LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

HEARING OFFICER REPORT

In the Matter of LOS ANGELES COUNTY PROFESSIONAL PEACE OFFICERS ASSOCIATION Charging Party v. COUNTY OF LOS ANGELES SHERIFF'S DEPARTMENT AND THE DIRECTOR OF PERSONNEL Respondent	)	UFC 9.11

HEARING HELD

August 15, 1978
374 Hall of Administration
500 W. Temple Street
Los Angeles, California 90012

HEARING OFFICER

WILLIAM S. RULE
644 Palos Verdes Boulevard
Redondo Beach, California 90277

APPEARANCES:

For the County: RAMON R. SINGLEY, Employee Relations Administrator

J. E. HAUPTMAN
Department of Personnel
222 North Grand Avenue
Los Angeles, California 90012

For PPOA: JAMES L. MARABLE, ESQ.
BODLE, FOGEL, JULBER, REINHARDT, ROTHSCHILD and FELDMAN
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BACKGROUND

A Memorandum of Understanding (MOU) existed between the Authorized Management Representatives (Management) and the County of Los Angeles (County) and the Los Angeles County Professional Peace Officers Association (PPOA)(JX 1). On May 26, 1978, PPOA filed an unfair employee relations practice charge alleging the County had proposed implementation of a Physical Agility Testing and Medical Examination Program affecting wages, hours and other terms and conditions of employment and had refused to negotiate the purposed program with PPOA in violation of Section 12 (a)(3) of the Employee Relations Ordinance.

The County denied the charge. The Employee Relations Commission Executive Officer investigated the charge and during its regular meeting on June 23, 1978, the Employee Relations Commission set the matter for hearing before William S. Rule without taking any position on the merits of the charge. A hearing was held before the Hearing officer on August 15, 1978 at which time both parties were given a full opportunity to present evidence and argument with regard to the charge. A verbatim transcript was taken and post hearing briefs filed in a timely manner.

(b) The scope of negotiation between management representatives and the representatives of certified employee organizations includes wages, hours, and other terms and conditions of employment within the employee representation unit.

. . .

Section 12. UNFAIR EMPLOYEE RELATIONS PRACTICES.

(a) It shall be an unfair employee relations practice for the County:

. . .

(3) To refuse to negotiate with representatives of certified employee organizations on negotiable matters.

. . . "

" MEMORANDUM OF UNDERSTANDING

. . .

ARTICLE 1 PURPOSE

It is the purpose of this Memorandum of Understanding to promote and provide for harmonious relations, cooperation and understanding between Management and the employees covered herein; to provide an orderly and equitable means of resolving any misunderstandings or differences which may arise under this Memorandum of Understanding; and to set forth the full and entire understanding of the parties reached as a result of good faith negotiations regarding the wages, hours and other terms and conditions of employment of the employees covered hereby, which understanding the parties intend jointly to submit and recommend for approval and implementation to County's Board of Supervisors.

. . .

ARTICLE 24 FULL UNDERSTANDING, MODIFICATIONS, WAIVER

A. This Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein. 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.

B. Except as specifically provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its rights, and agrees that the other shall not be required, to negotiate with respect to any matter covered herein or with respect to any other matters within the scope of negotiations, during the term of this Memorandum of Understanding.

C. No agreement, alteration, understanding, variation, waiver or modification of any of the terms or provisions contained herein shall in any manner be binding upon the parties hereto unless made and executed in writing by the parties hereto, and, if required, approved and implemented by County's Board of Supervisors.

D. 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.

ARTICLE 26 PROVISIONS OF LAW

It is understood and agreed that this Memorandum of Understanding is subject to all current and future applicable Federal, State and County laws and regulations, the Charter of the County of Los Angeles and any

lawful rules and regulations enacted by County's Civil Service Commission, Employee Relations Commission or similar independent commissions of the County. If any part or provision of this Memorandum of Understanding is in conflict or inconsistent with such applicable provisions of Federal, State or County rules and regulations, or is otherwise held to be invalid or unenforceable by any tribunal of competent jurisdiction, such part or provision shall be suspended and superseded by such applicable law or regulations and the remainder of this Memorandum of Understanding shall not be affected thereby.

. . ." (JX 1)

POSITION OF THE PARTIES

POPA Position

Respondents' continuing refusal to negotiate regarding the physical fitness program is a refusal to negotiate on negotiable matters and a failure to meet and confer in good faith on matters within the scope of representation. In refusing the charging party's request for negotiations regarding the physical fitness program respondents have violated and are continuing to violate Section 12(a)(3) of the Employee Relations Ordinance and Section 3505 of the Meyers-Milias-Brown Act.

The proposed physical fitness program constitutes a change in the wages, hours and other terms and conditions of employment of all affected employees. Respondents apparently argue that because employees are called upon in their jobs to exercise certain physical skills and abilities,

the physical fitness program cannot be regarded as a "new" condition of employment. The charging party does not dispute that law enforcement personnel may engage in strenuous work, nor does it contest the classification of certain positions as "class four arduous" positions. Respondents' argument confuses the requirement that employees perform their duties satisfactorily with a new requirement that they pass a physical ability test or a medical examination. It is the imposition of this new requirement with respect to which the charging party has requested negotiations.

Imposition of the proposed physical fitness program is not within respondents' "management rights."

The charging party has not conceded any "management right" to respondents which constitutes a waiver of the right to bargain over the physical fitness program.

The "zipper clause" in the 1977-1978 memorandum of understanding does not constitute a wavier of the right to bargain.

The charging party submits that the appropriate remedy herein is to require respondents to rescind the proposed physical fitness program which has been developed while respondents have been refusing to negotiate with the charging party regarding the program in violation of Section 12(a)(3) of the Employee Relations Ordinance and Section 3505 of the Meyers-Milias-Brown Act, and to rescind any and all acts or things done or undertaken to implement the proposed program.

County Position

The implementation of a medical examination and physical agility testing program is not a proper subject for negotiations.

The County has the exclusive right to set standards of service to be offered the public. Such standard of service must include the physical abilities and level of physical condition necessary to apprehend and control criminals. The State Employees Retirement System supports the need to maintain a physically fit police force able to protect the public. The County Retirement Systems Administration Association supports the same conclusion as does the State Assembly.

California Supreme Court Justice Clark in Hardy vs. Stumpf (SF 23482 Superior Court No. 415761) stated in part with regard to law enforcement, " . . . a constitutional right to pursue an occupation presupposes an ability to perform the job. Neither the federal nor state Constitution suggests a person be employed absent the ability to satisfy job requirements."

Elkouri's book "How Arbitration Works," states, "Management's good faith right to require job applicants to submit to a physical examination is so basic that it has rarely been an issue in arbitration. The utility of physical examinations obviously is not needed once the applicant has been hired and has commenced service with the employer--situations arise to warrant physical examinations during the employment relationship." The

authority for setting standards for evaluating employee performance has been long provided for by the Charter of the County of Los Angeles and other official documents authorized by said Charter.

Civil Service Rule 6 provides for developing and maintaing a class specification for each class in the classified service including physical requirements. Civil Service Commission Rule 10.01 provides the Director of Personnel shall specify the physical class of all classifications of positions and Rule 10.08(b) provides for medical reevaluation. Rule 21.01 provides for evaluation of comparative efficiency and performance at least once a year.

Therefore within the framework of the above provisions of County law (Civil Service Rules and Charter), Section 3500 of the Government Code (Meyers-Milias-Brown Act) which provides in part" . . . Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or provide for other methods of administering employee relations . . .", Section 6(c) of the County's Employee Relations Ordinance which states "Negotiation shall not be required on any subject preempted by Federal or State law, or by County Charter, nor shall negotiation be required on Employee or Employer Rights as defined in Section 4 and above . . .", and the Provisions of Law Article of the Memorandum of Understanding (JX 1), the County's right to evaluate the physical ability of its peace officers cannot be negotiable.

Even if the implementation of a physical examination and physical agility testing program were proper subjects for negotiations, the clear and unambiguous language contained in Article 24B of the Memorandum of Understanding specifically waives charging parties' right to compel respondents to negotiate such matters and relieves each party of its obligation to bargain collectively during the life of the contract not only with respect to any subject matter covered in the contract but also with respect to any subject matter within the scope of negotiations not covered in the contract.

Waiver of bargaining of "zipper" clauses, such as that set forth in Article 24B above, are very common in private and public sector labor-management agreements and during negotiations an employer may insist on the inclusion of a "zipper" clause to the point of impasse.

There are no reported State court decisions interpreting "zipper" clauses under the Meyers-Milias-Brown Act. In a recent series of cases, however, the California Supreme Court has held that in construing the Meyers-Milias-Brown Act, Government Code Section 3500 et seq, the Courts must review the Federal Law as set forth by the National Labor Relations Board and the Federal Courts in interpreting the National Labor Relations Act in order to properly interpret the applicable provisions of the State law. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608, 615-617; Social Workers Union, Local 535, SEIU v. Alameda County

Welfare Department (1974) 11 Cal. 3d 382; Glendale City Employees' Assn. v. City of Glendale (1975) 15 Cal. 3d 328.) California Appellate Courts have also held that Federal Law is persuasive authority regarding interpretation of the provision of the MMB Act.

A properly drafted "zipper" clause may be considered a waiver of a union's right to negotiate about matters either contained in the contract or not dealt with in the contract. (Radioear Corp. (1974) NLRB No. 13, 87 LRRM 1330.)

In NLRB v Southern Materials Company (1971) 447 F. 2d 15, the United States Court of Appeals recently upheld a waiver clause virtually identical to that contained in Article 24B and ruled that the employer was under no obligation to bargain regarding the issue of unilateral termination of Christmas bonuses during the life of the contract.

The "zipper" clause in the Southern Materials Company case provided: "The Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter referred to or covered in this Agreement, or with respect to any subject matter not specifically referred to or covered in this Agreement."

In the Radioear case, the Board, citing and relying upon the Court of Appeal's decision in NLRB v. Southern Materials Company, supra,

rejected what it termed a "rigid" application of the "clear and unequivocal" waiver rule, and construed a broadly phrased zipper clause as being a conscious waiver of the union's right to bargain about specific subjects not referred to in the agreement – there, the termination of a "turkey money" bonus.

The zipper clause in Radioear reads in pertinent part: ". . . Therefore, for the life of this agreement, the Union agrees that the Company shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in the agreement."

A second factor set forth in the Radioear case is also present here. The obligation to bargain under the Meyers-Milias-Brown Act and the Employee Relations Ordinance of the County of Los Angeles does not compel either party to agree to anything (Government Code Section 3505; Employee Relations Ordinance Section 3(d)). If PPOA had not wanted a tight zipper clause in the MOU, it could have refused to agree to its inclusion or it could have, like some County unions insisted on a less restrictive version thereof. Charging party did not do so.

A finding in favor of the charging party would have the effect of nullifying a clear and unambiguous provision of a bargaining agreement which was fully arrived at in negotiation by mutual understanding of the parties to the agreement. Such a decision would serve as an invitation to parties, who have reached negotiated good faith agreements, to violate

their agreements by filing unfair charges to condone the violation of their negotiated contract.

By granting the charging party something which though aware of management's plan, it did not even demand to put on the bargaining table as an issue subject to the give and take of contract negotiations, the hearing officer would frustrate the purpose of good faith bargaining between labor and management.

PPOA's demand to negotiate is without merit or basis in fact. PPOA proposed to negotiate on duty time to prepare for the agility test and physical examination and the provision of County facilities for that preparation, the relationship with the annual performance evaluation and the classification of liability when preparing for these tests.

The tests consist of tasks typically performed by Deputies in the course of performing their duties. A working peace officer must be able to perform these tasks routinely. No one needs to prepare for a physical examination. Present employees hired before January 1, 1976 would be "grandfathered" and exempt from receiving "Improvement Needed" or "Unsatisfactory" performance evaluation and thereby exempt from discipline and discharge for failure to pass the physical agility test. Any promotion could not be affected since promotional opportunities are to be found outside the classes covered by the test.

PPOA has been aware of the proposed program since May 24, 1976 (TR59:6-9), has signed new MOU's and each contained Full Understanding, Modification and Waiver language.

The County met and consulted with PPOA in good faith to solicit the Union's reaction to and suggestions for the program (TR91, 92, 93, 94 and 96). The County then modified the plan.

The County submits that the great weight of evidence shows that the implementation of a physical examination and physical agility testing program is not a proper subject for negotiation and even if it were, the charging party waived its right to negotiate it.

Therefore, the County requests that the hearing officer finds that the County did not commit an unfair employee relations act under Section 12(a) of the Los Angeles County Employee Relations Ordinance and dismiss Unfair Charge 9.11.

FINDINGS AND CONCLUSIONS

The material facts in this case are not really in dispute. Perhaps as early as May 1976, PPOA was made aware the County intended to implement a physical agility program for Deputy Sheriffs. The discussion between the parties about the program in 1976 appears to have been rather informal. PPOA may well have indicated some support for the physical examination concept and even for agility testing, though the record is quite clear the County made no attempt to implement the program in 1976.

The record is unclear whether PPOA knew in May 1976 just what effect the agility testing program could have on its unit members. Neither party made any negotiation proposals with regard to the program in the negotiation for 1976-77, 1977-78 or 1978-79 MOU's. The record indicates the program was not even discussed in any of these negotiations.

The record is clear the program was discussed with PPOA at least on October 4, 1977 in a meeting called for that purpose. At that meeting PPOA was given a copy of the proposed agility test which the County indicated would be implemented November 1, 1977. (AX 1). By letter to the Sheriff dated October 11, 1977, PPOA requested "to commence the Meet and Confer process for the purpose of reaching agreement regarding the Physical Fitness, Agility and Examination Program." (AX 2). Captain Anderson replied for the County on October 19, 1977, thanking PPOA for its "input in the form of comments and suggestions . . . these express concerns . . . are being considered . . . Prior to implementation of physical agility testing, we will again be in contact with your organization." (AX 3). The program was not implemented on November 1, 1977.

No further formal discussion or correspondence took place between the parties until a meeting on April 20, 1978 between the Sheriff's Department, Department of Personnel, PPOA and another employee organigation. At this meeting PPOA was given some additional information on the program including that the agility test would be linked to Performance

Evaluation and that implementation was scheduled for July 1, 1978. PPOA was also given a copy of an Annual In-Service Physical Agility Test form for employees to sign acknowledging that the Agility Test would be given all Sworn Personnel working in an arduous Class 4 classification annually, that failure to pass the test will result in an "Improvement Needed" Evaluation, and that a second failure six months later will result in an "Unsatisfactory" Evaluation and termination. (AX 5). PPOA represents employees working in arduous Class 4.

On April 24, and April 27, 1978, PPOA wrote the Sheriff's Office and the Department of Personnel requesting negotiations on the program and referring to PPOA's position as previously expressed in its correspondence of October 11, 1977 (AX 4, 6). The County replied by letter dated May 4, 1978, ". . . We are prepared to meet and consult in accordance with Section 6(a) of the Employee Relation Ordinance." (AX 7) and by letter dated May 5, 1978, ". . . Although we disagree on the issue of negotiability . . . Certainly our proposed program is subject to consultation as provided under Section 6(a) . . ." (AX 8). PPOA filed UPC 9.11 on May 26, 1978 which led to the instant hearing.

First, the County contends the program is not a proper subject for negotiations relying primarily on Section 5 of the Employee Relations Ordinance on County Rights which states in part, ". . . exclusive right of the County to . . . set standards of service to be offered to the public . . .".

The County argues this language gives it the right to set physical standards for quality of work and thus the Agility Test. The County supports its contention by numerous citation and quotes from reports about safety employees.

While the Hearing Officer would certainly agree the County has the right to establish a physical examination for job applicants and to require subsequent physical examination when it has reason to believe an employee may be unable to physically do his or her job, the Hearing Officer does not believe Section 5's reference to "standards of service" was meant to provide the County an exclusive right to implement Agility Testing. The words "standards of service" must be interpreted to mean such things as the number and types of employees and equipment which will be made available to serve the public and not Agility Testing.

While the County is correct it has the authority to set standards for evaluating employee performance long provided by the County Charter and Civil Service rule, the County is clearly required to negotiate wages, hours and other terms and conditions of employment. The County has the right to evaluate the physical ability of its peace officers but the methods and effect of such evaluation may will change conditions of employment and thus be subject to negotation.

Secondly, the County contends the clear language of the MOU specifically waives PPOA's right to negotiate about the program even if it were

negotiable. The County argues Article I is clear that the MOU is the full understanding regarding wages, hours and other terms and conditions of employment, and that Article 24B is a clear "zipper clause" excluding any further bargaining during the life of the MOU.

The Hearing Officer is in complete agreement with the County's argument the California Supreme Court has held that in construing the Meyers-Milias-Brown Act the Courts must review the Federal Law as set forth by the National Labor Relations Board and the Federal Courts. The Hearing Officer is also in agreement a properly drafted "zipper clause" may be considered a waiver of a union's right to negotiate about matters either contained in the contract or not dealt with in the contract.

The County cites two cases in particular, Radioear Corp, and NLRB v. Southern Materials Company to sustain its position. The Southern Materials Company case involved the Union's attempt to negotiate over Christmas bonuses in the light of a strong waiver clause. There was some question as to whether Christmas bonuses were included as part of the contract. The Court held the "zipper clause" excluded the matter from negotation. While not completely familar with this case, the Hearing Officer would question the similarity between a Union's desire to negotiate a Christmas bonus and PPOA's desire to negotiate with the County to prevent the unilateral imposition of Agility Testing which could bring loss of benefits and even employment to its members.

In Radioear Corp. the issue was "turkey money" bonus which the Company discontinued and refused to negotiate under waiver language. The Board upheld the Company position that negotiation was not required but only after noting the Union had used a Christmas bonus as leverage to get higher wages and could hardly have been unaware of the need to negotiate "turkey money" or lose the benefit. The Hearing Officer does not consider the facts in Radioear analagous to PPOA's request to negotiate over Agility Testing which County did not indicate a clear intention to implement when negotiation for the 1977-78 MOU were in progress.

Thirdly, the County contends PPOA's demand for negotiations on Agility Testing is without merit or basis in fact. The County's principal argument in this area is that persons employed prior to January 1, 1976, which would include all PPOA members in the unit since it requires a minimum of three years service to qualify for those positions, would be "grandfathered" from receiving "Improper Improvement Needed" or "Unsatisfactory" performance evaluations and therefore excempt from discipline or discharge for failure to pass the physical agility test. While this sounds fair, the record is clear failure to pass the agility test could still lead to a requirement of remedial work on employee time and that failure to pass would be recorded on the employee's record and performance evaluation which might well be considered by superiors in determining future assignments and/or promotion even if promotion meant removal from

the class in which the agility test was required. Particularly in a para-military organization the Hearing Officer can appreciate the genuine concern of an employee having any failure recorded in his record even if he is assured it won't count against him. The Hearing Officer must also recognize the legitimate concern of PPOA that employees hired after January 1, 1976 will soon be its members as they move up through the ranks and would be subject to discipline and dismissal for failure to pass the agility test under the County's position even though such a requirement had never been negotiated into the MOU which would then cover them.

Lastly, and perhaps with greatest emphasis, the County contends PPOA was aware of the program in 1976, 1977 and 1978 but failed to make any attempt to present proposals for negotiations on the program for the 1976-77, 1977-78, or 1978-79 MOU's. PPOA had its opportunity to negotiate the program, argues the County, did not use it and is now precluded by the waiver clause from doing so.

The record is unclear how much PPOA knew of the program in 1976. The County's subsequent meeting with PPOA in October 1977 and its failure to implement the program have convinced the Hearing Officer that PPOA had no reason to believe the County intended to implement the program during the 1976-77 MOU or before negotiations were completed for the 1977-78 MOU. The last written word PPOA had from the County in October 1977 on the subject said, "Prior to implementation of physical agility testing, we will

again be in contact with your organization." (AX 3). At that point the County had not stated in writing it would not negotiate the matter.

The County's position to implement the program and to refuse to negotiate became quite clear in May 1978. (AX 7,8). The UFC was filed in May 1978 when the 1977-78 MOU was still in effect. Since PPOA had no reasonable reason to believe the County would not negotiate the agility program if the County did decide to go ahead with it prior to concluding both its 1976-77 and 1977-78 negotiations with the County, the County may not now successfully contend that PPOA should have made demands in negotations if it wanted to negotiate about the program.

The 1978-79 negotations are a different matter and that MOU contains the same waiver language found in previous MOU's. By the time of 1978-79 negotiations, PPOA knew the County had refused to negotiate on the program and planned to implement it. PPOA may not plead lack of knowledge of County intentions in May 1978 but that does not mean the burden was clearly on PPOA to demand negotiations on the subject. The burden to propose a change in negotiations rests on the party which wishes to make that change. PPOA did not want the implementation of the agility testing program. The program was not in effect, was certainly not a past practice and was not provided for in the previous MOU. The County wanted the program and it was up to the County to propose it. There is no evidence the parties even discussed agility testing in negotiations and

there is no evidence the County said at the bargaining table it was their intention to implement the program.

In both the Southern Materials and Radioear Corp. decisions the Union was attempting to require bargaining on a benefit the Union wanted to obtain or continue. The contracts did not clearly provide the benefit and the Court and NLRB held the Union was excluded from seeking the benefit by the waiver clause in the contracts. If PPOA were to seek a fully paid medical exam for all members of its units and for all dependents on a quarterly basis, for example, the waiver clause would exclude such negotiations. In the opinion of the Hearing Officer, the same reasoning in these cases must apply in the instant case.

The County has not convinced the Hearing Officer that the MOU, the charter or the Law gives it the unilateral right to implement an agility testing program which could impact on the working conditions of PPOA unit members without negotiating the subject with PPOA. The agility testing program could result in current PPOA unit members being required to work to pass the test without additional compensation on their own time and/or to have their employee records and evaluations indicate failure of the test which might be a detriment to future assignments and/or promotions. The agility testing program could result in future PPOA unit members being disciplined and even discharged for failure to pass. The fact that employees hired after January 1, 1976 have signed a document that they recognize they

must pass a yearly agility test or face discipline and discharge does not change the MOU between the parties. That may only be changed in negotiations. Were this not true a Company or Agency might well take advantage of a new employees' willingness to sign almost anything to get a job and simply have a new employee sign a document that the benefits in the MOU or contract would not apply to him. Under such circumstances an Agreement would have no meaning and this is not what the law provides.

In summary then, the Hearing Officer is convinced by the record in this case that the agility testing program could have substantial effect on the other terms and conditions of employment of PPOA unit members, that neither the MOU, the Charter or the law gives the County the unilateral right to implement such a program, that there is no established practice of agility testing in the unit, that the MOU does not provide for agility testing, that the burden of raising the agility testing program in negotiations was on the County and not on PPOA since the County wished to implement the program and that the County must now negotiate the matter with PPOA in accordance with Section 6(b) of the Employee Relations Ordinance.

FINAL ORDER

Based upon all of the evidence and argument on charge UFC 9.11, it is the decision of the Hearing Officer that the County did violate Section 12(a)(3) of the Employee Relations Ordinance as charged and must negotiate its agility testing program with PPOA before its implementation in accordance with Section 6(b) of the Employee Relations Ordinance.

William S. Rule
Hearing Officer

December 28, 1978

Redondo Beach, California