

RECEIVED
EMPLOYEE RELATIONS
COMMISSION

The Hearing Officer was selected and the hearing conducted under the Los Angeles County Employee Relations Ordinance and the Rules and Regulations of the Employee Relations Commission. At the time of the hearing, the parties were given

the opportunity to offer argument, to present evidence, to call witnesses who were duly sworn and available for cross-examination. By the way of closing arguments, the parties filed post-hearing briefs.

IV. APPEARANCES

A. For The Union

James Rutkowski, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld

B. For the County

Mr. Don Elliott
Office of Chief Administrative Officer
County of Los Angeles

V. WITNESSES

A. For the Union

Ms. Mary Mora
Ms. Rosemary Agnick
Ms. Grace Duran

B. For the County

Ms. Gloria Graves
Ms. Lily Tapia
Mr. Ed Euler

VI. CHARGE

By petition dated January 21, 1986, the charging party alleged that the employer had committed an unfair employee relations practice under section 12(A)(1) of the Employee Relations

Ordinance. In support of the charge, the charging party made the following allegations:

1. During the first week of October, 1985, Mary Fuqua, an equipment operator in the Data Processing Department, asked Supervisor Gloria Graves why she had not received a promotion. The Supervisor responded that, "if you had not filed a grievance at the time of the merger of the departments, you would have received the promotion."
2. On or about October 1, 1985, Mary Mora, a tape librarian, asked Supervisor Graves if the position of Senior Tape Librarian was filled. Ms. Graves told Ms. Mora that it was not filled and shortly thereafter, the position was taken. Ms. Mora asked Ms. Graves why she was not considered for the position and Ms. Graves told Ms. Mora that "she didn't have to hire from the list or did she have to tell her anything."
3. For the month of July, 1985, Senior Tape Librarian Rosemary Agnick was in Supervisor Lily Tapia's office, and Ms. Agnick asked Ms. Tapia why Ms. Mora did not receive the promotion to Senior Tape Librarian. Ms. Tapia pulled Ms. Mora's file and showed Ms. Agnick the grievances Ms. Mora had filed. Ms. Tapia said to Ms. Agnick, "what does this tell you about an employee? With a file like this, she'll never get a promotion."
4. In September of 1985, Ms. Graves promoted equipment operator Daniel Winters to the position of System Operator. The position was never posted and the other employees did not know of the vacancy and subsequent promotion until the month of October, 1985.
5. On October 10, 1985, 5 employees were suspended after engaging in a work action during contract negotiations. This work action is clearly a protected activity and reflects the Department prejudice and anti-union animous.
6. A continuing practice of passing union flyers through a service window in the tape library area was halted by Supervisor Gloria Graves. Ms. Graves told Ms. Mora, the union steward, that passing the flyers was not official business. However, Ms. Graves continues to use the service window to sell Tupperware and pantyhose.

7. Mary Mora received an A.P. score of 70 for the position of Senior Tape Librarian in June, 1985, for which she is appealing. Ms. Mora had taken the very same examination for Senior Tape Librarian in 1982 and had received an A.P. score of 90. In comparing the two examinations for the very same position, she was down-graded in every category without exception. Yet, she had consistently been rated competent on her performance evaluations over the time period in question. If anything, she had developed more knowledge of her position, had obtained more experience, and had served as acting Senior Tape Librarian on numerous occasions. In spite of this, her A.P. score dropped 20 points with no explanation.
8. Ms. Mora is also appealing her denial of appointment to the position of Senior Tape Librarian and Computer Operator Trainee. Ms. Mora has applied for and has been denied promotion to both positions in question. Ms. Mora currently has more seniority than any other Librarian at her work site. She has worked as acting Senior Tape Librarian on numerous occasions, when other supervisors were unavailable. She has trained many librarians with lesser experience and knowledge, only to watch them be promoted over her.

Ms. Mora also applied for the position of Computer Operator Trainee. She received a score of 92 on the examination, which placed her on the top of the list. Although she is fully qualified for this position as well, she has been denied the appointment. The Department alleged that the basis for denial of appointment to Computer Operator Trainee was due to Ms. Mora's attendance record, although the absences in question were approved and were as a result of pregnancy and an Industrial Accident (both protected activities). She was informed by the Department subsequently that she needed to apply for a special waiver to be considered for the position. In fact, when she inquired about obtaining a waiver, she was informed that it was up to her supervisor to grant at the supervisor's discretion.

9. Local 660 contends that these actions constitute an Unfair Labor Practice under the Employee Relations Ordinance by exhibiting anti-union animus to the employees of the Data Processing Department as well as having a chilling effect on the employee's right to engage in union activity.

VII. RELEVANT PROVISIONS OF THE EMPLOYEE RELATIONS ORDINANCE

12(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 by this ordinance.

VIII. POSITIONS OF THE PARTIES

A. For the Union

After Ms. Mary Mora began to function actively as a union steward and filed two major grievances in close succession, her supervisor, Ms. Lily Tapia, told her that the filing of a grievance was "bad news." After this meeting, Ms. Mora's supervisor began to implement a series of actions against her which clearly established a pattern of retaliation for her role as union steward. Her supervisor began to warn Ms. Mora about returning late from coffee and lunch breaks, although Ms. Mora's conduct in this regard had not changed from years past. Ms. Mora was told not to pass union literature through the window of the tape library.

In June, 1985, Ms. Mora was given an appraisal of promotability rating of 70 on a 100 point scale, whereas her previous rating in 1982 had been 90. Ms. Mora was passed over for the position of computer operator trainee despite the fact that employees with lower interview scores were appointed to the position. Although eighty employees in the department participated in a work action in October, 1985, Ms. Mora was one of only four persons who were suspended for this participation. Also, her supervisor arranged that Ms. Mora would no longer be able to work overtime on weekends.

In most cases of anti-union discrimination there is no direct evidence of anti-union animus. The presence of anti-union animus must be reasonably inferred from the evidence presented in order to determine the employer's actual motive. The facts of the present case clearly establish a discriminatory motive. Ms. Mora was told by her supervisor that the filing of grievances was "bad news" in her department. Ms. Rosemary Agnick, the Senior Tape Librarian for the night shift, thought that Ms. Mora should have become the Senior Tape Librarian after her, and went to Ms. Tapia to inquire why Ms. Mora was passed over and, at that time, was told that people who file grievances are troublemakers. Ms. Mary Fuqua was also warned against filing grievances. A weekend supervisor, Grace Duran, was told that she should no longer offer weekend overtime to Mary Mora.

Once the union has established a prima facie case of interference, restraint, and coercion against an employee for his union activities, the employer has the opportunity to establish that the actions taken in relation to the employee were done for a valid business justification. In the present case, those business justifications proposed by the County are merely pre-textual and do not serve to justify the conduct of supervisors toward Ms. Mary Mora. As to the alleged tardies and restrictions on food in the working place, the County did not rebut the evidence presented by Ms. Mora that she was being singled out and treated in a manner which was more strict than that imposed upon other employees. As to Ms. Mora's reprimand for passing material through the tape library window, the Department's justification

was that the division was a production library and that employees should not be conducting any other business there. This excuse was undercut by evidence that a number of other employees, including a supervisor, passed items through the window, including raffle tickets, school cookies, pantyhose, and Tupperware.

There is no justification given for Ms. Mora's rating of a 70 on her appraisal of promotability when she had received a rating of 90 three years previously. Indeed, Ms. Tapia, who made the appraisal, admitted that she was not Ms. Mora's immediate supervisor at that time. Ms. Tapia's statement that Ms. Rosemary Agnick, Ms. Mora's immediate supervisor, had concurred in the appraisal was patently untrue because Ms. Agnick herself testified that she had been very surprised when Ms. Mora had been given such a low score.

The Department explained that Ms. Mora was passed over for the position of computer operator trainee because she had failed to receive a waiver regarding her sick leave requirement. However, Ms. Mora did receive a waiver from Mr. Ray Stout because her sick leave had been due to an industrial accident. When she received the waiver, she gave it to Ms. Gloria Graves.

Ms. Mora's suspension in 1985 was justified on the grounds that she had received previous warnings regarding unauthorized absences. However, the record shows that Ms. Mora had received no previous warnings regarding unauthorized absences although she had received warnings regarding tardiness.

Finally, the denial of overtime to Ms. Mora was justified on the grounds that Ms. Mora received too much overtime. However,

Ms. Duran, the person who assigned the overtime, testified that people were chosen for overtime based upon their availability.

Ms. Mora was an employee who was usually willing to work overtime when she was asked to do so. Indeed, Ms. Tapia praised Ms. Mora's availability for overtime in her 1985 appraisal of promotability evaluation.

Taken as a whole, the conduct against Ms. Mary Mora by her supervisor, Ms. Lily Tapia, exhibits an anti-union animus and constitutes prohibited interference, restraint, and coercion against Ms. Mora for her union activities. This conduct constitutes an unfair practice and the remedy for this unfair practice is that Ms. Mora should be offered the opportunity to become either a senior tape librarian or a computer operator trainer.

B. For the County

The Union has presented no proof to substantiate any of the allegations in this unfair practice charge. County witnesses and documentation have refuted each and every allegation in this matter. The County's proof as to each allegation in the unfair practice charge is as follows:

1. The statement that Gloria Graves was supposed to have made to Mary Fuqua that "if you had not filed a grievance at the time of the merger of the departments, you would have received a promotion" is unsupported by the evidence. Ms. Graves testified that she did not make such a statement and that she was not a person that had the ability to promote Ms. Fuqua. She had no knowledge of why Ms. Fuqua had not been promoted.

2. The allegation that Ms. Graves refused to discuss Ms. Mora's appointment to the position of senior tape librarian is contradicted by the evidence. Ms. Graves stated emphatically that no conversation ever took place between her and Ms. Mora. She is sure of this because she was never Ms. Mora's supervisor.

3. The allegation that Ms. Rosemary Agnick heard Ms. Lily Tapia state that the reason that Mary Mora had not been promoted was because of her file was contradicted by the direct testimony of Ms. Agnick. Ms. Agnick stated that she did not hear any specific remarks regarding Ms. Mora, and that the only relevant conversation she heard was about employees in general: why some get promoted and some do not.

4. The allegation that a position was filled without having been posted for all employees, while perhaps true, does not constitute a violation. There is no requirement nor practice of posting vacancies within the department prior to filling them. There was no evidence presented by the Union to rebut this evidence. One individual appointment was made through the usual process of Civil Service examination and interviews.

5. Five employees who participated in the concerted work action against the County were not suspended because of this work action but rather because these five individuals, one of whom was Mary Mora, had each been previously reprimanded for attendance problems. This suspension was later recinded because of a County-wide settlement agreement between County management and Local 660 in negotiations.

6. Ms. Mora was told to cease passing out union flyers through the tape library window during working hours because it was not part of her regular duties. Ms. Mora was not reprimanded for passing out flyers, merely told to stop doing it. There is no evidence of any written reprimand or warning and nothing was ever put in Ms. Mora's file regarding this request.

7. As to Ms. Mora's dissatisfaction over her appraisal of promotability given to her in June 1985, she has appealed this matter to both the County's Chief Administrative Office and to the County Civil Service Commission in the hopes of having her score raised. These are proper avenues of appeal regarding a civil service examination. Both of these organizations have denied her appeal to raise her score. Neither have found any fault with the score given to her in June, 1985.

8. Ms. Mora was not actually denied the position of senior tape librarian. Rather, she was offered such a position in November, 1985; however, she declined this offer because it was on a different shift from the one she currently worked. As to Ms. Mora being passed over for the position of computer operator trainee, she was passed over because her written score was 26 and the qualifying score was 33. Later, the department decided to allow applicants with a score lower than 33; however, the applicants were still required not to have exceeded the use of 48 hours sick leave in the past twelve months. Employees were entitled to get a waiver of the sick leave requirement if they had had more than 48 hours sick leave due to a work related injury. While Ms. Mora's sick leave was due to her work related injury, she did

not apply for a waiver. The burden of getting such a waiver is on the employee. Ms. Mora claimed that she requested a waiver from Ms. Graves; however, Ms. Graves testified that no such request was made to her, and it would have been improper for such a request to be given to her since she was not Ms. Mora's immediate supervisor.

IX. FACTUAL BACKGROUND

The facts in this case surround an employee, Ms. Mary Mora, who has worked for over five years in the Media Center of the Los Angeles County Data Processing Department as a tape librarian. Ms. Mora is a member of the Los Angeles County Employees Association, Local 660, SEIU. Her supervisors are Mr. Ray Stout, who is the manager of the Media Center, and Ms. Lily Tapia, who supervises the tape librarians. For the last four years, Ms. Mora has worked as the "senior backup," that is, she was next in rank to the Senior Tape Librarian, who for most of this period of time was Ms. Rosemary Agnick. The Senior Tape Librarian functions in a supervisory role when the supervisor is not present for a particular shift. When the Senior Tape Librarian and the Supervisor were not present, Ms. Mora would function as the immediate supervisor on the shift. In 1982, Ms. Mora was given an appraisal of promotability score of 90 for the position of senior tape librarian.

In October or November, 1984, Ms. Mora was selected to be the union steward for LACEA. As the union steward, Ms. Mora became involved in the filing of two group grievances: the first

regarding the work assignment of tape librarians and the second involving the department's medical verification policy.

Following the filing of these grievances, Ms. Mora was told in the following words, or words to this effect, by her supervisor, Ms. Tapia, that "the filing of grievances in this department is bad news; we have not had any grievances filed for some time." At this time, Ms. Mora also began to receive warnings about tardiness following coffee breaks and lunch breaks. On April 18, 1985, she received a written memo reprimanding her for being tardy three minutes on February 19, 1985, seven minutes on February 20, 1985, eleven minutes on April 15, 1985, and four minutes on April 17, 1985. Ms. Mora had not received warnings or reprimands prior to filing of the grievances, nor was there evidence presented that the department was tightening its tardiness policy toward all employees at that time.

Also in April of 1985, Ms. Mora was told that she had to stop passing out written information regarding union negotiations through the tape library window, although at this time other employees passed various items for sale, such as pantyhose and Tupperware, through the window of the tape library.

In June, 1985, Ms. Mora was again given a new appraisal of promotability rating for the position of Senior Tape Librarian. This time she received an appraisal of promotability rating of only 70. Ms. Rosemary Agnick, the Senior Tape Librarian at that time, was surprised to learn of this rating and asked the supervisor, Ms. Lily Tapia, why Ms. Mora had not been promoted to the position of Senior Tape Librarian.

In October, 1985, Ms. Mora was suspended for participating in a work stoppage conducted by the LACEA in her department during negotiations. Of the eighty or so persons who took part in the work stoppage, Ms. Mora was one of only four who were initially suspended for this conduct. These suspensions were rescinded as a result of negotiations.

After the October work stoppage, Ms. Lily Tapia told Ms. Gracie Duran, the weekend supervisor who was in charge of calling employees to work overtime on the weekends, that Ms. Mora was to no longer receive overtime on the weekends.

Sometime in the summer of 1985, Ms. Mora applied for the position of Computer Operator Trainee, which would have been a promotion from her position of Tape Librarian. Ms. Mora's interview score of 91 was high enough to qualify her, but her written score of 26 did not qualify her for the first round of applicants eligible for the position. However, after this first round there were still positions vacant and so an additional group of employees was allowed into the position. However, Ms. Mora was not offered a position of Computer Operator Trainee, even though two other employees with lower oral and written scores were offered positions.

X. DISCUSSION

A. Unfair Practice Violation

Section 12(A)(1) of the Employee Relations Ordinance makes it an unfair employee relations practice for the County to "interfere with, restrain, or coerce employees in the exercise of

the rights recognized or granted by this ordinance." Under the ordinance an employee has the right to form, join, or participate in unions.¹ The Union argues here that the County has violated section 12(A)(1) because it has retaliated against an employee for her activities as a union steward. Such retaliation, if established, is an infringement of the rights of both the employee who suffers the retaliation and the employees who witness the retaliation. The retaliation sends a direct message that bad things happen to those employees who join or participate in the union. Retaliation makes employees think twice before they exercise their rights under the Act or even prevents them from doing so altogether. The employees are, in effect, discouraged from union membership and participation. By adopting the Employee Relations Ordinance, the County has prohibited its own management from taking action in retaliation against an employee because of his or her union activities.

Precedent under the National Labor Relations Act (NLRA) is useful in determining what constitutes a violation of section 12(A)(1) for retaliation.² Under the NLRA such retaliation would be unlawful discrimination under section 8(a)(3).

While there is no provision in the Employee Relations Ordinance which is analogous to the National Labor Relations Act, section 8(a)(3), precedent under section 8(a)(3) is still useful in determining an Employee Relations Ordinance, section 12(A)(1),

1. Employee Relations Ordinance, section 4.

2. See Fire Fighter Union v. City of Vallejo (1974) 12 Cal. 3d 608, 116 Cal. Rptr. 507.

violation for three reasons. First, if such retaliation exists, it does interfere, restrain and coerce employees in the exercise of their rights; they do think twice or even refrain from action fearing retaliation. Secondly, on a technical level, under the NLRA, a section 8(a)(3) violation for retaliation would also be an 8(a)(1) derivative violation; and NLRA section 8(a)(1) is analogous to Employee Relations Ordinance section 12(A)(1). Thirdly, Employee Relations Ordinance, section 4, guarantees the employee the right to be free from discrimination because of the exercise of their rights.

The elements of the unfair practice are (a) employer knowledge of the employee's union activities, (b) negative action taken by the employer against the employee, (c) an anti-union motivation for the employer conduct. The motivation may be established by direct statements of the employer's management representative or by circumstantial evidence. Evidence of an employer's motive may be rebutted by evidence of a valid business justification for the employer's conduct.³

In the present case, all of the above elements have been established. The employer's anti-union motivation is evident by direct statements of one supervisor⁴ and by the overall pattern of conduct by supervisors toward Mary Mora.

3. See, Morris, The Developing Labor Law, 2nd Ed. pp. 182-267.

4. This anti-union motivation is apparent in the statements of Ms. Tapia to the effect that bad things happen to people who file grievances.

The evidence clearly presents a picture of an employee with a good work record who, after becoming involved as a union steward, which she was entitled to do, was suddenly in hot water with her supervisors. There is no evidence that Ms. Mary Mora's supervisors were unhappy with her job performance prior to her activities as a union steward. Ms. Mora worked for four years as the senior backup tape librarian, a position that gave her supervisory responsibilities when the immediate superior, the Senior Tape Librarian, was not present. The supervisory capacity could extend for days or even weeks during the Senior Tape Librarian's vacation. Ms. Mora was given a rating of 90 by Ms. Tapia, the Supervisor of Tape Librarians, on her appraisal of promotability for the position of Senior Tape Librarian.

In 1985, Ms. Mora became a union steward and participated in the filing of two grievances. Her superiors knew of this activity. After she became active in union affairs, a number of things began to happen to Ms. Mora. She began to receive warnings regarding tardiness; she was warned not to pass out literature through the employee window; and she received a 70 rating as opposed to her earlier 90; she was passed over for the position of Computer Operator Trainee, even though other employees with lesser scores were given such a position; when a work stoppage occurred in her department, she was one of four employees out of eighty who were suspended; and her supervisor directly instructed the supervisor in charge of weekend overtime not to give Ms. Mora any more overtime.

Any one of these actions toward Ms. Mora would not justify a conclusion that Ms. Mora's rights were being interfered with. Some of the actions may have been justified. However, the various actions taken as a whole clearly establish a pattern of behavior toward Ms. Mora. Because this pattern did not exist prior to Ms. Mora's becoming a union steward, the only logical conclusion is that the motivation for this conduct was reprisal for Ms. Mora's union activity and the effect is to interfere with, restrain and coerce Ms. Mora in the exercise of her rights.

The County presented evidence of a viable business justification for each of the actions taken against Ms. Mora. And it is true that a valid business justification can negate any inference of possible anti-union motivation for action taken against an employee. However, the evidence presented by the County does not negate the overall pattern of action taken against Ms. Mora in this particular case. The pattern is still clear. No action was taken against Ms. Mora until she became a union representative.

Moreover, the specific justifications for the actions against Ms. Mora are not always credible in their own right. While employers have a valid reason for having employees not be tardy, the employer did not worry about tardiness prior to Ms. Mora's action as a union steward. Other employees were not receiving similar warnings. Although the employer has a right to prevent extraneous materials passing through the tape library window, it was clear that other employees passed such things as Tupperware or pantyhose through the window. While it is possible

that the employee's appraisal of promotability could genuinely go from a 90, which is the second highest rating, to a 70, which is the fourth highest rating, there was evidence by Ms. Mora's immediate superior, Ms. Agnick, that she was so surprised by this low score that she went and spoke to the supervisor, Ms. Tapia, who had given the appraisal rating, regarding the score.

While Ms. Mora's rating for the position of Computer Operator Trainee was not the highest, it is clear that other employees with lower scores were given the opportunity to become Computer Operator trainees. The employer's justification is that Ms. Mora failed to obtain a waiver of her sick leave time, a requirement needed in order to be promoted to this position. However, Ms. Mora was entitled to such a waiver because her sick leave was used for a work related injury and Ms. Mora stated she did get such a waiver from Mr. Ray Stout, the Supervisor of the Media Center.

The only justification for Ms. Mora being denied weekend overtime was that she was receiving too much. However, Ms. Gracie Duran, the supervisor in charge of dispensing overtime, testified that Ms. Mora received this amount of overtime because, of all the employees, she was one of the most available and willing to put in the time.

In short, the justification provided by the Employer for its conduct toward Ms. Mora does not negate the inference that there was an attempt by her supervisors to harrass her for her activities as a union steward. Therefore, this conduct constitutes an unfair employee relations practice.

B The Remedy

The normal remedy for an unfair practice is that the Employer should be ordered to cease and desist from his prohibited conduct. This remedy would allow Ms. Mora to receive overtime in the future. But, while necessary to prevent any further possible retaliatory conduct, this remedy is not entirely sufficient in the present case. Ms. Mora to some degree must be made whole for the discrimination and retaliation she has suffered. Therefore, the County also should be ordered to offer Ms. Mora the next opening of Computer Operator Trainee.

Because the violation of section 12(A)(1) also affects the rights of other employees, notices of the violation and the order of the Commission should be posted in appropriate places in the Media Center.

XI. RECOMMENDED ORDER

The County has violated section 12(A)(1) of the Employee Relations Ordinance. In light of the above discussion the following order is recommended:

1. The County is ordered to cease and desist discriminatory and retaliatory conduct toward Ms. Mary Mora.

2. The County is hereby ordered to offer Ms. Mary Mora the next available position as Computer Operator Trainee, and to allow her to receive weekend overtime.

3. The County is also ordered to post notice stating that it has committed an unfair employee relations practice violation of Employee Relations Ordinance, section 12(A)(1), and the remedial action which has been ordered.

Nov 7, 1986
Date

Anthony Miller
Anthony Miller
Hearing Officer

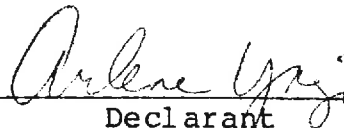
respondent at the office address of said counsel, as follows:

Mr. Don Elliott
Senior Administrative Analyst
Chief Administrative Office
500 West Temple Street
Los Angeles, California 90012

I then sealed the envelope addressed to the said counsel for the said respondent and deposited the same with postage fully prepaid thereon in the United States mail at Los Angeles, California, where is located the office of counsel for the person by and for whom said service was made.

There is delivery service by United States mail at the place so addressed and there is regular communication by mail between the place of mailing and the place so addressed.

Dated and executed at Los Angeles, California,
this 24th day of December, 1986.


Declarant