LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

In the Matter of FRANK ARBURTHA, RUBIN BAXLEY, RICHARD CASTILLO, LEON JOHNSON, RICHARD LINDERHOLM, ROBERT E. SCHLIEBS, AND ROBERT ULLOA, Charging Parties, -and- RONALD W. COLEMAN, DIRECTOR, AND ARTHUR BOGDANOFF, PRESIDENT, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 119, AFL-CIO, Respondents.	UFC 70.16 Report and Recommendation April 9, 1980

Hearing Officer:

Edgar Allan Jones, III

Appearances:

For the Union:

Paul Worthman, Representative

For the Charging Parties:

Frank Arburtha, Employee

STATEMENT OF THE CASE

On August 14, 1979 a charge was filed with the Los Angeles County Employee Relations Commission by Frank Arburtha, Rubin Baxley, Richard Linderholm, Robert E. Schliebs, Richard Castillo, Leon Johnson and Robert Ulloa against Ronald W. Coleman, Director, and Arthur Bogdanoff, President, American Federation of State, County and Municipal Employees, Local 119, AFL-CIO, alleging that the Respondents had engaged in an unfair employee relations practice as defined in the Employee Relations Ordinance ("the Ordinance") of the County of Los Angeles, Ordinance 9646, by discriminating against the Charging Parties during contract negotiations. After notice to the parties, a hearing was held on November 28, 1979 in 374-A Hall of Administration, 500 West Temple Street, Los Angeles, California before the undersigned. At the hearing all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. Representatives for the Charging Parties and the Respondent filed briefs. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact and conclusions.

FINDINGS OF FACT

The charge turns on an allegation that the Respondent Union discriminated against members of the Power Equipment Painter classification in the negotiation of the 1979-1981 Memorandum of Agreement with the County of Los Angeles. The Union represents some 350 automotive and equipment maintenance men and repairmen employed by the County of Los Angeles. Of that number 120 employees are in "bench mark" classifications. Approximately five unit employees are Power Equipment Painters.

Negotiations on the current Memorandum of Agreement took

place during an extended period preceding August 23, 1979. The Union negotiating committee included Arthur Bogdanoff, Local President; Charles Aston; Michael Meredith, Chief Steward; Joe Ochoa; Fred Boehm; Clarice Meredith; Carl Lublin; and Larry Dolson, Business Representative from AFSCME Council 36 and Chief Spokesperson.

The initial Union wage proposal was 30% for all classifications. At a negotiation session sometime in June or July, County Management made a wage offer of 3%. Larry Dolson replied for the Union that the offer would be accepted for the painters. There was no response from Management and no further comment on Dolson's statement during the bargaining with the County. At a Union caucus following the statement Dolson and others laughed about the statement and there was discussion about it and other types of bargaining tactics. Dolson testified that his comment was preceded by some choice four-letter language and that he did not expect Management to agree to 3% for the painters.

According to Union negotiating committee members Carl Lublin, Arthur Bogdanoff, Michael Meredith and Clarice Meredith the wages for many classifications were discussed during negotiations but there was no discussion of giving Power Equipment Painters a lesser wage increase. Prior to mediation, the final Union proposal on wages was 8 or 9% for all unit employees while the final County offer was about 4.5%. After mediation the parties tentatively agreed on July 31, 1979 to a 6% across the board wage increase with a special additional inequity increase of 1.5% for the classifications of Power Equipment Mechanics, Fire Equipment Mechanics, Automotive Body Builders, Body and Fender Mechanics and Helicopter Mechanics. Power Equipment Painters were to receive the 6% wage increase but not the 1.5% inequity increase.

The inequity increase was provided for certain classifications in which Management had had difficulty recruiting new employees. Because of recruitment problems, similar inequity increases had been agreed to in prior years for such classifications as Power Equipment Mechanics, Helicopter Mechanics, and Tire Repairmen. A 1971 Factfinding Report established certain benchmark classifications (Power Equipment Mechanic, Fire Equipment Mechanic, Helicopter Mechanic and Body and Fender Mechanic) in comparison to which the wages of other classifications were to be set. Power Equipment Painter was not a benchmark classification. In the years since the Power Equipment Painters first accreted in 1968 to the bargaining unit represented by the Union, they have received sometimes more, sometimes less of a wage increase than the benchmark classifications. In the last several contacts painters have maintained parity (i.e., received the same wage and wage increases) with the benchmark classification of Power Equipment Mechanic.

Frank Arburtha, a Power Equipment Painter and one of the Charging Parties here, spoke with Ronald Coleman, Executive Director of AFSCME Coundil 36 (with which the local Union is affiliated) on or about August 1, 1979 about the failure of the painters to receive the 1.5% inequity increase under the terms of the tentative agreement. Coleman advised Arburtha to follow the complaint procedures under the AFSCME International Constitution if he had an objection to what had taken place during negotiations. Thereafter Coleman reviewed certain records and determined that Power Equipment Painter wages had been in line with some of the power equipment repairmen in the unit. The instant unfair employee relations practice charge was filed on August 14, 1979. Sometime around August 16, 1979, Coleman discussed his findings regarding the painters with County Employee Relations Administrator Ed Barrios and requested, in essence, that in line with past practice the Power Equipment Painters receive the same inequity

increase as the Power Equipment Mechanics. The conversation was confirmed by letter of August 23, 1979. On the same date the final Memorandum of Agreement was executed for submission to the Los Angeles County Board of Supervisors for approval. The Memorandum as executed granted to Power Equipment Painters the same wage increase as the Power Equipment Mechanic classification.

Chief Steward Mike Meredith testified that in April 1979 a County manager allegedly precipitated problems with the established grievance procedure which resulted in the calling of a lunch-time meeting of unit employees at the County's North Eastern Avenue facility. At the meeting Meredith told employees, among other things, that he was ill and was therefore going home. After speaking with Frank Arburtha, Meredith went home. He indicated in testimony that he was told that Fire Equipment Mechanics, Service Assistants, Tire Repairmen and Power Equipment Painters did not go home ill. Sometime later Power Equipment Painter Richard Castillo who had in his words, "walked out" with the Union in April, was advised by Meredith to do his best to get out of the paint shop and into the body shop so that he would not be hurt moneywise. Castillo had been seeking a permanent transfer to the body shop since about 1978 and Meredith as Union Steward had been assisting him. Power Equipment Mechanic Eddie Lee Walker testified that after the tentative agreement of July 31, 1979, Meredith told him during a conversation about the ratification meeting that he had better join the Union in light of what had happened to the paint shop. Walker indicated that he assumed Meredith was referring to the inequity increase which at that time the painters had not received.

CONTENTIONS OF THE PARTIES

The Charging Parties argue that the Union violated sections 3(o) and 4 of the Employee Relations Ordinance by refusing during negotiations to give painters the same consideration for pay increases as was given to comparable classifications. The Charging Parties point out that after the final negotiation meeting between the Union and the County in July 1979, the painters were to receive 1.5% less of a pay increase than comparable classifications in the bargaining unit. Further, discussions between the Charging Parties and the Union which took place before and after the August 3, 1979 ratification vote by unit members did not result in any change. The Charging Parties contend that it was only after the filing of an August 14, 1979 unfair labor practice charge with the Employee Relations Commission that the painters were granted the 1.5% pay increase. The Charging Parties further maintain that the increase resulted from a telephone call by Council 36 Director Coleman to Ed Barrios, Employee Relations Administrator of the County. The Charging Parties conclude from this sequence of events that they did not receive consideration equal to that received by comparable classifications in the bargaining unit and that the Union thereby violated the Employee Relations Ordinance.

As a remedy the Charging Parties request (1) that the Union be placed on probation for three years; (2) that a painter be present for negotiations when the salary for their classification is considered; and (3) that the Charging Parties be reimbursed for $85.00 for expenses.

For its part, the Union contends that the conduct alleged in the charge is unproved, without fact and warrants dismissal of the charge. It points out that Federal precedent, applicable in interpreting the Ordinance, indicates that the statutory

duty to bargain in good faith imposed on the Union includes a duty to represent the interests of unit employees fairly and impartially. To determine whether in any particular case that duty has been breached, the Union asserts that it is necessary to look initially to the written agreement--the product of the contested negotiations. The Charging Parties must show that the Union's actions in agreeing to the terms of an agreement which have a negative or differential impact on the Charging Parties, was taken in bad faith, negligently or with a discriminatory motive. If the agreement does not result in differential treatment, the Union stresses, no genuine issue of fact exists and summary judgement for the Union is appropriate.

The Union notes that the allegation on which the instant charge is based is that the painters received 1.5% less than comparable classifications in the unit. The Union emphasizes that at the time the Employee Relations Commission set this matter for hearing the final Memorandum of Agreement did provide the contested 1.5% increase to the painters retroactive to July 1, 1979.

The Union claims that in its November 7, 1979 Bill of Particulars, the Charging Parties alleged an unfair employee relations practice in the process by which the Memorandum of Agreement was made. The Union submits that the process by which salaries were negotiatied was straightforward. Towards the end of July the Union made a final proposal of 9% across the board while Management countered with a 4.5% offer. Subsequent mediation led to a tentative agreement of 6% for all classifications with an additional 1.5% for certain classifications in which the County had experienced recruitment problems. The Power Equipment Painters did not receive the extra 1.5%; their classification did not have a problem with turnover and

thus lacked a recruiting problem. The Charging Parties complained to the Union about the 1.5% increase and the Union requested and Management accepted the 1.5% increase for the painters. The Union contends that rather than interfering with the protected rights of the Charging Parties, its agents successfully interceded with Management on their behalf.

The Union underscores the inherent danger to the negotiation process from undue interference. It notes that courts have recognized that a union must have discretion to represent members effectively. The Union claims that if the exercise of such discretion is subject to review by the Commission thereby requiring the Union to regularly defend itself as to the process by which an agreement is made, the effectiveness of the bargaining process will be jeopardized.

The Union states that the negotiating process that precedes the signing of an agreement involves proposals, concessions and a vast array of strategies and techniques employed by both sides and designed to reach agreement. It declares that mere dissatisfaction with the quality of representation cannot constitute an unfair employee relations practice. The Union cites several courts in stating that the complete satisfaction of all employees in the unit, given the recurring competition among employees, is hardly to be expected; the removal or gagging of a union on that basis would weaken the collective bargaining process.

In the face of the Charging Parties disagreement here with the Union's method of negotiating, the Union asserts that there is no evidence to show that its methods violated the Employee Relations Ordinance. Further, the Union contends that the Charging Parties' proper remedy was to file charges under the AFSCME International Constitution. The Union maintains that the Constitution provides specific and extensive remedies for filing complaints concerning the actions of Union officials

and Union staff. This the Charging Parties did not do. Nor did they show by evidence that resort to internal union complaint procedures would have been futile.

ANALYSIS AND CONCLUSIONS

The matter for resolution here involves the Charging Parties' assertion that the Union has failed in its duty of fair representation to them in negotiating the current Memorandum of Agreement. Since the Union questions the propriety of the Employee Relations Commission's entertainment of such an allegation, it is important at the outset to examine the jurisdictional basis for the instant charge.

Section 4 of the Ordinance grants employees the right to form, join or participate in a labor organization and the right to refuse to join or participate in such an organization. Section 9 of the Ordinance vests in an employee orgainization certified as majority representative, the authority to negotiate on wages, hours and other terms and conditions of employment for employees in an appropriate employee representation unit. The United States Supreme Court in Ford v. Hoffman, 345 U.S. 330, 31 LRRM 2548 (1953), found that a similar exclusive investiture under the National Labor Relations Act created a liability on the part of the union to represent all employees fairly with hostility to none. As the U.S. Court of Appeals for the Ninth Circuit said in Laborers and Hodcarriers v. NLRB, 564 F.2d 834, 97 LRRM 2287 (1977), the duty of fair representation is the quid pro quo for a union's right to be exclusive representative; it protects the employees in the minority from arbitrary discrimination by the majority. In Miranda Fuel, Inc., 140 NLRB 181, 51 LRRM 1584 (1962), the National Labor Relations Board adopted the above reasoning

in stating that the obligation imposed by Section 9 of the Act--the parallel to Section 9 of the Ordinance--to represent all employees fairly must be read into the rights guaranteed to employees under Section 7 of the Act--the parallel to Section 4 of the Ordinance. Thus a breach of the Section 9 duty is a violation of the Section 7 right and constitutes an unfair labor practice under Section 8(b)(1)(A) of the Act: to restrain or coerce employees in the exercise of the rights guaranteed in Section 7.

This same reasoning applies under the Ordinance. As the Union points out in its brief, construction and interpretation of the Ordinance may be done in light of federal precedent where the federal decisions effectively reflect the same interests as the local ordinance. Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 116 Cal. Rptr. 507 (1974). Thus a union as a certified employee organization under Section 9 of the Ordinance, has the obligation to represent all of the employees in the bargaining unit fairly and impartially. To neglect that duty is to violate the rights of employees defined in Section 4 of the Ordinance. And such a violation amounts to an unfair employee relations practice under Section 12(b)(1) of the Ordinance: to interfere with, restrain or coerce employees in the exercise of the rights recognized or granted in the Ordinance.

The Union makes the argument that the Charging Parties should have resorted to internal union remedies rather than to the unfair employee relations practice machinery of the Ordinance. This argument is without merit. While exhaustion of internal union remedies may be a prerequisite to a court suit based on the duty of fair representation, it is not a precondition to the filing of an unfair labor practice charge under the Miranda Fuel doctrine. Nor is it required by Section 12(d) of the Ordinance as a precondition to filing an unfair employee relations

practice charge. Indeed, such a requirement could prove to be a futile exercise due to the unavailability of an appropriate bilateral remedy such as alleviation of the disparate treatment by contract modification. Compare, Beriault v. Local 140, ILWU, 501 F.2d 258, 266, 87 LRRM 2070 (CA 9, 1974).

Having concluded that the Commission has jurisdiction over an allegation of a breach of the duty of fair representation--that such an allegation may amount to an unfair employee relations practice--it is necessary to define the standard of review in such cases. The NLRB in Miranda, supra at 185, indicated that "Section 7 thus gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment." In the arena of negotiations, while a union may negotiate for and agree to contract provisions involving disparate treatment of distinct classes of workers, it may not do so if such conduct is arbitrary or taken in bad faith. Williams v. Pacific Maritime Association, 103 LRRM 2659, 2665 (CA 9, 1980).

The above reference to the Williams case makes an important point: not every example of differential treatment by a collective bargaining agreement evidences a breach of the duty of fair representation. The Supreme Court in Ford v. Hoffman, supra at 338, put it best when it said:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

It follows from the above analysis that to violate Section 12(b)(1) of the Ordinance in negotiating an agreement, a union must have (1) agreed to differential treatment of unit employees, and (2) done so arbitrarily or in bad faith. To say

that an alleged breach of the duty of fair representation may be brought before the Employee Relations Commission is not to say that the charge brought in this case is meritorious.

The Charging Parties alleged in the charge that their classification received less of a pay increase than comparable unit classifications because of their failure to participate in an alleged walk-out on April 20, 1979. The record shows that the Memorandum of Agreement executed August 23, 1979 does not treat the Charging Parties, unit employees in the Power Equipment Painter classification, differently than comparable classifications. Wanting is the first and crucial element of a breach of the duty of fair representation--disparate treatment. Further, even at the time that the charge was filed it does not appear that the Charging Parties suffered from differential treatment since there was at that time but a tentative agreement between the Union and the County. The negotiations process was not yet complete; further movement by the parties was yet possible, as evidenced by the later adoption of the inequity increase for Power Equipment Painters. Indeed it would be inappropriate to deal with a charge of this nature where the process of negotiation is incomplete, while there is yet an opportunity for further petitions or demands from competing constituencies within the unit membership to sway positions taken at the bargaining table.

In this latter regard, the Charging Parties advance the argument that since it obtained equal wage treatment only after it initiated the instant charge, the Union violated the duty of fair representation. The record does not substantiate this contention. It is true that the Charging Parties complained to the Union's Executive Director of what they perceived to be an inequity--the lack of the 1.5% increase--and that they thereafter filed this charge. It is also true that the Executive Director investigated their complaint and made the request of the County

as confirmed by the August 23 letter. The record does not however clearly establish the sequence of these events. Even if the record were clear in that regard and the Union did make the request of Management to defuse the present charge, it does not inexorably follow that the Union was motivated by guilt. It is equally likely that in making the request the Union was reacting to one of the many competing employee demands exerted by any unit on its bargaining agent during the negotiation of a collective bargaining agreement. Because of circumstances such as these, a certain degree of latitude must be and is granted to a bargaining representative in the negotiation of an agreement--particularly where, as here, no harm resulted to the Charging Parties.

Much of the Charging Parties' energies at the hearing were directed toward establishing a bad faith motive on the part of the Union. The Charging Parties contended that certain statements by members of the Union negotiating committee evidenced bad faith on the part of the Union. Given the above conclusion that the terms of the Agreement do not as charged discriminate against the Charging Parties, detailed examination of this contention is not called for. Thus the statement by Dolson concerning accepting a 3% increase for painters, though it may not have enamored him with the painters, was, in the course of the negotiations with the County, of no consequence. Further, even if statements made by Meredith may have suggested to the Charging Parties a bias on his part against them, they too, measured by the impact they had on the final wage settlement, did not harm the Charging Parties.

In conclusion, I am constrained to find on the basis of the above analysis that the Union did not breach its duty of fair representation in negotiating the current Memorandum of Agreement with the County and did not therefore violate Section 12(b)(1) of the Ordinance.

RECOMMENDATION

It is recommended that the charge be dismissed.

April 9, 1980

Edgar Allan Jones, III
Hearing Examiner