

LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

In the Matter of)	
DONALD F. FOLEY, DEPUTY PROBATION OFFICER II)	
Charging Party)	
vs.)	UFC 70.10
S. OSTROFF, ASSISTANT PROBATION OFFICER, ET AL,)	
LOS ANGELES COUNTY PROBATION DEPARTMENT)	
Respondent)	

DECISION AND ORDER

The Commission appointed Addison Mueller as Hearing Officer in the above-identified matter. Hearings were held on January 26, 27 and February 3, 1978 during which testimony was taken under oath, exhibits were entered and various motions were made and disposed of. Both parties filed post-hearing briefs, the Hearing Officer issued his Report and Recommendations, and the County exercised its right to file exceptions thereto. Charging Party Foley did not respond to these exceptions but filed a motion to amend the charge by reducing the scope of the requested relief.

We have examined the entire record. The substance of the charge is that the Respondent violated Section 12(a)(1) of the Ordinance by denying the Charging Party due process in refusing his request for Union representation at the June 16, 1977 meeting convened by Respondent; in refusing to permit the Charging Party to cross-examine Supervisor D. O'Brien and to examine material witness Terry Hosaka, a fellow employee; and in effectively denying the presence of Union Steward Grady Lawrence at a third step grievance meeting (Lawrence had been named Acting Supervising Deputy Probation Officer to replace SDPO Andrew Nua while the latter was on vacation, thus creating a disqualifying conflict of interest).

In response, the County acknowledged 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 asserted that said meeting was a mere informal conference at which a union steward was not required. Concerning Charging Party Foley's contention that Steward Lawrence's temporary assignment as Acting SDPO was made in disregard of Charging Party's right to have independent representation, Respondent maintained that on previous occasions Lawrence had served in the same "acting" capacity and had also handled grievances as a union steward.

The Hearing Officer made several procedural rulings which cleared the way for a full consideration of the issues on their

merits and we confirm those rulings.

The substantive questions in this case involved the rights of an individual employee. A few other cases have been brought by individual grievants, as in the instant proceeding, complaining of a denial of union representation at a disciplinary conference; however, the charge in this case also alleges a restraint upon an individual seeking to avail himself fully of procedures negotiated by an employee organization.

The Employee Relations Ordinance provides that it shall be an unfair employee relations practice for the County "To interfere with, restrain, or coerce employees in the exercise of the rights recognized or granted in this Ordinance." (Sec. 12[a][1].) It further provides that the County and any certified employee organization may negotiate a procedure for handling grievances. (Sec. 11[b].) The right to participate in those grievance procedures is a protected activity.

The charge in this case claims unfair employee relations practices in the restraint of an employee seeking to participate in an activity provided for by the employee organization certified to represent employees in his work unit. The gravamen of the charge lies in two issues: (1) whether Daniel F. Foley was entitled to the presence of a union representative at a conference on June 16, 1977, and was denied such representation; and (2) whether he was denied due process in the failure or refusal

of his supervisors to make certain witnesses available for his examination in preliminary and later meetings.

As to the first issue, the Hearing Officer found that the conference or confrontation between Foley and his supervisors on June 16, 1977 was an occasion in which the employee had reason to believe he might be subjected to discipline and therefore he had a right to be accompanied by a union representative. The Hearing Officer found, however, that Foley did not request the presence of a union representative. The Hearing Officer heard the witnesses testify in person. He observed their demeanor and considered all the circumstances affecting their behavior. There was testimony substantiating his findings and no argument or evidence has been presented to warrant the substitution of a contrary finding by the Commission. The Commission therefore adopts those findings of the Hearing Officer and rules that the charging party was not denied proper union representation.

The charging party also complained of the effective denial of such representation at a subsequent meeting because the union steward had been made an acting supervisor as a vacation relief man. The Commission accepts the Hearing Officer's conclusion that this circumstance did not affect the processing of Foley's grievance through the regular grievance steps, hence his complaint of denied representation is without merit.

As to the second issue, or the denial of due process in the

investigation and grievance procedure, the facts are more complex. Foley's supervisors prepared for his personnel record a statement of his conduct on May 24, 1977 setting forth his failure to answer a call to duty and his unauthorized examination and destruction of a private memorandum on his supervisor's desk. Foley felt that was derogatory in that it omitted to state that he had failed to receive the call to duty because his beeper was not working, that he had gone to the supervisor's office to report and to leave the inoperative beeper, and that the memorandum was in full sight and was crumpled but left there. At the meeting of June 16, 1977, when the incident was discussed, he asked that a supervisor, D. O'Brien, and a fellow employee, Terry Hosaka, be brought in so that he might confront and cross-examine them. His supervisors felt satisfied with the information they had received earlier from O'Brien and declined to call him in for further questioning. Thereafter, the statement of the May 24 incidents was placed into or left in his personnel record, and he took formal grievance steps to have it removed. In one or more of these steps, the grievant repeated his request for an opportunity to examine witnesses O'Brien and Hosaka, without success.

Hearing Officer Mueller, a legal scholar deeply committed to the principle of due process of law, interpreted these circumstances as a breach of Foley's right to due process. The Commission shares his concern for that basic premise of American justice.

70.10

However, our jurisdiction in this matter is limited to a consideration of whether there was an unfair employee relations practice and we must determine whether the procedural restrictions placed upon Foley constituted an employer restraint upon the exercise of a right protected by the Employee Relations Ordinance.

The Employee Relations Ordinance does not purport to govern the nature of personnel investigations or disciplinary proceedings. It provides for the negotiation of grievance procedures by the County and employee organizations. (Sec. 11[b].) When such procedures are negotiated, as they were in this instance, every employee has the right to avail himself of them and a restraint or coercion in the exercise of that right may be an unfair employee relations practice. (Sec. 4 and 12.) We have held that the denial of union representation at a conference, reasonably interpreted to be likely to result in discipline, is an unfair employee relations practice. (UFC 6.28.) By the same reasoning, a restraint against resort to a negotiated grievance procedure might be a restraint against participating in the activity of an employee organization and, if so, it would constitute an unfair employee relations practice. (Sec. 11.)

It becomes necessary, therefore, to determine whether the right to utilize an established grievance procedure was restrained or interfered with by the refusal to call adverse witnesses for interrogation. It is the clear holding of court decisions that

procedural due process must be afforded public employees. Arnett v. Kennedy (1974), 416 US 134, and Skelly v. State Personnel Board (1975), 15 C3d 194. Those cases hold that a right "to confront and cross-examine adverse witnesses" is a minimal procedural requirement in discharge cases. Skelly, at p. 208. It is not so clear as to when the opportunity to cross-examine witnesses must be provided, particularly in minor disciplinary proceedings.

In the Arnett and the Skelly decisions, both the United States Supreme Court and the California Supreme Court held that a permanent public employee has a property interest in his job and he must be accorded a hearing before an impartial hearing officer, with due process, prior to his termination. At the same time, those courts recognized that there must be a balancing of the "competing interests" of the government and the employee. Among the factors to be considered are "whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful." That clearly contemplates that in some situations, a full hearing with due process might be postponed in the interest of effective action, even in serious

cases of termination of employment.

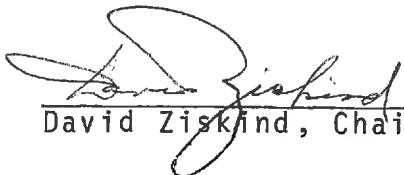
We do not find in the Employee Relations Ordinance, or in any public law or policy, the requirement of confrontation and cross-examination of adverse witnesses in the course of an investigation or in steps of the grievance procedure that do not lead to disciplinary action. The proceedings in this case, though reasonably considered likely to result in discipline, merely produced a written statement of criticism, filed for future reference. Had the grievance steps resulted in a discharge, it is likely from the Arnett and Skelly decisions that there would have been a denial of due process that would have vitiated the discharge. However, punitive action was not imposed in this case. Although the statement placed in Foley's personnel file was deemed by him to be prejudicial to his welfare, and it may have been incomplete in that it didn't explain all of the circumstances he wished to have explained, no punitive action was taken as a result of it. Nor was such action threatened. It may never occur. Although a letter of warning or disapproval in a personnel file may be annoying and potentially dangerous, it is not tantamount to punitive action or a deprivation of job rights requiring a prior hearing with due process. Under those circumstances, the Commission has concluded that the evidence does not support a finding that even in the grievance steps the Charging Party was restrained in the exercise of his right to the established griev-

ance procedure. We do not hold that an employee must wait until he is deprived of his job rights before he may insist upon resorting to negotiated grievance procedures with due process; but more than a hypothetical possibility of injury at an indefinite time in the future must exist to require the full panoply of procedural rights. In this instance, we find that the unfair employee relations practice charge was not sustained.

O R D E R

The unfair employee relations practice charge of Donald F. Foley is hereby dismissed.

Dated: August 15, 1978



David Ziskind, Chairman



Lloyd H. Bailer, Commissioner



William Levin, Commissioner