

EMPLOYEE RELATIONS COMMISSION

COUNTY OF LOS ANGELES

LOS ANGELES, CALIFORNIA

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EMPLOYEE RELATIONS COMM.
COUNTY OF LOS ANGELES

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Joint Council of LACEA, Local 660,)
SEIU and Local 434, SEIU,)

Charging Party,)

v.)

Los Angeles County Museum of)
Natural History,)

Respondent)

Case No. UFC 56.6

REPORT OF HEARING
OFFICER

Appearances: Terry Besbris Paule and John Nelson for Charging
Party and William Lyle, Charles Miller and Patricia Swancutt for
Respondent.

BACKGROUND

By letter dated November 14, 1979, the Museum of Natural
History (Respondent) notified Mr. Weldom Odom of its decision to
suspend him, effective November 15, 1979, and thereafter discharge
him from the position of Custodian for the following reasons:

- "1. Violation of Rule 56 of the Custodian Policy
and Procedures Manual. Said rule states
'Entering County buildings or facilities
without proper authorization during or after
working hours' is automatic discharge.

You specifically came to the Museum on your
regularly assigned day off and entered the
Museum after the Museum was closed to the
public Saturday, October 13, 1979. The
Museum was hosting a special event for the
Stanford alumni and only staff assigned to

work overtime were authorized admittance to the Museum.

2. Violation of Rule 3 on page 51 of the same manual which states 'Each employee is totally responsible for his uniform. Employees are not to wear their uniforms except during working hours.' Saturday was your normal day off; there was absolutely no reason for you to be in uniform and masquerading as an employee assigned to work."

On March 11, 1980, the Joint Council of LACEA, Local 660, SEIU and Local 434, SEIU (Charging Party) filed a charge¹ growing out of the suspension and discharge, alleging that Respondent's action violated Sections 4, 12(a)(1), and 12(a)(3) of the Employee Relations Ordinance of the County of Los Angeles.²

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1. An amended charge filed on April 15, 1980 made two technical changes which did not affect the substance of the charge filed on March 11, 1980.
 2. Those Sections of the Ordinance provide as follows:

"Section 4. EMPLOYEE RIGHTS.

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 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: UNFAIR EMPLOYEE RELATIONS PRACTICES.

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

- (1) To interfere with, restrain, or coerce employees in exercise of the rights recognized or granted in this Ordinance;
- (3) To refuse to negotiate with representatives of certified employee organizations on negotiable matters."

Respondent filed an answer to the charge on May 12, 1980, denying the allegations and denying any violation of the Employee Relations Ordinance. The answer moved for a pre-hearing dismissal of the charge on the grounds (a) that the Civil Service Commission (CSC) had already sustained Mr. Odom's discharge, (b) CSC rules prohibit anti-union discrimination and if Mr. Odom failed to bring this charge before the CSC, he had waived the right to bring it before the Employee Relations Commission (ERCOM), (c) the ERCOM has no authority to order Mr. Odom reinstated in the face of the CSC decision, and (d) even if Mr. Odom were ordered reinstated, a decision of the Workers' Compensation Appeals Board imposing severe work restrictions rendered him ineligible for reemployment with the Museum.

ERCOM set the matter for hearing before me on June 3, 1980 in my capacity as its authorized Hearing Officer for the case.

Respondent's motion for a pre-hearing dismissal was renewed on the first day of the hearing, at which time I afforded both parties an opportunity to make representations and to submit information in support of their respective positions on the motion. After receiving their presentations and taking the matter under submission briefly, I denied Respondent's motion on all grounds and proceeded to take evidence on the merits of the case.

The hearing was continued to July 18, 1980 and was concluded on that date.

(In the body of this report "T" refers to Transcript, "JX" to Joint Exhibit, "UX" to Charging Party's Exhibit and "CX" to Respondent's Exhibit.)

SUMMARY OF EVIDENCE

The parties entered the following stipulations of fact:

- "1. Mr. Weldom Odom was discharged, effective November 14, 1979, from the position of Custodian, Museum of Natural History.
2. Mr. Odom had worked for the County of Los Angeles in that position for approximately six years.
3. At the time of the discharge, Mr. Odom was a job steward for Local 660, Service Employees International Union. Mr. Kevin Johnson, his supervisor, and Mr. Charles Miller, Head, Staff Services, were aware of Mr. Odom's position of job steward for the Union.
4. On October 13, 1979 Mr. Odom was at the Museum of Natural History and entered the building although he was not scheduled to work as a Custodian." (T. 17-18)

Additionally, the Union presented testimony from four witnesses, including Mr. Odom. Ms. Trotter, a Security Officer with the Museum since 1975 testified that she was on duty from 5 A.M. to 1:00 P.M. on October 13, 1979 and had responsibility for the "back door", the entry and exit control position for Museum employees especially and for visitors as well. The security procedure in effect at the Museum at that time required all employees to sign in their names, the time of arrival, and their intended destination in the building. Nevertheless, around 11:00 A.M. on that date, Mr. Charles Miller entered with three visitors and failed to sign in. Mr. Miller declined Ms. Trotter's request for him to sign in, stating that he was just passing through. When a co-worker who had witnessed the exchange later reported that Mr. Miller and his guests were sitting in the cafeteria, Ms. Trotter placed the

notation "C. Miller and 3 guests" 10-13-79, 11:43" on the sign-in sign-out sheet. (UX-1) When she left the post to go off duty at 1:00 P.M., neither Mr. Miller nor his guests had signed out of the building. (T. 10-19). Mr. James Jones, a Custodian with the Museum for five years, testified that he and one other custodian (Sapp) were scheduled to work overtime from 4:00 P.M. to 9:00 P.M. on October 13, 1979 because of a special event. During his shift on that occasion, he saw other Museum employees at the Museum, some working, some not working. In keeping with an understanding he and Mr. Odom had reached on Friday, October 12, Mr. Odom appeared at the Museum on Saturday, October 13, to continue a discussion with Mr. Jones about several grievances Mr. Jones wanted to press. He talked to Mr. Odom several times during the evening regarding the grievances, inside as well as outside the building. (T. 22-36). Mr. Charles Shackelford, a Security Officer with the Museum for approximately five years, testified that he worked from 1:00 P.M. to 9:00 P.M. on October 13, 1979, replacing Ms. Trotter at the "back door" position. He corroborated Ms. Trotter's testimony regarding the sign-in sign-out procedures which were in effect on October 13, 1980. Additionally, he testified that he observed Mr. Miller sign out of the building at 7:10 P.M. and that he observed Mr. Miller's secretary (Gwen Berry) leave the building with a friend of hers at approximately 6:30 P.M., without signing out. Around 6:00 P.M., when Mr. Odom, accompanying Mr. Jones, walked approximately 25 feet past the security desk into a corridor, Mr. Shackelford approached and asked whether he was going to enter the building. Mr. Odom responded "no" at that time, walked back toward the door,

and stopped and chatted near the door with Kevin Johnson, Ms. Berry, and Ms. Berry's friend. Mr. Shackelford did not witness the specific content of their conversation. Mr. Odom signed into the building after Mr. Johnson left, at 6:30 P.M.; as he was leaving the building around 7:58 P.M., he asked Mr. Shackelford to sign him out. Mr. Odom testified that he became a job steward for Local 660 in April 1979 and in that capacity represented employees during grievance processing and during discussions with management. Mr. Odom and Mr. Jones were unable to complete a discussion they were having about Jones' grievances on Friday October 12 and agreed they would talk further on Saturday October 13 when Jones would be at the Museum on an over-time assignment. When Mr. Odom drove up on Saturday, Mr. Jones and Ms. Sapp were outside dumping trash and obtaining fresh trash cans. Jones decided to take a 10-15 minute break at that time and, therefore, stayed outside and conversed with Mr. Odom about his grievances. Mr. Odom accompanied Mr. Jones back into the building when his break was finished. Upon inquiry, Mr. Odom told Mr. Shackelford he did not intend to enter the building at that time and told Mr. Jones he would see him in a few minutes. Mr. Jones went back to his assignment; Mr. Odom went back to the doorway and talked to Mr. Johnson, Ms. Berry and Ms. Berry's friend. Mr. Odom definitely remembers telling Mr. Johnson he had come to see Mr. Jones. He did not specifically ask his permission to talk to Mr. Jones. After they left, Mr. Odom chatted briefly with Mr. Shackelford and then signed in and went up to the main floor so that he could finish his conversation with Mr. Jones. Mr. Jones said he was too busy to talk to Mr. Odom right then, so Mr. Odom expended time talking to a security guard who

was in her civilian clothes ("Miss Lucy") and to Ms. Sapp, the other custodian on duty. Mr. Odom continued his discussion with Mr. Jones only by following him around as he was doing his mopping, sweeping, and picking up chores. After his discussion with Mr. Jones and another conversation with Ms. Sapp, Mr. Odom talked to a security guard downstairs in the main hallway near the guard desk, and left the building. Mr. Shackelford signed him out. Mr. Odom was not wearing a County uniform when he appeared at the Museum on October 13, 1979. The pants he wore were of a dressier material than the County uniform; the shirt, although made of a work fabric, did not have the County patch or insignia on the sleeve. (UX-2). Neither Mr. Miller nor Mr. Johnson discussed with Mr. Odom his presence at the Museum on October 13, 1979 prior to issuing the notice of discharge. (T. 61-99)

On behalf of Respondent, Mr. Kevin Johnson, Mr. Odom's supervisor since April 1979, testified that he did not give Mr. Odom permission to enter the Museum on October 13, 1979 or to discuss union business with Mr. Jones while Mr. Jones was working on that date. Only two custodial employees, Jones and Sapp, were authorized to work on October 13, 1979. (CX-C). He noted that Mr. Odom by his signature, acknowledged receipt in April 1978 of the Policy Manual for Custodians (JX-2) and should have been aware of the consequences of unauthorized entry into the building. Rule 56, (at page 46 of the Manual) specifies discharge as the penalty for an employee's first offense of "entering County buildings or facilities without proper authorization during or after working hours". Although Mr. Johnson and Mr. Odom discussed the latter's presence at the

Museum on October 13, 1979, Mr. Odom never stated specifically that he was there on "union business". In the past, Mr. Odom had always sought Mr. Johnson's permission to discuss union business with employees during their working hours. In addition to violating the Custodians' Manual, Mr. Odom violated Article 29 of the Memorandum of Understanding (MOU) between the County and the Joint Council which governs the union steward's handling of union business during working hours. The pertinent portion of the Article provides: "Upon entering other work locations, the steward shall inform the cognizant supervisor of the nature of his business. Permission to leave the job will be granted promptly to the employee involved unless such absence would cause an undue interruption of work. If the employee cannot be made available, the steward will be informed when the employee will be made available". (CX-E, pp. 55-56). Respondent also introduced documentary evidence intended to show that the grievances addressed in Mr. Odom's and Mr. Jones' testimony were no longer viable on October 13, 1979. (CX's A and B)

CHARGING PARTY'S POSITION

Charging Party contends that the County's discharge of Mr. Odom denied Mr. Odom his right to join and participate in employee organization activities, such as serving as job steward and representing employees in Union matters; that the discharge was discriminatory since other employees who were not scheduled to work on October 13, 1979 and who were also in the building on that date were not disciplined and that the discharge inherently interfered with,

intimidated, and restrained Mr. Odom and the employees he represented from exercising their rights under the Ordinance. Noting an absence of reported decisions under the ERO regarding the issues at hand, Charging Party in accordance with Firefighters Union v. City of Vallejo, 12 Cal. 3d 608, looked for guidance to the California Public Employment Relations Board (PERB) and to the National Labor Relations Board (NLRB), both of which are governed by provisions of law almost identical to those at issue here. Charging Party cited the fourth parenthetical designation of the following PERB guidelines from the case of Carlsbad Unified School District, 3 PERC 10031, to support its position that the Union had established a prima facie case of discrimination and interference violative of the ERO:

"(1) A single test shall be applicable in all instances in which discrimination or interference violations of section 3543.5(a) are alleged; (2) Where the charging party established that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist; (3) Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly; (4) Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available; and (5) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent."

The Union next cited the U.S. Supreme Court case of NLRB v. Great Dane Trailers, 388 U.S. 26, 65 LRRM 2465 (1967) for the rule that "once it proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent,

the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him". The Union contends that the Respondent did not present such evidence to rebut the prima facie case established by the Union and that accordingly, the Hearing Officer must find that an Unfair Labor Practice occurred, in violation of Sections 4, 12(a)(1), and 12(a)(3) of the ERO. In relief, it seeks restoration of Mr. Odom to his former position with all past salary and benefits restored and issuance of a cease and desist order.

RESPONDENT'S POSITION

Respondent contends that Charging Party has not met its burden of establishing a prima facie violation of the ERO. Respondent asserts that the evidence presented by Respondent supports Respondent's position that Mr. Odom was discharged for having violated a very basic legitimate rule of the Museum pertaining to security: entering the building without permission after working hours. The Policy Manual states clearly that discharge automatically will be effected for the employee's first infraction of that rule. Mr. Odom did not request or receive permission to enter the building on October 13, 1979. As a Union Steward, he had a duty to request permission to enter the building if he desired to conduct Union business under a cloak of protected activity. There was no evidence that anyone else who entered or left the building without signing in or out was not punished. All others in the building on October 13, 1979 were either guests at the special event being held at the Museum or employees

scheduled to work at that affair on behalf of the Museum. There is no evidence that the County's discharge of Mr. Odom violated Section 4, Section 12(a)(1), or Section 12(a)(3) of the Ordinance. The charges set forth in UFC 56.6 should be dismissed.

DISCUSSION

In the absence of precedent decisions from this Commission regarding unlawful discrimination or interference issues, the decisions of analogous bodies prove helpful in analyzing and resolving such issues before this Commission.

Charging Party's Brief, at pages 6 and 7, sets forth the test enunciated by the California Public Employment Relations Board (PERB) for determining whether discrimination or interference violative of the Educational Employment Relations Act has occurred. Within the last few months, the NLRB, presented with a case alleging violations of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA)³ and guided by a 1977 decision of the U.S. Supreme Court⁴, announced⁵ its intention henceforth to employ the following causation test in cases alleging such violations:

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3. NLRA Sections 8(a)(1) and 8(a)(3) provide: "(a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; ... (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization..."
 4. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274.
 5. Wright Line, a Division of Wright Line, Inc. and Bernard R. Lamoureux, an Individual, 251 NLRB 150, decided August 27, 1980.

"First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." (Also, see Footnote 14 of the NLRB's decision, quoted immediately below.)

Footnote 14

"In this regard, we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful discrimination once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that 'cause' was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act."

Considering the longer period of experience the NLRB has had in deciding cases involving interference and discrimination issues, I have analyzed this case against the NLRB test quoted above rather than against the PERB test. Using the NLRB standard, the first question to be addressed is whether Charging Party made a prima facie showing that Mr. Odom's status as a union steward played a part in Respondent's decision to suspend and discharge him. Regarding that question, the record discloses, without controversy, the following facts: Mr. Odom had been employed by Respondent for approximately six years at the time of his discharge; he had been a steward for Local 660 for approximately six months at the time of his discharge; the officials who initiated and effected his suspension and discharge were aware of his status as a union steward, having met with him on many occasions in his representative capacity for Local 660; Mr. Odom was not scheduled to work on October 13, 1979 at the Museum;

and when his supervisor encountered him at the Museum on October 13, 1979, they held a conversation about Odom's presence at the Museum on that date. Charging Party presented uncontroverted evidence that other employees who were not scheduled to work were in the Museum on October 13, 1979 and that some of those employees, including the official who discharged Odom, did not comply with the Museum's sign-in/sign-out procedure which is mandatory for all employees.

The record is not free of controversy regarding some of the other circumstances of this case. There is doubt about the exact specifics of the exchange between Odom and his supervisor regarding Odom's presence at the Museum on October 13, 1979. The supervisor testified that Odom, in response to the question "why are you in uniform?", responded that he had helped someone out. Odom denies that he was wearing the Museum's uniform on that date; he testified that he was wearing industrial clothing which merely resembled his uniform. Odom testified that he informed his supervisor that he had come to talk to Mr. Jones. The letter of discharge alleges that Odom said "he was there to help someone out". Mr. Odom's supervisor testified that the discrepancy between his testimony and the letter of discharge had not come to his attention prior to the instant hearing.

Considering the posture of the record, as demonstrated by the foregoing summary of controverted and uncontroverted evidence, I conclude that Charging Party has made a prima facie case that Odom's status as a union steward was a factor in Respondent's decision to suspend and discharge him. Thus, the burden shifts to Respondent to demonstrate that it would have taken the same action in the absence of his status as a union steward.

In support of its decision to suspend and discharge Mr. Odom, Respondent must be deemed to have relied primarily upon evidence that Odom was not scheduled to work on October 13, 1979, that he entered the Museum on that date without his supervisor's permission, and that Rule 56 of the Policy Manual for custodians specifies discharge for the first offense of entering the Museum's buildings or facilities without proper authorization. While the letter of discharge sets out other alleged bases for the discharge, i.e., previous counselings for failure to follow rules and a previous "improvement needed" status, Respondent did not present evidence to support those allegations. I also find that no forthright, credible evidence was presented by Respondent which rebutted Mr. Odom's testimony that he was not wearing his Museum uniform on October 13, 1979. Additionally, although Charging Party presented evidence that other employees not scheduled to work were present at the Museum on October 13, 1979, Respondent did not present evidence regarding whether their presence at the Museum was authorized. Respondent also failed to present evidence regarding what action, if any, it took against employees who did not comply with its sign-in/sign-out procedure. While there is no definition in the record regarding what constitutes "proper authorization" to enter the Museum's buildings or facilities, surely the definition, at a minimum, must include compliance with the sign-in/sign-out procedures which were established for security purposes. Nor was there any explanation why it was permissible for Odom to be present upon the outside facilities of the Museum, but not permissible for him to be present at the Museum's inside facilities. Although Respondent's brief pointed to Charging Party's failure to adduce

evidence that other employees (who were present at the site and who were not scheduled to work) were not disciplined, the reasonable inference to be drawn is that they were not disciplined, since Respondent knew of their presence at the Museum, should be in official possession and command of the fact regarding their presence there, and failed to present evidence that they were disciplined. A similar inference must be drawn from Respondent's failure to address the issue of whether employees who failed to comply with the sign-in/sign-out procedure were disciplined. The absence of that kind of explanatory evidence renders questionable Respondent's focus of discipline upon Mr. Odom for his entry into the Museum without express authorization. The circumstances present here suggest a design to single out Odom because of his status as a union steward.

Respondent has failed to demonstrate in this record that it would have taken the same action against Odom in the absence of his status as a union steward. In accordance with the foregoing analysis and discussion, I conclude that Respondent's suspension and discharge of Mr. Odom violated Sections 4 and 12(a)(1) of the Employee Relations Ordinance. I have found nothing in the evidence presented which demonstrates that Respondent "refused to negotiate...", in violation of Section 12(a)(3) of the Ordinance.

FINDINGS OF FACT

1. Mr. Weldom Odom had been employed as a Custodian by the Museum of Natural History for approximately six years prior to his thirty-day suspension, effective November 14, 1979, and his discharge, effective December 14, 1979.

2. Mr. Odom became a job steward for Local 660, SEIU approximately six months before his discharge. His immediate supervisor and the head of staff services were aware of his status as a union steward.
3. On Friday October 12, 1979, Mr. Odom and Mr. James Jones, a Custodian, were unable to finish an after-work discussion regarding several grievances Jones had. Jones informed Odom he was scheduled to work overtime the next day at the Museum and the two agreed to continue their discussion at that time.
4. Odom appeared at the Museum on Saturday October 13, 1979 and continued discussions of the grievances with Jones, both inside and outside the Museum. Odom was not scheduled to work at the Museum on that date. He was wearing industrial pants and an industrial shirt which resembled his uniform, but was not wearing the uniform prescribed by the Museum.
5. Rule 56 of the Policy Manual for the Custodial Unit specifies discharge for the first offense of "entering County buildings or facilities without proper authorization during or after working hours". Rule 3 of the Manual provides that "employees are not to wear their uniforms except during working hours".
6. Although Odom had a discussion with his supervisor before entering the Museum, he did not obtain permission from his supervisor to enter the building

or to talk to Jones on October 13, 1979. Odom signed in and out of the building, as required by Museum policy.

7. Several other employees, apparently not scheduled to work, were also present in the Museum on October 13, 1979. Some were accompanied by visitors. There is no evidence that those employees were granted permission to enter the Museum on that date.
8. Several of those employees did not comply with the sign-in/sign-out procedure required by the Museum. There is no evidence that they were disciplined for their failure to comply with the procedure.
9. The Museum suspended Mr. Odom for thirty days, effective November 15, 1979 and discharged him, effective December 14, 1979, ostensibly for violating Rule 56 and Rule 3 of the Policy Manual for the Custodial Unit.

CONCLUSIONS OF LAW

1. Weldon Odom was subjected to disparate treatment by Respondent because of his status as a union steward.
2. Respondent's suspension and discharge of Mr. Odom violated Section 4 and Section 12(a)(1) of the Employee Relations Ordinance.

3. Charging Party failed to demonstrate that Respondent's suspension and discharge of Mr. Odom violated Section 12(a)(3) of the Employee Relations Ordinance.

RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is recommended that the Employee Relations Commission order that:

1. Respondent reinstate Mr. Odom to his former position with the Museum of Natural History effective November 15, 1979 and restore to him all pay and benefits lost as a result of his suspension and discharge.
2. That aspect of Charging Party's charge alleging a violation of Section 12(a)(3) of the Employee Relations Ordinance be dismissed.

Dated: October 15, 1980

Los Angeles, California

Edna E. J. Francis
Edna E. J. Francis
Hearing Officer
Employee Relations Commission