute the 4/40 week. These circumstances hardly evidence an intent on the part of the Association to forego or to waive bargaining on this subject.

The County also asserts there was also discussion during the 1981 contract negotiations concerning the 4/40 week, and the action or lack of action concerning the Association's demands indicate the matter was resolved in favor of the County's right to regain its exclusive control of this matter. The facts do not support this claim. The Association sought to expand the 4/40 week to the entire year, beyond its existing limitation to the daylight saving hours portion of the year. It also attempted to include within the application of the policy the lifeguards performing rescue boat duties at Catalina, a group that had been excluded from the benefits of the policy by the verbal agreement in 1979. At no time did the County evidence any intent to discontinue the practice that had been engaged in, agreed upon, and implemented for two years. This effort to expand the practice did not include any discussion concerning an intent to discontinue the practice. At no time during these negotiations did either side raise or discuss the question

of the continuance of the existing practice. There was, in fact, no real discussion concerning the Association's demand to expand the practice, since the only response of the County negotiator was to refer the Association to a departmental discussion and to treat the matter as non-negotiable. This was not enough to support a finding that the question of the maintenance of the practice was previously negotiated and that the right to further negotiations had been waived.

The final and principle defense of the County is based on its contention that Article 14 of the MOU is a specific waiver of the right to further bargaining on this question. It is not unreasonable in its argument that Article 14, requiring it to only give five days' prior notice "to the concerned employee" of any change in the work week or daily shift time, implies its right to make such changes unilaterally and that the only limitation on its right is the requirement to give five days' prior notice of such change. There is no language, says the County, limiting the right to any number of employees that could be affected, and the County contends this provision entitles it to change the work week of all lifeguards who worked the 4/40 week, without the necessity of prior negotiations.

However, Article 14 is reasonably subject to the Association's interpretation. It argues the reference to the term "employee" in the singular indicates the intent to allow only a limited right to change the work week, that there was no intent to permit a general change in policy, nor to permit the change in the work week of an entire class of employees. It contends further, that in reading the entire Article, it is clear it was intended to apply only to assignments within existing

shifts such as for emergencies, or to individual changes of the work week within the policy of the 4/40 week. It was not intended, claims the Association, to apply to the right to make a general change of the work week of all lifeguards, a change that would vary from the consistent practice followed by the County since the middle of 1979 and a change that would have considerable impact on the working conditions of an entire class of employees.

Since this provision is subject to both these reasonable interpretations, it is ambiguous and does not meet the standard set by the Commission, which requires a clear and unequivocal expression of the waiver of the right to prior bargaining, Delaware Coca-Cola Company v. General Teamsters Local Union 326, 624 F. 2d, 1182, 1184. There is no doubt the Association waived its right to require prior negotiations concerning individual changes in shifts, assignments, or in the work week of individual employees, but this provision does not sufficiently or clearly indicate an intent to waive the right to prior negotiations concerning the broad change in work week policy attempted in this case.

The County is also correct in its assertion that by agreeing to the provisions of Article 14, it certainly did not intend to give up its right to make changes in the methods by which its operations would be conducted, and that this would include the right to change the work week. But, again, this provision of the contract does not evidence a clear intent on the part of the Association to forego its right to obtain prior negotiations concerning the impact on working conditions such changes would effect.

In summary, we conclude the right to require prior bargaining

concerning the discontinuance of the 4/40 week was not waived by the provisions of the MOU, nor did the County Ordinance or State law protect the department in engaging in such action. We find the County violated its statutory obligation, as expressed in the County Ordinance and in Meyers-Milias-Brown, to confer with the Association before discontinuing the 4/40 week, because of the impact such change had on the working conditions of its employees.

REMEDY

The Association seeks as the appropriate remedy in this matter an order reinstating the 4/40 week during daylight saving hours until the expiration of the current MOU, compensation for the travel expenses incurred on the fifth day of the week, and a day's pay for the work required on the fifth day of each week worked. The last request for additional salary for working a fifth day is not appropriate. It would require the County, in effect, to pay double time for such fifth day of work. This would be punitive, since such penalty or bonus is not required by contract, nor has the employee suffered any loss of pay by working five days a week. Whether the employee works four or five days, the total hours of work amount to forty hours, and the employee has been paid for forty hours of work.

The request for reinstatement of the 4/40 week during daylight savings hours is appropriate and should be granted. We also consider it appropriate that the practice should be enforced until the expiration of the current MOU. This practice was established as a result of bargaining resulting in concessions and mutual agreement. Although no

term or limit was agreed upon, we would apply the contract law doctrine that in such cases, a reasonable time limit for such agreement should be established. The Association gave up the substantial benefit of overtime, and it should be entitled to receive the gain obtained by such concession for the entire period it is constrained from bargaining to regain the concession it made. It cannot seek the return of the conceded overtime until the end of the current MOU, and to be fairly treated the Association should be entitled to the benefit they obtained for the same period. The employees were also caused extra travel expense by working five days instead of four, and this damage resulting from the County's violation of law should be remedied by making these employees whole against such extra expense.

RECOMMENDED AWARD

The Department is ordered to reinstate the practice of a four-day, ten-hour-a-day work week during daylight savings hours, until June 30, 1983, and thereafter for each succeeding contract term, unless the County negotiates concerning the discontinuance of such practice, at a time when the MOU is open for negotiations.

The County shall reimburse each employee their travel expense for the fifth day worked during a week whose work week was changed from a 4/40 week to a five-day week, at the rate the County allows for mileage.

Marshall Ross
Impartial Arbitrator

Del Mar, California, March 16, 1982

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March 15, 1982

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Re: UFC 19.6 - Los Angeles Co. Lifeguard Assoc. v. Department of Beaches

Dear Mr. Daugherty:

I am enclosing three copies of my opinion and recommended findings and conclusions in the captioned matter. I am also sending you my copy of the transcript and exhibits and the briefs of the parties.

I am also enclosing my bill for services rendered in this matter.

If any question please call me.

Very truly yours,

Marshall Ross