**LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION**

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UFC 6.94 - AMENDED HEARING OFFICER'S REPORT

DATED: December 23, 1982

COUNTY OF LOS ANGELES

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LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION

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| In the matter of<br><br>LOS ANGELES COUNTY EMPLOYEE ASSOCIATION, LOCAL 660, SIEU,<br><br>Charging Party<br><br>and<br><br>DEPARTMENT OF COLLECTIONS, COUNTY OF LOS ANGELES<br><br>Respondent | UFC 6.94<br>AMENDED HEARING OFFICER'S REPORT AND RECOMMENDATION |



## I. PROCEDURAL BACKGROUND

When the County refused to negotiate on the work schedule change which is described below in the Findings of Fact, the Los Angeles County Employee Association (hereinafter LACEA) filed the present Unfair Practice Charge on October 9, 1981, alleging that the County violated sections 12(a)(1) and (3) of the Los Angeles County Employee Relations Ordinance, Ordinance 9646. Implementation of the work schedule change was delayed by a Cease and Desist Order issued on October 15, 1981 and a Temporary Restraining Order granted by the Los Angeles Superior Court on October 16, 1981. The Cease and Desist Order was vacated October 27, 1981 and the Temporary Restraining Order on November 6, 1981. The schedule change was made effective as of November 2, 1981.

A hearing to investigate the Unfair Practice Charge was conducted by the Hearing Officer, H. Anthony Miller. At the outset of that hearing, the County moved that the matter be deferred to arbitration. This motion was taken under submission by the Hearing Officer, and arguments and evidence were presented by the parties on the merits of the Unfair Practice Charge.

Written briefs were filed by the parties, and on April 26, 1982 the Report and Recommendation of the Hearing Officer was filed with the Commission recommending that the Commission defer the matter to arbitration. On August 5, 1982, the Commission remanded the case back to the Hearing Officer to take additional evidence and to make findings of fact and recommendations on the merits of the charge. This Amended Report and Recommendation has been prepared in response to the Commission's Interim Decesion and Order in this matter.

A subsequent hearing was scheduled on October 25, 1982, and, at that time, both parties presented evidence. Both parties also filed supplemental briefs on November 10, 1982.

## II. FINDINGS OF FACT

Prior to November 2, 1981 the employees of the Department of Collections worked one of the following schedules:

Monday through Friday, 8:00 A.M. to 4:30 P.M., or

Monday through Friday, 8:30 A.M. to 5:00 P.M. (R.T. 7).

On September 17, 1981, twenty-seven employees in the Department were notified that their work schedule would be changed to Tuesday through Friday, 12:30 P.M. to 9:00 P.M. and 8:00 A.M. to 5:00 P.M. on Saturday (R.T. 7-8). The employees were originally notified that the change would take place on October 19, 1981; however, because of a Cease and Desist Order which was issued by the Los Angeles County Employee Relations Commission and a Temporary Restraining Order granted by the Los Angeles County Superior Court, the change did not actually occur until November 2, 1981 after both orders were vacated (see supra section I, Procedural Background).

The twenty-seven employees affected by the work schedule change were in three separate bargaining units:

Unit 111 - Clerical and Office Services (see Joint Ex. 1);

Unit 112 - Supervisory Clerical and Office Services (see Joint Ex. 2);

Unit 121 - Administrative and Technical Staff Services (see Joint Ex. 3);

Unit 122 - Supervisory Administrative and Technical Staff Services (see Joint Ex. 3).

In order to resolve the present Unfair Practice Charge, it is necessary to know how many employees were affected by the work schedule change in each bargaining unit; how many members of each unit were in the Department of Collections; and the total number of employees in each bargaining unit. The following

chart summarizes this information regarding the four bargaining units (see County Cont. Ex. 5, 6, and 7):

| Unit No. | Employees Affected | Unit Members in Dept. | Total Unit Membership |
|---|---|---|---|
| 111 | 4 | 281 | 15,679 |
| 112 | 1 | 30 | 1,626 |
| 121 | 21 | 77 | 2,411 |
| 122 | 1 | 9 | 549 |

## III. ISSUE

Did the County violate sections 12(a)(1) and (3) of the Employee Relations Ordinance by refusing to negotiate with LACEA over work schedule changes?

## IV. POSITIONS OF THE PARTIES

### A. The Charging Party

The Respondent has unilaterally changed the work schedule of twenty-seven employees in the Department of Collections causing great hardship on the employees. The Respondent committed an Unfair Practice under the Employee Relations Ordinance because the Respondent refused to negotiate with the Charging Party regarding this matter. Because the work schedule is not covered by the Memoranda, the waiver provisions of the Memoranda do not preclude negotiations. Indeed this very same provision compels negotiations because of a subsection which in certain circumstances requires negotiations of subjects not covered by the Memoranda.

B. The Respondent

There was no Unfair Practice committed because there was no duty to bargain on the subject of work schedules. This subject was covered by the Memoranda, and, therefore the waiver provisions of the Memoranda preclude further negotiations. Even if the waiver provisions do not preclude negotiations, the criteria included in the Memoranda allowing negotiations on new subjects have not been met.

V. DISCUSSION

The Los Angeles County Employee Association has charged that the County Department of Collections has violated sections 12(a)(1) and (3) of the Los Angeles County Employee Relations Ordinance by refusing to negotiate on the subject of the work schedule change described above under "Findings of Fact." Section 12(a)(1) makes it an unfair practice for the County to "interfere with, restrain, or coerce employees in the exercise of the rights recognized or granted in the Ordinance" and section 12(a)(3) makes it an unfair practice to "refuse to negotiate with representatives of certified employee organizations on negotiable matters." Of the two, sub-section (3) is by far the broader, encompassing a wide range of prohibited activity. However, it is clear, from both the charging papers and the evidence presented at the hearings that the LACEA is alleging a violation of sub-section (1) only in the sense that a violation of sub-section (3) might also

be a derivitive violation of sub-section (1). There was no allegation or evidence of any of the many possible types of unfair practice which may be categorized as interference, restraint, or coercion.

It is clear that the Respondent did not negotiate on the subject of the work schedule change which took place in the Department of Collection. Respondent stipulated that it notified the employees of the change and that it consulted with Local 660 regarding the change (R.T. 8). However, there was no evidence that any negotiations took place on this subject. Respondent did not assert that working hours were not a valid subject of mandatory bargaining, rather Respondent argued that negotiations on this subject were precluded by the language of the Memoranda of Understanding (Joint Ex. 1-4).

There are four Memoranda of Understanding which cover the employees affected by the work schedule change in the Department of Collections. Each of these agreements contain an identical provision entitled "Full Understanding, Modification, Waiver" which states as follows:

> 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.

This waiver provision is designated as Article 32, section 1 in Memoranda 111 (Joint Ex. 1) and 112 (Joint Ex. 2) and Article 35 section 1 in Memoranda 121 (Joint Ex. 3) and 122 (Joint Ex. 4). Neither party attacked waiver clauses in general or this one in particular. However, it is worth noting that the Employee Relations Commission has previously applied a similar waiver provision (See, Coalition of County AFL-CIO Unions v. County of Los Angeles, UFC 60.11, 1981, County Rehearing Ex. 2) and that express waiver provisions are generally allowed if the language is "clear and unmistakable" (See, Morris, The Developing Labor Law, pp. 333).

The County argues that since the work schedule is covered by the agreement, the waiver provision precludes further negotiations on this subject. Although there is a provision in all the Memoranda of Understanding entitled "Work Schedule" the actual subject which the Charging Party is seeking to negotiate--the work days and hours of the affected employees--is, at best, only partially covered in two of the Memoranda. Memoranda 111 (Joint Ex. 1) and 112 (Joint Ex. 2) contain identical "Work Schedule" provisions (Article 13) covering the length of the work day, the number and length of breaks, the length of the work week. The Memoranda also require two consecutive days off.

In these two Memoranda there is no mention of starting and ending times of work other than a statement that there may be only one eight hour work day within a twenty-four hour period (Art. 13 subd. A). The only limit placed upon the days of the work week is a provision which states that "work schedules including Saturday and Sunday will be established only when essential to the County's public service" (Art. 13 subd. D).

Although these provisions impinge upon the work schedule, they do not actually set the work schedule in the sense of setting the days of the week worked and the starting and ending time of each day. These provisions do not show that the parties intended to memorialize the actual work schedule of each employee. Although the parties to the Memoranda set guidelines to be used in determining the schedules of individual employees, the actual schedules were left open to be determined by the County.

The "Work Schedule" provisions of Memoranda 121 (Joint Ex. 3) and 122 (Joint Ex. 4) are similar to those of the first two Memoranda except they do not have any prohibition on working more than one eight hour shift in a twenty-four hour period. Nor do these last two Memoranda have any guidelines at all governing weekend work schedules. The case is even less strong that these Memoranda control the actual starting and ending times or the days of the work week.

The four Memoranda do not cover the subject which the Charging Party sought to negotiate; therefore, Article 32, section 1 does not preclude further negotiations. However, it should be noted that if the Memoranda were construed to cover the subject which the Charging Party sought to negotiate, the result would be the same as the one arrived at below: Respondent would not be required to bargain, and so there would be no unfair practice.

Besides opposing Respondent's argument that the waiver clause applied, the Charging Party proposed an alternative argument to the effect that if the Memoranda do cover the work schedule, the Waiver provision precludes the County from acting unilaterally to adjust the work schedule. This interpretation is not supported by the express language of the waiver provision. If the subject is covered by the agreement, the parties are precluded from further negotiation. This does not mean that management is free to act unilaterally, but rather it cannot be compelled to negotiate. If management does act unilaterally, it may have violated the agreement, but it has not committed the unfair practice of refusing to negotiate.

The four Memoranda of Understanding (Joint Ex. 1-4) all contain a similar section of the Full Understanding, modifications, waiver provision governing future negotiations of matters not specifically covered by the Memoranda while the Memoranda are in effect:

> 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 change it shall notify the Union indicating the proposed change prior to its implementation.
>
> Where such change would significantly affect the working conditions of a significantly large number of employees in the unit; where the subject matter of the change is subject to negotiations pursuant to the Employee Relations Ordinance and where 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 of the employees within a readily identifiable occupation such as Stenographer or Truck Driver.

This provision appears as Article 32, section 2 in Memoranda 111 and 112 (Joint Ex. 1 and 2) and as Article 35, section 2 in Memoranda 121 and 122 (Joint Ex. 3 and 4).

It is clear that negotiations on management changes are required only where it would "significantly affect" a "significantly large number of employees in the unit." In the present situation, the Charging Party's case fails because according to the tripartite definition of "significantly large numbers" in the Memoranda the work schedule change did not affect a significantly large number of employees.

The first part of the definition requires a "majority of the employees in the unit" to be affected by the change. This requirement cannot be satisfied for any of the bargaining units

involved here as the following chart reveals:

| UNIT NO. | EMPLOYEES AFFECTED | TOTAL EMPLOYEES IN UNIT |
|---|---|---|
| 111 | 4 | 15,679 |
| 112 | 1 | 1,626 |
| 121 | 21 | 2,411 |
| 122 | 1 | 549 |

The second part of the definition states that a significantly large number would be "all of the employees within a department in the Unit." The following chart summarizes the figures as they pertain to the employees of the Department of Collections:

| UNIT NO. | EMPLOYEES AFFECTED | UNIT MEMBERS IN DEPARTMENT |
|---|---|---|
| 111 | 4 | 281 |
| 112 | 1 | 30 |
| 121 | 21 | 77 |
| 122 | 1 | 9 |

Only a small portion of the Employees in the department in each unit were affected by the work schedule change.

The last portion of the definition of the term "significantly large numbers"--"all of the employees within a readily identifiable occupation such as Stenographer or Truck Driver"--is the most difficult to apply since the occupation must be identified. The examples given are very important; it should be noted that there is no mention of pay grade, such as Stenographer I, and that the terms used could be considered

lay terms devoid of personnel jargon. Using the general examples as guidelines it would appear that the identifiable occupations involved here are "clerks" and "Collection Investigators." The use of these occupations means that the employees in Units 111 and 112 may be combined into one category "Clerks" and that the employees in Units 121 and 122 may be combined into one group of "Collection Investigators." Although both of these groupings combine supervisors and non-supervisors, there is nothing in the language of section 2 to indicate that this distinction must be observed.

Using the identifiable occupations, there were six clerks and twenty-one collection investigators affected by the work schedule change. The total number of employees in each occupation can be determined by the computer print-out provided by the Respondent (County Cont. Ex. 7). The validity of the information was not discredited by the Charging Party. On the print-out, which summarizes the number of employees in each unit by occupation, clerks are represented by item 1136 and intermediate clerks by item 1138. There are 958 clerks and 3,338 intermediate clerks for a total of 4,296 clerks.

In Unit 121, Collection Investigator I appear as item 1527 on the print-out and Collection Investigator II appear as item 1528. In Unit 122, Collection Investigators III appear as item 1529. In the County there are seventeen employees classified as Collection Investigator I, fifty-eight as Collection Investigator II, and thirteen as Collection Investigator III

for a total of eighty-eight Collection Investigators.

It is clear that the criteria of "all the employees in a readily identifiable occupation" has not been met. Five affected Clerks and twenty-two Collection Investigators are not all of those employees with those occupations. It should be noted that the result is the same if the term readily identifiable occupationis interpreted more specifically to mean actual job classifications such as Intermediate Clerk or Collection Investigator I.

The Charging Party also argues that the phrase "significantly affect the working conditions of a significantly large number of employees" in section 2 should be construed broadly to mean not only those employees directly affected by the work schedule change but also those indirectly affected. This argument is based on the view, which is probably correct that changing the schedule of twenty-seven employees has a ripple effect on many of the other workers in the Department. This view should be rejected for two reasons. First, the section 2 says "significantly affect" and there was no evidence that this ripple effect on the employees was significant. Second, if the language is interpreted broadly to include the indirect ripple effect then section 2 becomes meaningless; there is no criteria to determine what degree of indirect effect will be "significant." Such a standard would allow those who interpret the Memoranda a free hand. The better approach is to limit the "significantly affect" standard to those who are directly affected by the work schedule change.

Finally the Charging Party points out that the Respondent may have violated a provision which exists in Memoranda 111 (Joint Ex. 1) and 112 (Joint Ex. 2) which prohibits employees from having to work two eight hour shifts in one twenty-four hour period (Art. 13 subd. A). If there is a violation of the agreements, this violation can be remedied through the grievance process. A contract violation is not a per se unfair practice under the employee relations Ordinance.

Ultimately the work schedule change involved here is within the managment rights protected by Article 36 of Memoranda 111 and 112 (Joint Ex. 1 and 2) and by Article 39 of Memoranda 121 and 122 (Joint Ex. 3 and 4). The criteria set out in the four Memoranda requiring continued negotiations have not been met. If there was no duty to bargain, there is no unfair practice for failure to bargain.

## VI. RECOMMENDED ORDER

Unfair Employment Practice 6.94 should be dismissed.

Date: 12/17/82

H. Anthony Miller,
Hearing Officer