

LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

In the Matter of:

Donald F. Foley, Deputy Probation Officer II

Charging Party

vs.

S. Ostroff, Assistant Probation Officer, et al,
Los Angeles County Probation Department

Respondent

UFC 70.10

Report

and

Recommendation

May 30, 1978

Hearing Officer:

Addison Mueller

Appearances:

For the Charging Party:

Donald F. Foley, in propria persona

For the Respondent:

William D. Lyle

Henry Alva

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EMPLOYEE RELATIONS COM.
COUNTY OF LOS ANGELES

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The undersigned was appointed by the Los Angeles County Employee Relations Commission to serve as Hearing Officer in the above captioned Matter under the terms of the Employee Relations Ordinance of the County of Los Angeles, Ordinance 9646. The Matter to be heard was the charge filed by Donald F. Foley on November 28, 1977 that Los Angeles County Probation Department, Assistant Probation Officer S. Ostroff, et al engaged in unfair employee relations practices in its dealings with him.

Hearings were held on this Matter on January 26, 1978, January 27, 1978 and February 3, 1978 during which testimony was taken under oath

exhibits were entered and various motions were made and disposed of. A record of the proceedings was made both by stenographic reporter and tape recorder. Post hearing written briefs were filed by both parties on April 21, 1978 and received by the undersigned on April 24, 1978, whereupon the hearing was closed.

The undersigned, having duly considered all of the evidence and arguments offered by the parties, submits this Report in accordance with Section 6.10 of the Commission's Rules and Regulations, with a one week extension of time for filing said Report granted by the Commission's Executive Officer on May 23, 1978.

POSITIONS OF CLAIMANT AND RESPONDENT

Claimant's position as stated in his Complaint and urged by him throughout the Hearing was that he had been denied due process because he:

- 1.) had not been permitted to have the Union steward for his work area, Grady Lawrence, present at a meeting on June 16, 1977 between himself, Assistant Director of the Probation Department Grace Jones, and his supervisor, SDPO Andrew Nua, at which meeting he was aggressively questioned about an incident on May 24, 1977 involving what was claimed to be questionable conduct on his part;

- 2.) had been denied at that meeting -- and subsequently -- an opportunity to question SDPO O'Brien about his version of a discussion with Claimant on the night of May 24, 1977, and to call as a witness DPO Terry Hosaka who was present at that Claimant-O'Brien discussion; and

- 3.) had been effectively denied the presence of Union steward Grady Lawrence at a third stage grievance meeting with Sam Ostroff because Lawrence had been named an Acting Supervising Probation Officer to replace

SDPO Andrew Nua while Nua was on vacation, thus creating a disqualifying conflict of interest.

In response the Probation Department admitted that neither Union steward Lawrence (who was then on jury duty) nor any other Union representative was present at the June 16, 1977 meeting, but claimed that that meeting was a mere informal conference at which a Union steward was not required, especially since all that resulted was a gram issued by Grace Jones as a mere memorandum of the meeting and such gram was neither a letter of warning or reprimand. Beyond that, if the meeting did qualify as a disciplinary inquiry, Claimant did not request either before or during the meeting that a Union representative be present and hence waived the right to have one present.

As for Claimant's contention that steward Lawrence's temporary appointment as Acting SDPO in Nua's place was done in total disregard of Claimant's right to have steward Lawrence with him at his third step meeting and in fact denied him Union representation, there were several alternatives available to Claimant, including request for a postponement, and he elected to use none of them.

MOTIONS DURING HEARING

Three motions were made and argued at the opening of the Hearing. First, Claimant filed a Motion for Leave to File a Supplemental Complaint in which he incorporated such prayers for relief as (1) the broadest possible expungement from his file of any and all grievances or "related matters" during 1977; (2) a letter of reprimand for SDPO Nua for claimed threatening and hostile acts toward Claimant on November 15, 1977; and (3) an order from the undersigned to Local 6851 (AFSCME) to show cause why it is not representing him in this matter. After hearing arguments, all of these

requested additions were held to broaden the scope of this matter far beyond the permissible limits of this properly noticed Unfair Practices Hearing and the Motion was denied in its entirety.

Claimant next moved that the undersigned remove himself as Hearing Officer on the ground of demonstrated prejudice. Claimant argued in support of this Motion by pointing to the total denial of his previous Motion and by claiming that favoritism toward Respondent had been shown by the Hearing Officer in the course of a telephone conversation initiated by Claimant to demand denial of a continuance that had been requested by Respondent. Claimant's position was that the Hearing Officer showed favoritism when he attempted to find a compromise continuance that would be acceptable to Claimant instead of simply accepting Claimant's refusal to agree to a continuance without more. After considerable discussion, Claimant elected to withdraw his Motion.

A Motion to Dismiss was then filed by Respondents on the ground that Claimant had filed a grievance on July 15, 1977 covering the same basic issue as that involved here and asking for the same relief, that this grievance was denied, that it was not pursued by Claimant, and that therefore the issue is conclusively settled. This Motion was denied on the ground ^{THAT} the County waived this res judicata defense when Claimant filed another grievance on September 29, 1977 which substantially restated his grievance of July 15, which grievance the County heard and denied on the merits, and which denial has led to this Hearing.

FINDINGS OF FACT

Once the masses of irrelevant material which kept creeping into the three days of the proceedings in this matter are eliminated, the essential

events are seen to be both few and uncomplicated. But as is so often the case, determination of the true posture of those events is difficult because of flat contradictions and unrealistic assertions in the record. The following Findings are based on my best efforts to resolve these contradictions and difficulties honestly and realistically in the light of the evidence and exhibits available to me.

1. On June 16, 1977, Claimant was summoned to a meeting on his day off with Assistant Director of the Probation Department Grace Jones and Claimant's supervisor, SDPO Andrew Nua.
2. At the meeting, Complainant was aggressively questioned about an incident on May 24, 1977 involving what was claimed to be questionable conduct on his part, although he had been assured that the meeting was to be merely a friendly discussion of the matter.
3. Complainant did not ask for the presence of his Union steward even after he discovered that the meeting was less than friendly, that Grace Jones was taking notes, and that it was possible that disciplinary action might result. (On this issue, Complainant insisted that he did so request; Jones and Nua -- both testifying under oath -- denied that he made such request to the best of their recollection.) Union steward Lawrence was in fact unavailable because he was on jury duty.
4. Claimant remained in the meeting until its conclusion despite lack of Union representation even after he felt that he was entitled to it. His claim that he was afraid to defy his superiors by leaving cannot be reconciled with his aggressive pursuit of his rights in this and other proceedings.
5. This meeting resulted on June 30, 1977 in the issuance by Grace Jones of a gram that in effect amounted to a letter of reprimand or warning however it might technically be labeled, and this was placed in Claimant's

personal file and subsequently parts were made a part of his 9/1/76--
8/31/77 Performance Evaluation.

6. At no time before the first meeting of June 16, 1977 or thereafter was any effort made to question DPO Hosaka about what he had witnessed despite the fact that Claimant repeatedly requested such interrogation, nor was Claimant ever given an opportunity to cross examine SDPO O'Brien about their conversation on May 24, 1977.
7. Claimant grieved the issuance of Grace Jones' letter and had an audience with Office Director Arleigh Ronning on July 20, 1977. At this meeting Grady Lawrence, the proper Union steward, was present. The grievance was denied by Ronning.
8. Claimant appealed Ronning's denial to Sam Ostroff, the Assistant Probation Officer and at that appeal meeting Claimant was without the presence of Union steward Grady Lawrence because Lawrence had ^{BEEN} ~~by~~ named as Acting Supervising Probation Officer by SDPO Nua to replace him while he (Nua) was on vacation. Claimant did, however, have DPO Hosaka with him as an "observer" and not as a Union representative.
9. SDPO Nua had similarly named Lawrence Acting Supervisor during Nua's vacations in 1975 and 1976 and hence there was every reason for him to do so again in 1977.
10. Claimant made no attempt to have the step 3 grievance session with Sam Ostroff postponed until Lawrence completed his temporary stint as Acting Supervisor and thus would again be available to render the assistance deemed by Claimant to be so vital to his protection.
11. Since Claimant used Lawrence in his capacity as Union steward in the July 20, 1977 session with Arleigh Ronning despite the fact that Lawrence was as "compromised" by his 1975 and 1976 management connections as he would be by his 1977 service in the same capacity, Claimant's ins^stence

that this 1977 service caused Lawrence's help to be unavailable to him forever thereafter is not not tenable.

ANALYSIS AND CONCLUSIONS

1. As to the claim of denial of Union representation:

There can be little question but that the meeting of June 16, 1977 between Claimant, Jones and Nua had enough of a disciplinary character to qualify under NLRB v. Weingarten, Inc. (95 S. Ct. 959, 88 LRRM 2689) as applied to the public sector in Los Angeles County by the Employee Relations Commission in UFC 6.28. Claimant was thus entitled to the presence of a Union representative if he properly demanded one. Claimant insists that he did so. Jones and Nua are equally insistent that he did not. It is at least clear that if Claimant demanded the presence of ~~steward~~ Lawrence as he says and didn't get him, he nonetheless remained in the meeting until its conclusion. And Claimant strikes me as too knowledgeable as to his rights and too ready to see that they are respected to make such conduct on his part likely.

Beyond that, it is hard to see why Jones and Nua and everyone else in authority would go to the lengths charged by Claimant to deprive him of the presence of a Union steward at any of the steps of the grievance process. Even if there were a clear intention to victimize Claimant, it must have been obvious to all concerned that depriving him of the presence of a Union steward would do precious little to further their plan because they ~~knew~~ Claimant well and knew that he was more than able to ~~be~~ take care of himself without help. Claimant is simply not the intimidateable type.

In short, the weakness of Claimant's case on lack of Union representation is that it is built on a theory of massive determination to

put him at a disadvantage by denying him proper representation at two grievance meetings through cleverly contrived moves -- or on negligence so consistent and concerted that it looks like the same thing. This is not to say that if such machinations in fact took place that Claimant would not be seriously wronged. Claimant's problem is in establishing the existence of all of the complicated moves that he insists were made (or at least took place) throughout the history of this entire matter. The creation and preservation of what amounts to a quite mildly worded gram indicating future conduct to be "avoided" is a very small mouse to justify the construction of such a very large and complex trap. Thus Claimant must support his charges in the teeth of denials under oath by responsible people by building on the totality of surrounding circumstances that, by their ~~very~~ plausibility, lend credibility to those charges. That plausibility and credibility I find to be totally lacking.

2. As to the claim of insufficient investigation and failure to interview

Claimant's witness:

The other major prong of Claimant's charge does not suffer from the weakness that runs through his complicated theories on how and why he was denied Union representation. That prong is the admitted failure on the part of Respondents to give Claimant an opportunity to question SDPO O.Brien at some point in the grievance meetings or -- even more importantly -- to make any effort to question DPO Hosaka as to his version as to what took place on the night of May 24, 1977. The fact that those involved did not feel that Hosaka be so questioned was important is certainly no defense for them. Claimant felt that it was important and Hosaka was a witness to part of the incident. Hence Claimant properly

asked for a more diligent investigation before any conclusion as to the propriety of his conduct was reached -- a matter about which he ~~is~~ was understandably upset because it reflected to at least some extent on his integrity. There was no such investigation in which Claimant was permitted to participate -- in fact there was no real investigation at all. Here Claimant stands on firm ground when he insists that he was denied the due process to which everyone charged with misconduct is entitled. Administrative convenience, efficiency and economy must give way before such entitlement.

RECOMMENDATIONS

Claimant prays for three kinds of relief in his Complaint.

The first, (a) asking for "expungement from plaintiff's yearly evaluation report for the period 1976-1977 of the paragraph beginning with the words ' Mr. Foley was given a letter' and ending with the words 'Actions must be avoided'" should be granted because of fatal defects in the investigation of the incident referred to therein.

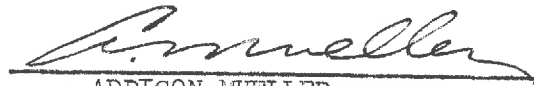
The second, (b) asking for "expungement from plaintiff's office personnel file of all grams, letters and other material relating to the incident of May 24, 1977, including all grievance papers filed by this plaintiff for any cause whatsoever during the period of Aug. 31, 1976 through and including November 4, 1977" should be granted only with respect to the first part (i.e., down to and including "May 24, 1977") and denied as to the balance (i.e. beginning with " including all grievance papers etc."). The recommendation for denial is based on the fact that the prayer is too broad.

The third, (c) asking for "promise (written or verbal) by the defendants

to cease and desist in an ongoing pattern of harrasment towards this plaintiff emanating from his exercise of the right to file union grievances to correct past office MOU violations" should be denied both because it obviously goes far beyond the scope of this hearing and because -- to the extent that it might be limited to the precise matter here -- I find no evidence of harassment.

Respectfully submitted,

DATE: May 31, 1978


ADDISON MUELLER
Hearing Officer