REPORT OF HEARING OFFICER

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EMPLOYEE RELATIONS COMM.
COUNTY OF LOS ANGELES
SEP 2 1 12 PM '76

In the Matter of LOS ANGELES COUNTY EMPLOYEES ASSOCIATION; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 660 AFL-CIO; PAT DAVOREN Charging Parties And LOS ANGELES COUNTY SHERIFF'S DEPARTMENT Respondent	UFC 6.25: Charge of Unfair Employee Relations Practice

Hearing Officer

Dr. Paul Prasow
338 Oceano Drive
Los Angeles, California 90049

Hearings Held

January 20 and 27, May 26, and July 13, 1976
Los Angeles County Hall of Administration
Los Angeles, California

Appearances

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For the Respondent: John M. Baskett
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BACKGROUND

On December 10, 1974, the Office of the Sheriff, County of Los Angeles, notified Patrick J. Davoren that he was suspended, without pay, from his position as Detective Sergeant for a period of three days. Such suspension was based on Davoren's alleged violation of Section 3-01/015.30 of the Department's Manual of Policy and Procedures relating to the use of alcohol while on duty. Although under Rule 19.01 of the Civil Service Rules Davoren had the right to appeal his suspension by the Sheriff's Department, he did not do so.

Several weeks subsequent to his three-day suspension, however, Sergeant Davoren was also transfered and reassigned from his prior position as a Detective Sergeant at Carson Station, Detective Bureau, Patrol Division West, to a position as a uniformed Sergeant at Biscailuz Center, Custody Division. Such assignments at Biscailuz Center, according to a stipulation by the parties, are generally considered to be less than desirable (TR 1/20/76 112:11-16). The latter assignment of Davoren has continued to date.

Sometime prior to March 21, 1975, a grievance hearing was convened in Headquarters, Patrol Division West, at the request of Grievant Davoren who was represented by his attorney, Edward L. Faunce. Davoren protested his transfer to Biscailuz Center as being unfair, arbitrary and tantamount to a demotion. While the reviewer at the grievance hearing, Division Chief LeBas,

expressed regret that the transfer of Sergeant Davoren was not accomplished simultaneously with his suspension, the transfer was nevertheless upheld on the basis of "other considerations" including: (1) Davoren's position as an "indigenous leader," (2) an asserted need for closer supervision of Davoren, and (3) management prerogative.

The instant charge of unfair employee relations practice was thereafter filed by the charging parties on April 3, 1975 with the Employee Relations Commission pursuant to Section 12 of the Employee Relations Ordinance, Number 9646, in protest of Davoren's reassignment and transfer. It is specifically the position of the Charging Parties that the Respondent Sheriff's Department has violated and continues to violate Section 12 (a) (1) of the Ordinance by interfering with, restraining and coercing its employees in their exercise of rights which are recognized and granted under Section 4.

In support of this position, the Charging Parties assert that this case presents a particularly sensitive issue because Sergeant Davoren has in the past sucessfully pursued a charge of unfair employee relations practice against the Sheriff's Department on similar facts (Exhibits 1 and 2). Additionally, the Charging Parties claim that Davoren has a reputation within the Department as a martyr and that his transfer to Biscailuz Center was both discriminatory and a double penalty on top of his suspension. Finally, the Charging Parties maintain that the Respondent has established a consistent practice of transfering Sergeant Davoren as a punitive measure and that this

particular transfer had an adverse impact upon him from both financial and career points of view.

In defense of its actions, the Respondent Sheriff's Department contends that the record in this case provides no basis upon which to find a violation of Section 12 (a) (1). First, the Respondent asserts, Davoren was not disciplined for engaging in protected activity but, rather, for drinking on duty - an activity not only not protected but strictly proscribed by departmental policy. With respect to the Charging Parties' allegation that the transfer was a penalty, the Respondent urges that Davoren has failed to show that he lost anything that was his by right; according to the Respondent, employees have no right to overtime. In this same context, Section 80 of the Los Angeles County Administrative Code relating to departmental work assignment would be a nullity, the Respondent maintains, if the Hearing Officer were to decide that Davoren has a vested interest in his prior overtime.

The Respondent further denies that Davoren's transfer was discriminatory. Such action on the part of the Sheriff's Department, it is asserted, was based on Departmental information that he was a problem drinker on duty and was consistent with the Department's handling of a similar case involving one Sargeant Powell. Finally, the Respondent maintains, the record does not support the allegation that Davoren is the object of a Departmental vendetta. It is urged that to hold the Department hostage by the decision in the previous unfair employee

relations practice case involving Sergeant Davoren would be to destroy the Department's ability to supervise.

The charge alleging an unfair employee relations practice was processed through the steps provided by Rule 6 of the Employee Relations Commission Rules and Regulations. Dr. Paul Prasow was appointed by the Commission to serve as Hearing Officer. Pursuant to Rule 6.07, hearings were held on January 20 and 27, May 26 and July 13, 1976 at which time all parties concerned were given a full and complete opportunity to present evidence and argument bearing on the issues. Each party concluded its case by filing a Closing Brief received on or about August 6, 1976.

ISSUES

No stipulation was entered into by the parties at the hearing with respect to a precise framing of the issues presented by the record in this case.

It is clear to the Hearing Officer, however, that the issues may be properly stated by reframing the language of paragraph 2 of the Charge filed with the Employee Relations Commission on April 3, 1975. Thus, the issues to be decided may be stated as follows:

1. Has the Sheriff's Department engaged and is it engaging in unfair employee relations practices within the meaning of Section 12 (a) (1) of the Employee Relations Ordinance?

2. If so, what action shall the Hearing Officer recommend to the Los Angeles Employee Relations Commission as the appropriate remedy in this case?

PERTINENT PROVISIONS OF THE EMPLOYEE RELATIONS ORDINANCE OF THE COUNTY OF LOS ANGELES

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 the 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 the exercise of the rights recognized or granted in this Ordinance;

. . . .

POSITION OF THE PARTIES

Position of the Charging Parties

It is the position of the Charging Parties that the Respondent Sheriff's Department violated and continues to violate Section 12 (a) (1) of the Los Angeles County Employee Relations Ordinance. It has done so, according to the Charging Parties, by interfering with employee rights, guaranteed by Section 4 of the Ordinance, "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." By the terms of Section 4, the Charging Parties point out, "no employee shall be interfered with, intimidated, restrained, coerced or discriminated against because of his exercise of these rights."

The basis for this contention is set forth in a "charge alleging unfair employee relations practice" and attachments thereto filed with the Employee Relations Commission on April 3, 1975. In that charge and in the record developed subsequently, the Charging Parties have made several principal assertions. First, it is contended that the transfer of Sergeant Davoren to Biscailuz Center, because of his prior relationship with the Respondent Sheriff's Department, requires that the Hearing Officer give special consideration to his claims of an unfair employee relations practice. The Respondent does not deny that approximately five years ago Sergeant

Davoren successfully pursued the first unfair employee relations practice charge against the Sheriff's Department and that ultimately a court decision was required to gain Department compliance with the Employee Relations Commission order in that case.

According to the Charging Parties, the danger is ever present that the Respondent will take retaliatory action against Grievant Davoren because of the prior decision. In view of that danger, it is maintained, the Respondent must shoulder a greater burden of proof that Davoren's transfer to Biscailuz Center was circumspect in every regard. That burden has not been sustained in this case, the Charging Parties argue, and thus the transfer will almost surely be interpreted as a punitive act for Davoren's labor activity with a resulting negative impact on other members of the Department - precisely the evil sought to be avoided by Section 12 (a) (1) of the Ordinance.

Second, it is claimed that Sergeant Davoren's reputation among members of the Sheriff's Department is that of a martyr. In support of this position, the Charging Parties cite the testimony of both Lieutenant Wilson and Grievant Davoren with respect to Davoren's labor relations activities and the generally adverse Departmental response thereto. Such testimony focused on Davoren's non-promotability and his apparently not infrequent confrontations with top administration in the Department. The Respondent cannot dismiss the statements made to and about Davoren, it is maintained, simply by claiming that they were

made in jest. The testimony of both Davoren and Wilson is uncontroverted on this point and it is unlikely that Lieutenant Wilson would put his own long career in jeopardy to testify over a joke.

The Charging Parties further assert that Sergeant Davoren's transfer from the Carson Detective Bureau to the Biscailuz Custody Center was a double penalty. Punishment for his alleged violation of Departmental rules relating to the use of alcohol while on duty was given both in the form of a three-day suspension and a transfer, although the transfer admittedly was an after-thought and came later in time. If the transfer penalty had been given at the same time as the suspension, it is argued, the Grievant would have appealed the entire penalty under the Civil Service Rules. As it was, he did not appeal the three-day suspension solely in an attempt to avoid further confrontations with the Department.

It is clear from the record, the Charging Parties maintain, that Davoren's transfer was a punitive measure. Chief LeBas testified that it was made with a specific purpose in mind, to correct a problem of drinking on duty, and that he supposed the transfer to be disciplinary (Tr. 5/26/76, 63:14-18). Thus, not only was Sergeant Davoren punished twice for the same alleged offense, but the second punishment was even more severe than the first because the disciplinary transfer was and remains completely open-ended.

It is further contended by the Charging Parties that the Respondent Sheriff's Department has established a consistent

practice of transfering Grievant Davoren in order to punish him. This is shown, contended, by the claimed requirement for "closer supervision" made by the Department in the instant case. The same claim was made by the Respondent in the previous unfair employee relations practice case brought by the Grievant and was rejected by Hearing Officer Roberts, as it should be rejected here. Second, the consistency of the Department's treatment of Davoren is shown by its repeated references to his organizational activities. In the prior case, the Respondent justified the transfer "because Sergeant Davoren was adding to existing dissension...through his activities on behalf of LACEA..." Here, the Respondent justified the transfer to Biscailuz Center partly on the basis that Davoren was an "indigenous leader." In view of the similarity of the circumstances surrounding the two transfers, the Charging Parties maintain, the conclusion must necessarily be drawn that just as the first transfer was an unfair employee relations practice, so was the second transfer.

Another principal assertion by the Charging Parties is that Davoren's transfer amounted to discrimination by the Department in its application of punishment to the four sergeants involved in the alleged drinking-on-duty incident. The Respondent asserts that it acted on the basis of information that Grievant Davoren was a "problem drinker." The record discloses, however, that of the four individuals involved, he was the only one who had neither a prior suspension or a letter

of reprimand in connection with drinking while on duty. He was, nevertheless, given a disciplinary transfer in addition to the three-day suspension - a punishment matched only by that given to Sergeant Powell who had been both suspended and reprimanded in writing for past violations of the same departmental rule. Given the disparity of the disciplines imposed in relation to the records of the four individuals, the Charging Parties argue that some other factor was responsible for the Respondent's action in transfering the Grievant. It is submitted that such other factor was Davoren's reputation and leadership in respect to matters of labor organization.

Finally, the Charging Parties maintain that the transfer of Sergeant Davoren has adversely affected him both financially and in terms of his career in the Department. The financial impact is due to the loss of opportunity to earn overtime, which is not available to the Grievant at the Biscailuz Center. That Davoren's career has been adversely affected is apparent from the Respondent's stipulation that "...most detective sergeants, if given a preference, would not prefer to work Biscailuz Center or the Custody assignment at Biscailuz Center" (Tr. 1/20/76, 112:11-16).

In conclusion, the Charging Parties do not question the right of the Respondent Sheriff's Department to transfer its employees for proper reasons. That power, however, is abused when it takes the form of an open-ended disciplinary action without provision for review to see whether the alleged precipitating problem has been corrected. The power is further

abused when the penalty is double and imposed in a discriminatory manner.

For these and other reasons, the Charging Parties ask that the charge alleging unfair employee relations practice be upheld and that the Hearing Officer recommend that the Respondent be ordered to cease violating Section 12 (a) (1) of the Ordinance. The Charging Parties further urge that it be recommended that Sergeant Davoren be immediately transferred to a detective sergeant position within a reasonable distance of his home and that the Respondent issue a written apology to the Grievant for its unlawful action.

Position of the Respondent

It is the Respondent's position that the Charging Parties have failed to prove the existence of the necessary elements of a violation of Section 12 (a)(1) based on the factual record in this case. Consisent with the decision of the California Supreme Court in Firefighters Union v. City of Vallejo (1973), the elements of a cause of action under Section 12 (a)(1) of the County Ordinance are the same as they would be under Section 8(a) (1) of the National Labor Relations Act. Those elements were set out by the United States Supreme Court in NLRB v. Burnup and Sims, Inc. (1964) as follows: 1) at the time in question, the employee must be engaged in protected activity, 2) the employer must know that the activity is protected, 3) the basis of the discipline must have been an alleged act of misconduct in the course of the protected activity, and

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4) the employee must not, in fact, be guility of the alleged misconduct.

Here, according to the Respondent, there is no evidence that the activity for which Sergeant Davoren was disciplined, drinking on duty, was a protected activity. Indeed, such activity was and is not only not protected but is specifically proscribed by long standing departmental policy. Since Davoren's activity was not protected, it is asserted, the Charging Parties have failed to satisfy the first three elements of Burnup. With respect to Burnup's fourth requirement, the Respondent submits that the Charging Parties have similarly failed to show that Davoren was not guilty of violating the established rule against drinking while on duty. It was, in fact, the Charging Parties who sought to limit evidence on the subject of the underlying offense and who failed to appeal the initial suspension imposed by the Department. In short, the Charging Parties have not established the existance of any of the Burnup elements of an unfair labor practice charge and, thus, their position cannot be sustained.

The Respondent turns next to the assertion made by the Charging Parties that the transfer here in question was somehow a penalty. Grievant Davoren has not shown that he lost anything that was his by right. While deputized personnel in custody facilities do not normally work overtime, as Davoren apparently wants to do, he was never at any time during his employment given assurances that he would be able to earn overtime. Indeed, counsel for the Charging Parties admitted

at the hearing that employees have no "right" to overtime. Further, according to the Respondent, far from being disadvantageous, Sergeant Davoren's Biscailuz Center assignment offered the advantages of both being closer to his residence and providing a free meal each day.

If the Charging Parties' position were to prevail on this issue, the Respondent maintains, once an employee was assigned to a position that allowed him to earn overtime he could never be reassigned to a position which did not provide that opportunity. Under such a ruling, Section 80 of the Los Angeles County Administrative Code, providing that "It shall be the duty of the head of each...department to assign work... and he may reassign any work at any time he deems it expedient for the securing of efficiency...," would be a nullity.

With respect to the allegation that the transfer constituted discrimination against Sergeant Davoren for prior employee organizational activity, the Respondent relies on testimony to the contrary offered by Chief LeBas. According to LeBas, the decision not only to suspend but to transfer both Sergeants Powell and Davoren was based on the belief of individuals in "the chain of command" that the two individuals were problem drinkers on duty. The transfers were effected to place both men in more closely supervised positions where their drinking problems could be monitored.

The Department's judgement in this matter, the Respondent argues, was reinforced by the admission of Sergeant Davoren that it was generally his practice to have a drink or two on

his lunch break and that this might be either beer, wine or liquor depending on where he ate (Tr. 1/20/76, 156:6-12). Further, although it was later determined that the other two men involved in the drinking incident, Sergeants Roe and Oltman, had each received a prior written reprimand for drinking on duty, this fact was not known to Chief LeBas at the time Davoren was transfered; thus, it should not be held against the Department in assessing the propriety of Davoren's discipline.

Finally, the Respondent turns to the import of the Decision and Order of the Commission in UFC 6.8 with respect to the instant case. The Charging Parties have asserted that because Sergeant Davoren prevailed against the Sheriff's Department in the prior case, he became a "marked man." The record discloses, however, that the Charging Parties' contention in this regard is based on hearsay statements which were nothing more than jokes and wisecracks. To allow the Department now to be held hostage by a five-year-old decision in a prior unfair practice case and by comments made by friends and associates of the prevailing employee would be to destroy the Department's ability to supervise.

The relevant case law is clear, the Respondent contends, that the burden is on the Charging Parties to show that discipline was imposed for improper motives where good cause for such discipline otherwise exists. The mere existence of anti-union animus is not enough.

In summary, the Respondent submits that the Charging Parties have failed to establish that the transfer of Sergeant Davoren to the Biscailuz Center facility constituted a violation of

Section 12(a)(1) of the Los Angeles County Employee Relations Ordinance. The Respondent further submits that the discipline imposed by the Department as a result of Sergeant Davoren's drinking on duty has not been shown to have been imposed in a discriminatory or otherwise improper manner. For these and other reasons, it is requested that findings and an order be entered in favor of the Respondent on all issues presently before the Hearing Officer.

HEARING OFFICER'S FINDINGS AND CONCLUSIONS

On December 10, 1974, Sergeant Davoren was given a three (3) day suspension for allegedly consuming alcoholic beverages while on duty. According to Davoren, he did not appeal the suspension to the Civil Service Commission within the ten days permitted because he had accumulated far more than three days of accumulated overtime which he could afford to lose. Furthermore, Davoren contends, he did not wish to have any further confrontation with the Sheriff's Department.

Some sixteen days after the expiration of Sergeant Davoren's time to appeal the suspension to Civil Service, he was transferred and reassigned from Patrol Division West to the Custody Division at Biscailuz Center.

Turning first to the Respondent's suspension of Grievant Davoren, the Hearing Officer does not question the right of the Sheriff's Department to impose a three day suspension for allegedly drinking on the job. The Department's delayed action of the transfer to Biscailuz Center, however, adds another dimension to the situation. The Hearing Officer would not question such transfer had it been imposed at the time of the suspension or immediately thereafter. What does concern the Hearing Officer, however, is not so much the lapse of twenty-six days between the suspension and the transfer, but the fact that the transfer has lasted for a period of over eighteen months and is open-ended.

During the hearings on the case, the parties stipulated or Management testified to the following facts regarding the transfer to Biscailuz Center:

1) that it was an undesirable transfer in that the average sergeant would not care for such an assignment;

2) that the transfer was an afterthought on the part of management; and

3) that the transfer was considered a part of the disciplinary penalty imposed on Sergeant Davoren.

The Hearing Officer considers it unnecessary to evaluate the twenty-six day delay in transferring Sergeant Davoren to Biscailuz Center; nor is he prepared to appraise the "afterthought" nature of the transfer. The critical factor, in the Hearing Officer's opinion, is that the transfer was open-ended and has already lasted for over eighteen months. This situation, in short, is simply not consistent with Management's stated objective that the transfer was to supervise Sergeant Davoren in terms of his alleged drinking problem - that the transfer "was to correct a problem of drinking on duty" (Tr. 5/26/76, 63:14-18).

It is pertinent that there were four sergeants involved in the alleged drinking incident which resulted in the three day suspension and all four sergeants were charged with identical violations of the Sheriff's Department rules. The record discloses, however, that Management imposed a three day suspension and a transfer on Sergeant Davoren and on Sergeant Powell but not on the two other individuals involved in the

incident.

According to the record, Sergeant Powell "had a couple of prior disciplinary actions," while Davoren had a clear prior record in that he had neither a letter of reprimand nor a prior suspension for any problem relating to drinking. It is important to note, in fact, that there is no credible evidence in the record to support the charge that Sergeant Davoren was a "problem drinker." In the first place, the charge is denied and rebutted in the record. Secondly, there are only vague references in the record to the source of information regarding Davoren's alleged drinking problem. Management's testimony on this charge refers to information received through the "chain of command." It is certainly not clear whether any Management official in the "chain of command" had any direct knowledge regarding the alleged drinking problem. Thus, the testimony as to the source of information regarding Sergeant Davoren's alleged drinking problem is so tenuous that it must fall of its own weight. Finally, and most important, the record is barren of any evidence that Sergeant Davoren had ever received any prior discipline for drinking on the job, nor had he ever received a written or even an oral reprimand for such alleged conduct. This last point is especially significant in light of the fact that the two other Sergenant's (Oltman and Roe) involved in the alleged drinking incident with Davoren and Powell both had prior letters of reprimand in their files for drinking on the job. Yet neither one of them was given a transfer in

addition to the three day suspension.

Returning to Sergeant Davoren's transfer to Biscailuz Center, it is clear from the record that the transfer was not intended to be open-ended. Chief Le Bas testified for the Respondent that the transfer was to last only until the alleged drinking problem was corrected. Chief Le Bas further testified that once the alleged problem was corrected, he would be in favor of transferring Sergeant Davoren back to his detective sergeant duties (Tr. 5/26/76, 105:24-28).

Yet it is now eighteen months later and Sergeant Davoren is still at the Biscailuz Center. There is no evidence in the record to show what kind of monitoring, if any, took place during this period of eighteen months. Sergeant Davoren is still working in an admittedly undesirable assignment that, according to Chief Le Bas, was not intended to be open-ended.

In summary, the Hearing Officer does not question the right of Management to transfer its employees. However, when such transfer amounts to an open-ended disciplinary action without review to see whether the alleged problem has been corrected, then it leads the Hearing Officer to the inescapable conclusion in this case that the transfer was unreasonable and discriminatory and in violation of Sergeant Davoren's rights as provided in Section 4 of the Employee Relations Ordinance.

RECOMMENDATIONS OF HEARING OFFICER

Upon full consideration of all the evidence and argument of the parties on the issues involved, the Hearing Officer recommends that:

1) The Respondent be ordered to cease and desist from taking further action against Sgt. Davoren in violation of Section 12 (a) (1) of the Employee Relations Ordinance.

2) The Respondent be ordered to transfer Sgt. Davoren forthwith to a detective sergeant position within a reasonable distance of his home.

Respectfully Submitted,

Paul Prasow

Paul Prasow
Hearing Officer

August 31, 1976
Los Angeles, Ca.