

COUNTY OF LOS ANGELES  
EMPLOYEE RELATIONS COMMISSION  
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**EMPLOYEE RELATIONS**  
**COMMISSION**

MAR 30 1990

In the Matter of

CALIFORNIA ASSOCIATION OF  
PROFESSIONAL EMPLOYEES (CAPE),

Charging Party

v

HEARING OFFICER'S REPORT

UFC 3.16

DEPARTMENT OF PUBLIC WORKS,

Respondent  
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Hearings in the above matter were held on October 11 and November 1, 1989 pursuant to a Notice of Hearing issued by the Employee Relations Commission of the County of Los Angeles upon a charge by the California Association of Professional Employees (CAPE) that the Department of Public Works had engaged in unfair labor practices as defined in the Employee Relations Ordinance of the County of Los Angeles, Ordinance 9646. The charge alleges that Brian Brooks, a Department employee, was denied promotion because of his having engaged in protected union activities. The parties were given full and complete opportunity to call, examine and cross-examine witnesses and enter exhibits into the record of these proceedings. The parties were represented as follows:

For the Charging Party - Helena Sunny Wise, Esq.

For the Respondent - Don Elliott, Employee  
Relations Division

## I. The Charging Party's Evidence

In support of its case, the Charging Party presented evidence from Brian Brooks, the complainant, and Abel Morales, his supervisor. The union also entered 17 exhibits into evidence. This evidence shows as follows:

Brooks has approximately 23 years of service with the Department, commencing his employment in 1966. He was first classified as a Senior Engineering Technician. In 1982 Brooks was requested and he agreed to perform the duties normally performed by a Valuation Engineer I in connection with a two-year training program for the position. Brooks completed the program in 1984 but was not promoted to the Valuation Engineer I position. After some grievance litigation leading to arbitration, the parties agreed to settle the matter by granting Brooks the promotion. According to Brooks, he was also promised a future promotion to Valuation Engineer II after another two years of service.

Two years later, in 1986, Brooks discussed such promotion with his supervisors. They advised that the Department would first have to secure budget funding for the position which would take some time to obtain. For the 1988-89 fiscal year the Department was able to secure funding for two additional positions of Valuation Engineer II. On May 24, 1988, R.E. Hoff, in charge of Brooks' work unit, sent a memorandum to the Personnel Division requesting that a departmental promotion examination be scheduled for this new position. Hoff stated therein that there was one

employee eligible to file for the examination. This employee was Brooks. The memorandum was then forwarded to Harry Stone, the Deputy Director of the Department. Hoff thereafter advised Brooks that there would probably be some delay before Stone acted on the matter.

Brooks continued to press Hoff inquiring when the examination would be scheduled. On July 28 Hoff met with Brooks on the matter. The meeting was also attended by Brooks' immediate supervisor, Abel Morales. According to Brooks and Morales, Hoff explained that Stone was not disposed to approve the request for the Valuation Engineer II position because Stone first wanted some applicants other than Brooks to qualify to take the examination. Hoff added that Stone believed that promotions should be awarded to what he characterized as "team players". Stone did not believe that Brooks was such a "team player". To date, Stone has still not acted on the matter and no promotional examination for the vacant positions has been scheduled and they remain vacant.

In the interim, after Brooks was appointed to the position of Valuation Engineer I, he became active in union affairs. He was selected to be a Union Steward representing union employees working in the Department. In this capacity he filed and processed a number of grievances on behalf of employees as well as communicating with management regarding other types of problems affecting employees in the work unit. In 1986 the Department Director, Thomas Tidemanson, commenced a program of encouraging employees to advise him of

work problems and to make suggestions to improve operations. Brooks utilized this procedure to raise a number of ongoing problems with management. One such problem involved parking facilities for employees, another involved the appointment of an Ombudsman. A third matter in which Brooks became involved as the representative of employees concerned the practices of a Division Head who, as a result of such complaints, was subsequently reassigned.

Much of this activity was carried on by Brooks by means of letters to the Department Director. In some cases, Brooks saw fit to send copies of such correspondence to the Board of Supervisors which led to inquiries from one or more Supervisors to the Department management concerning the matters raised by Brooks.

In 1987 Brooks was elected Secretary of the Union and took charge of publishing a periodic union newsletter. Some of the material in the newsletter tended to be critical of Department management. Brooks also became a member of the the union's bargaining team and participated in the ongoing negotiations for a new contract. In this connection, Brooks became involved in a number of heated exchanges with management concerning the status and duties of Valuation Engineers.

During the period of his service in the Department, Brooks has consistently received Competent performance evaluations. As noted above, he was deemed qualified for promotion to Valuation Engineer II.

## II. The Department's Evidence

Two Witnesses testified on behalf of the Department;

Richard Hoff, the Assistant Director of the division in which Brooks is employed, and Harry Stone, the Deputy Director of the Department.

Stone testified that after receiving the request from Hoff to hold a promotional examination for the position of Valuation Engineer II, he discussed the matter with Huff. Huff informed Stone that Brooks was the only candidate in the Department eligible to compete in the examination. Stone advised that it was against his policy to permit an examination to be held when there is such a limited pool of applicants as in this case. Stone would prefer that other applicant be developed so that a real choice can be made from those deemed qualified. Under these circumstances, Stone informed Huff that he would not approve an examination for the position at this time until a larger pool of applicants had been developed. In cross-examination, Stone testified that this policy was not rigidly followed and that in certain cases promotional examinations were scheduled soon after new positions were approved and budgeted.

Stone also testified that he was not aware of Brooks' union activities and that they played no role in his decision not to proceed with an examination for the post. Both Stone and Huff denied that they had ever stated that Brooks was not a "team player" and, accordingly, did not deserve any promotion. In this connection Stone testified that he had formerly been an official of the union and a member of its bargaining committee. he strongly denied having any animus against the union or against Brooks personally.

#### IV. Discussion

The Charging Party contends that the Department violated The Employee Relations Ordinance of the County of Los Angeles by not proceeding to promote Brooks to the vacant position of Valuation Engineer II. Specifically, the union claims that by failing to schedule a promotional examination for the position the Department denied Brooks the job since he was the only qualified candidate for the post at the time. The union contends that the Department's actions in this regard were retaliation against Brooks for his protected union activity. In effect, the union argues, but for Brooks' union activities, management would have proceeded in due course to schedule a promotional examination for the recently approved budget positions of Valuation Engineer II. Further, the union claims, Brooks alone would have passed the examination and been placed upon the certified list of eligibles for appointment to the post. Finally, it is the union's position that management would have appointed him in due course to the vacancy but for his involvement with the union.

The Department contends to the contrary arguing that Stone, who made the decision not to go forward with the promotional examination, was not aware of Brook's union activities and, accordingly, made his decision strictly for valid non-discriminatory reasons. Although recognizing that Brooks was qualified for the vacant position, Stone nevertheless believed it would be more advisable to have a larger pool of applicants take the examination so that the

ultimate selection from the list would better suit the needs of the Department. In making this argument, the Department recognizes that Brooks might have still been appointed to the post but the selection would have been more broadly based.

In my opinion the evidence in this case establishes that Brooks engaged in extensive union activities of a protected nature in the several years preceding the events in this case. As noted above, he was elected to union office, served on the union's bargaining team and acted as the spokesman for employees concerning a number of complaints that they had against management. Although some of the positions taken by Brooks in his dealings with management were not always too well founded, he nevertheless became a forceful agent on behalf of the employees concerned. I consider it clear that management was largely aware of Brook's activities and were not always pleased with his actions in these matters. Accordingly, I do not credit Stone's testimony that he was unaware of Brooks' union activities at the time he considered whether or not to go forward with the promotional examination for Valuation Engineer II.

The evidence in this case also establishes that Brooks was promised promotion to the post of Valuation Engineer II on a number of occasions by his supervisors, particularly by Richard Hoff. Indeed, Hoff advised his superior, Stone, in recommending that a promotional examination be held, that Brooks was the only person qualified for the post. It

strains one's credulity to believe that after repeatedly promising the promotion to Brooks and after convincing the budget authorities to establish and fund the Valuation Engineer II positions, that the Department would suddenly change course and decide it neither needed to or wished to fill the position. i do not accept Stone's explanation for this change in course - that it was against his policy to schedule promotional examinations when there was an inadequate pool of applicants to pick from as was the case here since Brooks alone was qualified for the position. In this connection, it is to be noted that in other cases Stone has relaxed his policy and agreed to the scheduling of promotional examinations where there was an equally limited pool of applicants.

There is no evidence that since the events in this case, management has taken any particular measures to increase the pool of applicants to compete with Brooks for the vacancies. It is also of some significance that there were two, not just one, positions approved in the new budget. Management could have scheduled the examination and promoted Brooks to one of the vacancies (assuming he passed) and left the other vacancy open until a larger pool of applicants were developed.

Under these circumstances, I am inclined to conclude that the Department retaliated in a discriminatory manner against Brooks on account of his protected union activities by refusing to go forward and schedule a promotional examination for the position of Valuation Engineer II.



Accordingly, The Department's conduct in this regard constitutes an unfair employee relations practice within the meaning of Section 12(a) of the Employee Relations Ordinance.

In arriving at this conclusion I have considered the argument advanced by The Department in its post-hearing brief, that the Employee Relations Commission lacks authority to act in this case because examinations for promotions and promotions themselves fall within the exclusive jurisdiction of the Los Angeles County Civil Service Commission. Specifically, it is claimed. Rule 25 of the Civil Service Rules prohibits discrimination against an person in his employment on account of "non-merit" factors including "organizational membership or affiliation". A person claiming a violation of this provision may petition the Civil Service Commission for a hearing and, if successful, the Commission has the authority to formulate an appropriate remedy to redress such discrimination.

It would appear that the jurisdiction of the Civil Service Commission in this regard is concurrent with that of the Employee Relations Commission rather than exclusive in nature as contended by the Department. I note that in decisions of the Employee Relations Commission cited by the Charging Party in its post-hearing brief, UFC 6.152, UFC 1.14 and UFC 54.1, the Commission has issued remedial orders affecting the employment status of employees who have been discriminated against because of their protected union activities. Although there are some areas of overlapping

authority between the Civil Service Commission and the Employee Relations Commission, I do not believe in this case that Brooks' sole remedy lay with the Civil Service procedure and that he is, accordingly, now barred from seeking a remedy before the Employee Relations Commission.

#### IV. The Appropriate Remedy

The Charging Party seeks an Order in this case requiring the Department to forthwith promote Brooks to the position of Valuation Engineer II. The union further wants such promotion to be made retroactive to the time in 1988 when funding for the position was approved or retroactive out-of-class pay covering the period. Finally, the Charging Party believes that the Department should be required to post a remedial notice to employees.

The remedy sought by the union is very broad and sweeping in nature and I entertain severe doubts that it lies within the authority of ERCOM to issue such an order. The case before us is quite unusual in that it does not involve an employee who passed a promotional examination, was thereafter placed on a certified eligibility list, but failed to receive the promotion because of retaliation for his protected union activities. Under such circumstances, it might well be appropriate to order a retroactive promotion. In this case, however, a promotional examination has not been either scheduled or held and, accordingly, no certified list of eligibles has been issued. Nor has any promotion to the vacant position been made. The Charging Party's remedy

would, in effect, subvert this process since it would eliminate the examination, the certification of eligibles and the process whereby management makes a selection from the eligible employees for appointment under the Civil Service band system. I do not believe such a sweeping remedy is legally permissible since it eliminates the Civil Service examination and appointment process.

In my opinion, a more appropriate remedy would be for an order directing the Department to give preference to Brooks for promotion to the position of Valuation Engineer II provided that an examination for the position is scheduled and held, that Brooks passes the examination, and provided further that he scores in a band which makes him eligible for selection and appointment. In the event these conditions are met and a person other than Brooks is nevertheless appointed, I would require the Department to furnish Brooks with a detailed written explanation and justification why someone other than Brooks was selected. Under these circumstances, neither retroactive or out-of-class pay to Brooks would appear to be warranted.

Since the violation by the Department in this case was limited to one person, Brooks, I do not believe there is sufficient justification for the posting of a Notice to Employees as requested by the Charging Party. In lieu of such Notice, I would require the department to cease and desist from retaliating in this or any other fashion against

Brooks because of his protected union activities.

Dated: March 30, 1990

Respectfully submitted,

Leonard S. Kimmell

Hearing Officer