LOS ANGELES COUNTY EMPLOYEE RELATIONS COMMISSION

In the matter of	)	
	)	
LOS ANGELES COUNTY	)	
EMPLOYEE ASSOCIATION,	)	UFC 6.94
LOCAL 660, SEIU,	)	HEARING OFFICER
	)	REPORT AND
Charging party	)	RECOMMENDATION
	)	
DEPARTMENT OF COLLECTIONS,	)	
COUNTY OF LOS ANGELES	)	
	)	
Respondent	)	

I. FACTUAL BACKGROUND

A. The Memoranda of Understanding

In 1981, the County of Los Angeles (hereinafter referred to as the County) and the Los Angeles County Employee Association, Local 660, SEIU (hereinafter referred to as LACEA) negotiated four similar Memoranda of Understanding covering four different bargaining units in the Department of Collections. Each Memorandum of Understanding (and the bargaining unit it governs) is designated by a number. Memorandum 111 (Joint Ex. 1) covers the Clerical and Office Services Unit; Memorandum 112 (Joint Ex. 2) covers the Supervisory Clerical and Office Services Unit; Memorandum 121 (Joint Ex. 3) the Administrative and Technical Staff Services Personnel Units; and Memorandum 122 (Joint Ex. 4) the Supervisory Administrative and Technical Staff Services Personnel Unit.

All of the Memoranda contain articles with the following titles: "Work Schedule" (See Appendix A), "Grievance Procedures" (See Appendix B), "Full Understanding, Modifications, Waiver" (See Appendix C), and "Management Rights" (See Appendix D). The "Grievance Procedure" articles contain arbitration provisions. All of the memoranda are in effect from July, 1981 to June 30, 1983.

B. The Events Leading to the Unfair Practice Charge

On September 17, 1981, twenty-six (R.T. 60) employees in the Department of Collections were notified by the Department that their work schedule would be changed from 8:00 a.m. to 4:30 p.m. or 8:30 a.m. to 5:00 p.m., Monday through Friday, to a schedule of 12:30 p.m. to 9:00 p.m., Tuesday through Friday, and 8:00 a.m. to 5:00 p.m. on Saturday (R.T. 7-8). This change affected four employees in Unit 111, 21 in Unit 121, and one in Unit 122. Originally one employee in Unit 112 was affected, but the schedule change of that individual was rescinded. In the four bargaining units, there are approximately 150 employees in the Department of Collections and approximately 90 in the Delinquent Accounts, Public Service and Special Accounts Divisions of the Department, the divisions affected by the schedule change.

After some delay, the work schedule change was implemented on November 2, 1981 (R.T. 8). The parties stipulated, inter alia, that the County consulted with LACEA (R.T. 8) but did not negotiate or bargain with LACEA regarding the work schedule change (R.T. 30-31).

II. PROCEDURAL BACKGROUND

LACEA filed an Unfair Employee Relations 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, when it failed to negotiate regarding the work schedule change described above. Implementation of the schedule change was delayed by a Cease and Desist Order from the Los Angeles County Employee Relations Commission issued on October 15, 1981 and a Temporary Restraining Order issued by Judge Robert Weil of the Los Angeles County Superior Court on October 16, 1981 (R.T. 8). The Cease and Desist Order was vacated on October 27, 1981 and the Temporary

Restraining Order on November 6, 1981. The schedule change was then made effective as of November 2, 1981 (R.T. 8).

On November 6, 1981, H. Anthony Miller was appointed as a Hearing Officer, and a hearing was conducted on December 15, 1981. At the outset of this hearing, the County moved to dismiss the charge on the grounds that the subject of the hearing was a proper matter for arbitration. LACEA was offered an opportunity to argue against the motion. At the close of argument, the motion was taken under submission, and the hearing proceeded. During the hearing all parties were afforded opportunity to present evidence and to cross-examine witnesses. By agreement of the parties, post hearing briefs were to be filed thirty days after the receipt of the transcript of the hearing. Following a receipt of the briefs, the deadline for the Hearing Officer's report and recommendation was extended to April 23, 1982.

III. ISSUES

A. Should the subject matter of this unfair employee relations charge be deferred to arbitration?

B. Did the county violate section 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 unfair practice charge should not be deferred to arbitration. The existence of grievance and arbitration procedures as set forth in the four

Memoranda of Understanding does not divest the Employee Relations Commission of jurisdiction nor does it preclude the Commission from preceding to resolve an unfair employee relations practice charge. No provision of the Employee Relations Ordinance or the Regulations of the Employee Relations Commission requires a party to elect to pursue arbitration or an unfair practice charge.

The County committed an unfair practice when it refused to negotiate the work schedule change. The work schedule is a mandatory subject of negotiations and the Employee Relations Ordinance establishes a duty to negotiate on mandatory subjects. The County's unilateral change in the work schedule of some of the employees constitutes a breach of the County's duty to negotiate. The "Full Understanding, Modifications, and Waiver" provision of each Memorandum of Understanding does not relieve the County of its duty to bargain for two reasons. First, this "Waiver" provision only applies to subjects which have been resolved by the Memoranda of Understanding, and, since the work schedule was not established by the Memoranda, the "Waiver" does not apply. Second, section 2 of each "Waiver" provision, which allows for continuing negotiations on new subject matter, should apply. Therefore the County should be required to negotiate.

B. The Respondent

The issue before the Hearing Officer is a matter of contract interpretation of the "Work Schedule" and "Full Understanding, Modification Waiver" provisions of the Memoranda of Understanding and therefore should be deferred to arbitration.

The County did not violate sections 12(a)(1) and (3) of the Employees Relations Ordinance. The negotiated language of the "Work Schedule", "Full Understanding, Modifications, Waiver" and "Management Rights" articles of the

subject Memoranda of Understanding as well as the Employee Relations Ordinance, clearly provides that the County of Los Angeles was within its rights and acted properly when it changed employee work schedules. In making the work schedule changes, County management took full cognizance of the negotiated provisions of the "Work Schedule" article and complied with the limitation of providing proper notice to affected employees well in advance of the proposed effective date of the new work schedule.

V. DISCUSSION

At the beginning of the hearing, the County made a motion to dismiss the Unfair Employment Relations Charge on the grounds that the issue presented should be resolved in arbitration. The Hearing Officer agrees that the subject matter of this hearing should be deferred to arbitration. There are three fundamental reasons for this decision: first, virtually all the issues which need to be resolved in order to determine if an unfair practice charge can be supported in this case are issues of contract interpretation; second, the National Labor Relations Board (hereinafter NLRB) has established strong precedent in favor of deferring matters of contract interpretation, particularly of waiver clauses, to arbitration; and third, important policy reasons dictate that the deferral policy of the NLRB should be adopted by the Employee Relations Commission.

A. Issues of Contract Interpretation

There are virtually no issues to be resolved in this case which are not matters of contract interpretation. Both parties recognized that the central substantive issue in this case is whether the County had a duty to negotiate under the four Memoranda of Understanding which cover the affected bargaining

units. Both parties make plausible arguments that the language of specific articles of the Memoranda justify their positions. The charging party argues that the work schedule articles of the four Memoranda do not cover the actual starting and finishing times of the employees; therefore, section 1 of the "Waiver" provision which prevents further negotiations on matters covered by the contract (the zipper clause) does not apply. Section 2 of the "Waiver" article which covers new matters to be negotiated during the term of the agreement should apply thus justifying further negotiations (See Appendix C).

The County's position is also plausible. The "Work Schedule" article of the Memoranda covers the work schedule as negotiated by the party. Since the work schedule is covered by the Memoranda, the "Waiver" article should apply. Section 2 of the Article only covers new subjects once the Memoranda have been adopted by the parties. Therefore it should not apply. The "Management Rights" article reserves the right of the County to make a unilaterial work schedule change which does not conflict with the "Work Schedule" provisions.

It is not necessary to discuss the merits or the specifics of these arguments. Their existence points to the crucial issue of this unfair practice charge: whether or not the County had a duty to bargain under the Memoranda of Understanding. To decide this issue, a number of sub-issues must also be decided and each of these is also a matter of contract interpretation. Both parties seem to recognize that this matter is one of contract interpretation; indeed, the briefs of both parties argued matters of interpretation almost exclusively.

Once the interpretation issues has been resolved, there are really no further issues to be decided here. Under section 12(a)(3) of the Los Angeles

Employee Relations Ordinance, Ordinance 9646, it is unfair employment practice to refuse to negotiate with representatives of a certified organizations on negotiable matters. "Negotiable matters" can be defined as "wages, hours, and other terms or conditions of employment." (Section 3(o)) Neither party choose to debate, either orally or in brief, whether the work schedule was a "negotiable matter" under the above definition. Finally, there is no issue as to whether the County offered to negotiate: the parties stipulated that the County changed the work schedule of workers in the Department of Collections without negotiating about the change with LACEA (R.T. 30-31). Where there are issues of contract interpretation and no other significant issues, there is strong precedent for deferral.

B. Precedent of the NLRB

The National Labor Relations Board has taken the position that issues of contract interpretation, especially those involving a "Waiver" clause, should be deferred to arbitration. In Collyer Insulated Wire (1971) 192 N.L.R.B. 837, 77 L.R.R.M. 1931, the NLRB held that an unfair practice charge arising from an employer's unilaterial change in work assignments during the term of the contract was a proper subject for arbitration. The issue of the propriety of the employer's conduct turned upon interpretation of the contract and in particular of the "Waiver" clause. The NLRB stated that "this dispute in its entirety arises from the contract between the parties, and from the parties relationship under the contract, it ought to be resolved in a manner which that contract prescribes." (Id., at 837) The prescribed manner was arbitration.

This language and the rationale of Collyer are equally applicable to the instant case. In Collyer the company based its actions on "a substantial claim of contract privilege." The contract "was questionably broad enough to embrace the dispute." The NLRB found that "the contract and its meaning . . .

lie at the center of the dispute" and "the dispute is eminently well suited to resolution by arbitration." (Id., at 842) These statements could have been made about the instant case.

The NLRB found that arbitration was the preferred method of resolving such disputes because there is a national policy favoring arbitration embodied in section 203(d) of the Labor Management Relations Act and the famous Steelworkers trilogy of cases (See, Id., at 840) Moreover, the fundamental purpose of the National Relations Act, to avoid industrial strike, could best be effectuated by the process of the parties resolving their own disputes. Arbitration is a part of that process. If the parties have agreed to arbitrate, they should be held to their agreement: "We believe it could be consistent with the fundamental objectives of Federal Law to require that parties adhere to honor their contractual obligation, rather than, by casting this dispute in statutory terms, to ignore their agreed-upon procedures." (Id., at 843) The Collyer approach is well established and has often been applied in the private sector. (E.g. National Radio Co. (1972) 198 N.L.R.B. No. 1; Radioear Corp. (1973) 199 N.L.R.B. 1161; Valley Ford Sales (1974) 211 N.L.R.B.) Although NLRB precedent is not binding in California Public Sector Labor Relations, it is highly persuasive. (Firefighter Union, v. City of Vallejo, (1973) 12 Cal. 3d 608, 617 526 P.2d 971, 116 Cal. Rptr. 507.

C. Policy Reasons For Adopting NLRB Precedent

There are sound policy reasons why the policy referral rule of Collyer should be adopted in the present case. Arbitration should be no less highly regarded in the public sector than it is under the NLRB. The stated purpose of the Employment Relations Ordinance, "to promote the

improvement of personnel management relations and relations between the County of Los Angeles and its employees. . . " (section 2) can also be effectuated best if the parties are required to resolve their own disputes whenever possible. If the parties agree to arbitrate, they should not be allowed to circumvent their agreement by bringing an unfair charge.

Although there is no evidence that a flood of cases would occur if it was possible to litigate contract interpretation as an unfair charge, the limited resources of the Commission should still not be stretched to meet the needs of contract interpretation. Furthermore, it must be recognized that unfair practice hearings and arbitrations have a different purpose. It is a primary function of the Hearing Officer to determine the facts of a particular case and apply the Employee Relations Ordinance to the facts. If the Ordinance is unclear, the Hearing Officer may interpret the Ordinance or apply relevant precedent. As Rule 6.07 of the Employee Relations Commission Rules and Regulations states "a hearing shall be limited to argument and evidence on issues of fact or law material to the preceding." Although this rule is not the cornerstone of this decision (nor is it taken too literally), it is indicitive of the purpose of the unfair practice hearing.

The role of the arbitration hearing is to resolve disputes between parties. The arbitrator is selected by the parties to do this. The arbitrator does not apply the Employee Relations Ordinance to a set of facts; rather he or she determines what the parties intended. All of the Memoranda of Understanding involved in this case implicitly recognize the distinction between hearings and arbitration by limiting arbitration to matters of contract interpretation (See Appendix B).

It should be noted that the Employee Relations Commission has adopted Rule 6.04.1 requiring deferral to arbitration of matters involving "the

interpretation of Memoranda of Understanding provisions." This rule is not applicable to the present case since it was adopted on March 12, 1982, and the decision in this case does not stand or fall on the existence or non-existence of this Rule. However, the Rule does add support for the view that the Collyer approach should be adopted in the present case.

V. RECOMMENDED ORDER

Unfair Employment Practice 6.94 should hereby be dismissed with limited jurisdiction retained by the Employee Relations Commission to entertain an appropriate motion upon a showing that (a) the unfair charge has not been resolved by settlement or been submitted promptly to arbitration (b) that the arbitration procedures have not been fair, (c) that the result of the arbitration is repugnant to the Employee Relations Ordinance or (d) that there is refusal to bargain despite an arbitrator's finding that a duty to bargain exists.

Date: 4/22/82

H. Anthony Miller, Hearing Officer

APPENDIX A

In all four Memoranda (Joint Ex. 1-4), the "Work Schedule" Provision is designated Article 13. This Article as it appears in Memoranda 111 (Joint Ex. 1) and 112 (Joint Ex. 2) is somewhat different from the version which appears in Memoranda 121 (Joint Ex. 3) and 122 (Joint Ex. 4). Both versions appear here.

WORK SCHEDULE
(as it appears in Memoranda 111, Joint Ex. 1, and 112, Joint Ex. 2)

Purpose

This article is intended to define the normal hours of work and shall not be construed as a guarantee of hours of work per day or per week, or of days of work per week.

A. Work Day

The normal work day shall be eight (8) consecutive hours of work, exclusive of at least a thirty (30) minute lunch period in a consecutive twenty-four (24) hour period, except as provided in Section E. Each eight-hour shift shall include two 15 minute rest periods, one scheduled during each half of the assigned shift. Such shifts shall not be worked consecutively. During rest periods, employees shall be relieved of all duties and may leave their immediate work locations but must remain within general area as prescribed by management.

B. Work Week

The normal work week shall be five (5) consecutive work days and two (2) days of rest in a seven consecutive day period except as provided in Section E.

c. Work Shifts

Employees shall be scheduled to work on regular work shifts having regular starting and quitting times. Except for emergencies (see Section E), employees' work schedules shall not be changed without notice to the employee at least five (5) working days prior to the date the change is to be effective. Irregular work schedules shall not be changed without notice to the employee at least ten (10) working days prior to the date the change is to be effective.

D. Saturday and Sunday Schedules

Work schedules including Saturday and Sunday will be established only when essential to the County's public service. In no event shall such schedules be established to deprive employees of payment for overtime.

E. Emergencies

Nothing herein shall be construed to limit the authority of management to make temporary assignments to different or additional locations, shifts or work duties for the purpose of meeting emergencies. However, such emergency assignments shall not extend beyond the period of such emergency.

F. Nothing herein shall be construed to affect in any manner whatsoever irregular work day or work week assignments required for the maintenance of necessary operations.

WORK SCHEDULE

(as it appears in Memoranda 121, Joint Ex. 3, and 122, Joint Ex. 4)

Nothing herein shall be construed as a guarantee of a minimum number of hours of work per day or per week, or of days of work per week. Nothing herein shall be construed to modify in any manner whatsoever a work day or work week as defined in Article 7 of Ordinance 6222, County's Salary Ordinance.

Section 1. Work Shift

Employees shall be scheduled to work on regular work shifts having regular starting and quitting times. Except for emergencies (See Section 4), employee's work schedules shall not be changed without notice to the employee at least 5 working days before the change is to be implemented. Irregular work schedules shall not be changed without notice to the employee at least ten (10) working days prior to the date the change is to be effective.

Section 2. Work Week

The normal work week shall be five (5) consecutive work days and two days of rest in a seven consecutive day period except as provided in Section 4.

Section 3.

Nothing herein shall be construed to affect in any manner whatsoever irregular work day or work week assignments required for the maintenance of necessary operations.

Section 4.

Nothing herein shall be construed to limit the authority of management to make temporary assignments to different or additional locations, shifts or work duties for the purpose of meeting emergencies. However, such emergency assignments shall not extend beyond the period of such emergency.

Appendix B

The arbitration provisions of the four Memoranda appear in the "Grievance Procedure" articles; in Memoranda 111 (Joint Ex. 1) and 112 (Joint Ex. 2) the arbitration provision is Article 22 section 8, and in Memoranda 121 (Joint Ex. 3) and 122 (Joint Ex. 4), it is Article 23, section 8.

Arbitration

1. Within ten (10) business days from the receipt of the written decision of the department head, or his designated representative, LACEA, Local 660, SEIU may request that the grievance be submitted to arbitration as provided for hereinafter.

2. Only those grievances which directly concern or involve the interpretation or application of the specific terms and provisions of this Memorandum of Understanding may be submitted to arbitration hereunder. . . .

Appendix C

The "Full Understanding, Modifications, Waiver" provision is designated as Article 32 in Memoranda 111 (Joint Ex. 1) and 112 (Joint Ex. 2) and Article 35 in Memoranda 121 (Joint Ex. 3) and 122 (Joint Ex. 4).

FULL UNDERSTANDING, MODIFICATIONS, WATER

Section 1.

It is intended that this Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the matters set for [sic] 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 qualifiedly 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 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 indentifiable occupation such as Stenographer or Truck Driver.

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.

Section 3.

Nothing herein shall limit the authority of Management to make necessary changes required during emergencies. However, management shall notify the Union of such changes as soon as practicable. Such emergency assignments shall not extend beyond the period of the emergency. "Emergency" is defined as an unforeseen circumstance requiring immediate implementation of the change.

Section 4.

Where Management makes any changes in working conditions because of the requirements of law, including ordinances adopted by the Board of Supervisors, the County shall not be required to negotiate the matter or manner of compliance with such law where the manner of compliance is specified by such law.

Section 5.

The waiver of any breach, term or condition of this Memorandum of Understanding by either party shall not constitute a precedent in the future enforcement of all its terms and provisions.

Appendix D

The "Management Rights" provision is Article 35 in Memoranda 111 (Joint Ex. 1) and 112 (Joint Ex. 2) and Article 39 in Memoranda 121 (Joint Ex. 3) and 122 (Joint Ex. 4).

MANAGEMENT RIGHTS

It is the exclusive right of the County to determine the mission of each of its constituent departments, boards, and commissions, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the exclusive right of the County to direct its employees, take disciplinary action for proper cause, relieve its employees from duty because of lack of work or for other legitimate reasons, and determine the methods, means and personnel by which the County's operations are to be conducted; provided, however, that the exercises of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours and other terms and conditions of employment.