

REPORT OF THE HEARING OFFICER

RECEIVED  
EMPLOYEE RELATIONS  
COMMISSION

AUG 27 1987

In the Matter of: )

LOS ANGELES COUNTY )  
EMPLOYEES ASSOCIATION, )  
LOCAL 660, SEIU )

Charging Party )

vs. )

DEPARTMENT OF TREASURER )  
AND TAX COLLECTOR )

Respondent )

UFC 6.154

Subject: Bonus Plan Pilot Project

Date of Hearing: December 16, 1986

Record Closed: February 5, 1987

Appearances:

For the Association:

Van Bourg, Weinberg, Roger,  
and Rosenfeld

By: James Rutowski

For the County:

Donna Hill  
Management Specialist  
Employee Relations Division

Arbitrator:

Michael D. Rappaport  
15840 Ventura Blvd.  
Suite 338  
Encino, Ca. 91436

## BACKGROUND

The dispute before the Hearing Officer arose out of a decision by the Los Angeles County Department of Treasurer and Tax Collector (herein "Department") to implement a collection bonus plan pilot project in its Collection Division. The facts which led to the present case are not in dispute and for the most part were stipulated to by the parties and are as follows.

Prior to April 1, 1986 there was no bonus incentive plan in effect in the Collection Division, nor were there revenue standards for the position of Collection Investigator. There were, however, performance standards for the clerical employees in that division.

On March 3, 1986 the Department delivered to Local 660 (herein "Union") a copy of the bonus incentive plan entitled "Treasurer and Tax Collector Collections Division Bonus Plan Project" (herein "Bonus Plan"). In a letter, also dated March 3, 1986, County management offered to consult with the Union on the Bonus Plan.

Union representative Judith Serlin agreed to meet with the Department on March 17 and 19, but later requested to meet on March 24, 1986. The parties eventually met on March 24, 25, 31 and April 2, 1986 to discuss the Bonus Plan.

County management took the position at the outset, and maintained throughout the meetings, and subsequently before the Board of Supervisors, that the Bonus Plan pilot project was a consultation matter based on the "Full Understanding, Modifications Waiver" language of the applicable Memorandum of Understanding and because of the limited duration of the pilot project. The Union maintained throughout the meeting and before the Board of Supervisors that the Bonus Plan changed wages and therefore could not be implemented during the term of the current agreement and that the plan impacted wages, hours and working conditions and was, therefore, negotiable as a mandatory subject of bargaining under the Employee Relations Ordinance (herein "ERO").

During the four meetings between the Union and the County, the Union presented a counter proposal and discussions were held on the plan as presented by the Department and the counter proposal presented by the Union; however, the parties were unable to reach an agreement on the proposed plan.

The proposed plan covered all Collections Investigators and clerical staff in the Automated Delinquent Accounts, Legal Section, Unsecured Personal Property, and Delinquent Business and Health License Sections of the Collections Division.



The plan itself contained incentive provisions, which were not previously utilized by the Department, whereby individual Collection Investigators could earn cash bonuses above and beyond their base salary as set forth in the MOU if they performed at above collection levels established by the plan by successfully collecting past due monies owed the County. Clerical employees in the Collection Division would also receive cash bonuses above their base salary if the entire division performed above the levels set forth in the plan. There was no provision under the plan by which any employee would be subject to a decrease in wages established by the MOU for failure to meet the bonus targets.

After the four meetings were held between the parties, and when no agreement was reached on the implementation of the plan, the Department went before the Board of Supervisors to present the plan. On April 1, 1986, after hearing testimony by both parties, the Board of Supervisors approved the implementation of the plan on a one year trial basis. At that point the Department unilaterally implemented the plan. The Union then filed the present unfair charge alleging that the Employer had engaged in an unfair employee relations practice within the meaning of Section 12(a), Subsections 1 and 3 and Section 12(d) of the Employee Relations Ordinance. The unfair charge was eventually brought before the Hearing Officer for his recommendation.

### POSITION OF THE PARTIES

#### UNION

The Union argued that the Bonus Plan is a mandatory subject of bargaining under the Employee Relations Ordinance. In support of this position, it cited Section 6(b) of the Employee Relations Ordinance and contended that since wages are a subject of mandatory bargaining, the Bonus Plan, which directly and clearly impacted wages should also be covered by Section 6(b).

The Union noted that the plan provided an opportunity for employees to increase wages through cash bonus incentives and, as a result, some, but not all employees, would have their wages increased by the plan. As a result, the plan clearly and directly impacted wages of employees within the Department and, therefore, it is a subject of mandatory bargaining. In support of this position, the Union cited the Meet and Confer Provisions of the Government Code, Section 3505, upon which Section 6(b) was based. This part of the Code provides in part:



"The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations...and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."

The Union also contended that the Los Angeles County Employee Relations Commission has adopted the broad and liberal standards by which California courts have construed the previously cited code section. It also argued that it was well established under the code, as well as the County ERO, that it is appropriate to look at Federal law to interpret the phrase, "wages, hours and other terms and conditions of employment" in determining what are mandatory subjects of bargaining. The Union cited several NLRB decisions which held that bonus and incentive plans similar to that now before the Hearing Officer have almost without exception been considered mandatory subjects for bargaining by the NLRB.

Based on the preceding, the Union argued that there is no question that the Department's proposed implementation of the Bonus Plan is a matter subject to mandatory negotiations and, as a result, the Department's refusal to negotiate the plan and its unilateral implementation of the plan was a violation of Section 6(b) of the ERO.

The Union also argued that it did not waive its right to negotiate the implementation of the plan.

The Union noted that the Department's main defense was that the Union waived its right to negotiate over the implementation of the Bonus Plan through the "Full Understanding, Modifications Waiver" (herein "Full Understanding Provision") provision of the respective MOU's. The Union contended, however, that this language did not apply in the present case. It argued that the Bonus Plan attempted to modify matters already specifically covered and established in the MOU, which in the instant case constituted the wages of employees. The Union pointed out that Section 2 of the Full Understanding Provision expressly stated:

"It is understood and agreed that the provisions of this section are intended to apply only to matters which are not specifically covered in this agreement."



Since, according to the Union, the subject of wages was specifically covered in the MOU and was extensively negotiated by the parties, the waiver clause of Section 2 does not apply. It was pointed out that wages were carefully negotiated by the parties and, therefore, according to the Union, Management could not simply unilaterally implement a plan which impacted and modified the wage agreement negotiated by the parties without obtaining the full agreement and consent of the Union.

The Union also contended that a fundamental tenet of labor law is that once an item was agreed upon in the body of a collective bargaining agreement, it could not be modified during the term of the agreement without the consent of both parties.

It was also argued that any alleged waiver of rights under a negotiated collective bargaining agreement must be clear and unmistakable. With respect to the present case, the Union contended that the application of this test compels a finding that there has been no waiver. It noted that wages are a fundamental and central element in any collective bargaining agreement and, therefore, given the importance of the wage section of the Agreement, no waiver of the employee's statutorily created right to negotiate such matters can be made unless the waiver is clear, specific, expressed and unequivocal. The Union argued that the broad language of the full understanding clause of the MOU simply did not meet this test. It further contended that the Union would never waive its right to negotiate with respect to a mid-term attempt to change wages.

Finally, the Union argued that the significant numbers test of the full understanding provision was met. It contended that even if the full understanding provision is applicable, the "significantly large number" part of that provision was met in the present case, and, therefore, the article did not relieve the Department of its obligation to negotiate.

The Union pointed out that the record established that the Collections Division of the Treasurer and Tax Collector Department are all located at a single location. It further noted that the majority of the Collection Investigator II's at that location work in either the Automated Delinquent Accounts section or the Unsecured Personal Property section of the Collections Division, which are the two sections covered by the plan. It further pointed out that, as shown in Joint Exhibit 1, page 4, as well as the stipulation, paragraph 10, all of the Collective Investigators found within these two sections of the Division are covered by the Bonus Plan. The Union argued that these Collection Investigators comprise the



entire Collection work force of the two most significant sections of the Collections Division and all of them are covered by the Bonus Plan. The Union further contended that since there are so few Collections Investigators within the County system, they can be considered a "readily identifiable occupation" as used in the article.

Based on the above, the Union argued that the Bonus Plan is not subject to the waiver article at all, however, even if the waiver article were applied, the significantly large numbers test is met and the Department is therefore obligated to negotiate.

#### EMPLOYER

The Department argued that it did not engage in an unfair employee relations practice when it implemented the Bonus Plan pilot project.

The Employer contended that it complied with Section 6(a) of the ERO when it gave timely notice to the Union to consult on the plan. It was pointed out that there was notification to the Union that the County was willing to consult with the Union, and, in fact, meetings with the Union to discuss the Bonus Plan did take place. The Employer maintained that it properly consulted with the Union prior to implementing the Bonus Plan as required by Section 6. It contended that proper and timely notice was given to the Union with respect to the discussions and the County also pointed out that it provided appropriate and necessary data and that no evidence was presented to the contrary to support the Union's original charge that data was not presented in a timely fashion.

The County also took the position that the matter in question is not negotiable based upon the Full Understanding Provision in each of the applicable MOU's. The Employer argued that it is well settled under Federal precedent that a Union may waive its statutory right to negotiate, provided the waiver is clear and unmistakable. In the present case, the County argued that the Full Understanding Provision is an express waiver designed to relieve the parties of the obligation to negotiate during the terms of the Contract unless certain requirements are met. However, according to the Department, those requirements were not met in the present case. It pointed out that neither the majority in the bargaining unit, nor all of the employees within the department in the unit, nor all of the employees in a readily identifiable occupation, were substantially affected by the implementation of the Bonus Plan, as is required under the Full Understanding Provision before negotiations must take place. The County also



argued that the Union failed to offer evidence that the change would significantly affect the working conditions of a significantly large number of employees as is required by the article. As a result, the County was not obligated to negotiate the plan with the Union.

In support of this position, the County pointed to several decisions by the Employee Relations Commission which have dealt with the waiver issue. In the cases pointed to by the Department, it argued that the employer's position, which was similar to the position now before the Hearing Officer, was sustained.

The Department also argued that the plan did not really impact employees' duties, wages, or working conditions in a significant manner. It noted that there was no adverse impact on employee wages, hours or working conditions as a result of the plan, and there had been no change in duties, nor had anyone been disciplined. Instead, employees now have an opportunity to earn a bonus in excess of their salary. It further stressed that no employee has suffered reduced wages because of the introduction of the plan.

Based on the preceding analysis, the Department contended that it was under no obligation to negotiate the plan. It noted that the significant numbers language contained in the Full Understanding Provision constituted an express waiver by the Union which the Employee Relations Commission has in previous decisions found to be a clear and unmistakable waiver. It also noted that the evidence established that the employees' duties did not change, nor have employees' wages, hours, or working conditions been significantly impacted by the plan. As a result, the Department contended that the Hearing Officer should find that the charging party waived its right to bargain by express agreement and that the Department did not violate the Employee Relations Ordinance by its introduction of the Bonus Plan.

#### RELEVANT CONTRACT AND STATUTORY LANGUAGE

##### MEMORANDUM OF UNDERSTANDING

##### ARTICLE 7: Salaries

##### "Section 1. Recommended Salary Adjustment

The parties agree jointly to recommend to County's Board of Supervisors that said Board adopt and implement the following salaries applicable to employees in the unit on the ef-

fective dates indicated:..."

ARTICLE 38\*

Full Understanding, Modifications Waiver

"Section 1. It is intended that this Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein, and 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. 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 subject or matter covered herein.

With respect to other matters within the scope of negotiations, negotiations may be required during the term of this agreement as provided in Section 2 of this Article.

Section 2. It is understood and agreed that the provisions of this section are intended to apply only to matters which are not specifically covered in this agreement. It is recognized that during the term of this agreement, it may be necessary for Management to make changes in rules or procedures affecting the employees in the Unit. Where Management finds it necessary to make such changes, it shall notify the Union indicating the proposed change prior to its implementation.

Where such changes would significantly affect the working conditions of a significantly large number of employees in the Union; where the subject matter of the change is subject to negotiations pursuant to the Employee Relations Ordinance and when the Union requests to negotiate with Management, the parties shall expeditiously undertake negotiations regarding the effect the change would have on the employees in the Unit.

The phrase "significantly large number" shall mean: (a) a majority of the employees in the Unit, (b) all the employees within a department in the Unit, or (c) all the employees within a readily identifiable occupation such as Stenographer or Truck Driver.

\*In two of the MOUs before the Hearing Officer, Article 35 is the Full Understanding Clause.



Any agreement resulting from such negotiations shall be executed in writing by all parties hereto, and if required, approved and implemented by County's Board of Supervisors. If the parties are in disagreement as to whether any proposed change is within the scope of negotiations, such disagreement may be submitted to the Employee Relations Commission for resolution. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted as an impasse to the Employee Relations Commission."

#### EMPLOYEE RELATIONS ORDINANCE

"Section 6(a). All matters affecting employee relations, including those which are not subject to negotiations, are subject to consultation between Management representatives and the duly authorized representatives of affected employee organizations. Every reasonable effort shall be made to have such consultation prior to effecting basic changes in any rule or procedure affecting employee relations."

"Section 6(b). The scope of negotiations between management representatives and the representatives of certified employee organizations includes wages, hours, and other terms and conditions of employment within the employee representation unit."

"Section 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 their rights recognized or granted in this Ordinance;...(3) to refuse to negotiate with representatives of certified employee organizations on negotiable matters."

"Section 12(d). Charges of violations of this Section or of this Ordinance, or of applicable rules or regulations may be initiated by a Management representative, by a representative of any employee organization, or by an individual employee or group of employees. Such charges shall be filed in writing with the Commission. Each charge so filed shall be processed in accordance with the rules and regulations of the Commission."

#### DISCUSSION

The basic issue before the Hearing Officer is whether the County engaged in an unfair employee relations practice when



the County unilaterally implemented the Bonus Plan without negotiating the Bonus Plan with the Union. After considering the evidence and arguments presented by the parties, the Hearing Officer has concluded that the County did engage in an unfair labor practice in violation of the ERO. The reasons for this decision are as follows.

It is undisputed that under the ERO wages are a mandatory subject of bargaining. As a result of the bargaining of the MOU's which took place between the parties, there were very specific salaries established for the classifications which are the subject of the present unfair labor charge. In each case, a minimum and maximum rate was established. Having negotiated the wage rates of employees for the period of the MOU's, both parties had the right to rely on the negotiated wages. Therefore, when the Bonus Plan was unilaterally imposed by the Department without negotiating, the question immediately arose as to whether the Bonus Plan should be considered a change in wages and thus should be a mandatory subject of bargaining under the Employee Relations Ordinance. The Hearing Officer is persuaded that the Bonus Plan is indeed a mandatory subject of bargaining under the Employee Relations Ordinance since it directly impacts and changes the negotiated wages of the employees involved.

There can be no question that the wages of some of the employees will be changed because of the implementation of the Bonus Plan. The fact that the wages of individual employees will not be adversely affected in that no wages will be reduced as a result of the Bonus Plan, does not change the fact that wages of employees will be changed, nor does it change the fact that the wages of some employees will be reduced at least relative to the wages of other employees whose wages will increase. The Hearing Officer is persuaded, furthermore, that since not all employees are likely to have their wages increased, nor are increases likely to be in the same amount, the potential exists for a certain amount of disparity and a disruptive effect among employees due to what will be changes in wages of certain employees. While there may well be merit in a pay plan that rewards the most productive employees, nonetheless, the Union has the right to negotiate such a plan, given the fundamental change in wage policy that the implementation of such a policy would represent. The Hearing Officer is convinced that as the representative of the employees, the Union has the right to not only negotiate wages on behalf of the employees, but also has the right to the benefits of the negotiations, without the wages which it negotiated being unilaterally changed by Management. The Union in addition has the right when negotiating wages to be made aware of any impact upon those wages, such as a plan to provide bonuses to certain of the employees, so that this may be taken into consideration during the negotiations. The Hearing Officer is



further persuaded that it is clear that a bonus plan which will provide certain employees with additional wages must be described as one which clearly affects wages of employees and thus clearly impacts the wage scale system negotiated between the parties. Therefore, the Hearing Officer has concluded that the Department's proposed implementation of the Bonus Plan was a matter of mandatory negotiations under the ERO. Accordingly, the Hearing Officer finds that unless it can be shown that there was somehow a waiver by the Union of its right to negotiate the implementation of this plan, the refusal by the Department to negotiate the plan and its unilateral implementation of the plan is a violation of Section 6(b) and Section 12(a) of the ERO.

The Department has contended that the Union has waived its right to negotiate over the implementation of the Bonus Plan by agreeing to the wording of the Full Understanding Provision of the MOU. The Hearing Officer, however, was not convinced by this argument.

The Hearing Officer was persuaded that contrary to the apparent position of the County, the Bonus Plan is a matter covered by the MOU. Although the MOU does not specifically discuss a Bonus Plan, the Hearing Officer, nonetheless, is convinced that, given the close and intertwined relationship between the Bonus Plan and its impact on wages of employees, the Bonus Plan does deal with a subject, specifically wages, which has been extensively negotiated between the parties and upon which the parties ultimately reached an agreement. Thus, the Bonus Plan is an attempt by the County to unilaterally alter the wage provisions already negotiated and specifically covered under the MOU.

The Hearing Officer further notes that the MOUs contain a section in Article 9 entitled "Special Pay Practices" in which the parties have negotiated unique pay practices which impact upon other negotiated wages. These include, for example, provisions for night shift differential, call-backs, and even a section in some of the MOUs which deals with bonus pay for completion of educational programs. Thus, it is quite apparent to the Hearing Officer that the subject of wages was negotiated and that special pay practices which impact upon wages, including bonus plans, were negotiated, and are specifically covered by the MOU. The fact that the Hearing Officer finds that wages are covered by the MOU is significant because Section 2 of the Full Understanding Provision, which the Employer is relying on to assert its position that it is not required to negotiate with the Union, states that the provisions of that section are intended only to apply to matters which are not specifically covered by the agreement. Since the Hearing Officer has concluded that wages and salaries, as well as bonuses, are covered by the Agreement, the Full Understanding



Modification Waiver Provision cannot apply and, therefore, does not relieve Management of its duty to negotiate the changes in wages caused by the proposed Bonus Plan.

Having determined that the Full Understanding Provision is not applicable in this case, the Hearing Officer does not have to deal with the question of whether significantly large numbers of employees were affected in order to require that the County engage in negotiations with the Union over the proposed Bonus Plan. Accordingly, the Hearing Officer has determined that the Full Understanding Provision does not constitute a waiver by the Union of its right to negotiate a change in wages, which in this case would include the implementation of the Bonus Plan.

FINDINGS AND RECOMMENDED REMEDY

The Hearing Officer finds that the County engaged in an unfair employee relations practice when Management implemented the Bonus Plan Pilot Project without negotiating with representatives of the certified employee organizations. For that reason, the Hearing Officer finds that the implementation of the plan was improper and a violation of the ERO. The Hearing Officer, therefore, recommends that the status quo which existed before the unilateral implementation of the plan be reestablished and that the operation of the plan be immediately suspended and rescinded until the completion of negotiations between the parties over the establishment of the plan. However, given both the administrative and practical costs of returning entirely to the status quo, the Hearing Officer does not recommend that employees who have received bonuses under the plan be required to relinquish and return funds already previously paid to them under the plan.

August 24, 1987  
DATE

[Signature]  
HEARING OFFICER