LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

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

On May 26, 1978 Charging Party filed an unfair employee relations practice charge alleging the Los Angeles County Sheriff's Department 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 proposed program with Los Angeles County Professional Peace Officers Association (herein called PPOA) in violation of Section 12(a)(3) of the Employee Relations Ordinance (herein called Ordinance). The Executive Officer of the Employee Relations Commission (herein called Commission) investigated the charge, and at its regular meeting on June 23, 1978 the Commission set the matter

for hearing before William S. Rule. A hearing was held before Hearing Officer Rule on August 15, 1978. Both parties were afforded full opportunity to present evidence and argument regarding the charge. Post hearing briefs were filed in a timely manner. County filed exceptions to the Hearing Officer Report and Charging Party responded.

## Statement of Facts

In May 1976 County notified the Executive Director of PPOA of its intent to implement a physical agility testing program. At a meeting held May 24, 1976, material as to the proposed testing program was presented by a representative of the Sheriff's Department. At that time, the program was scheduled for implementation on July 1, 1976.

By October 1977 the Sheriff's Department had taken no step to implement the program. In early October County presented PPOA, at a meeting, a copy of the proposed agility test. By a letter to the Sheriff dated October 11, 1977 a representative of PPOA, noting that PPOA had been informed that the Department intended to initiate the program effective November 1, 1977, submitted a request to commence the "meet and confer" process, for the purpose of reaching agreement regarding the program.

On October 19, 1977 the Department responded:

> During our consultation meeting on October 4, 1977 we discussed the Department's plans and solicited input

> in the form of comments or suggestions from P.P.O.A. These expressed concerns, as reiterated in your October 11 correspondence, are being considered by the Sheriff's Department.
>
> Prior to implementation of physical agility testing, we will again be in contact with your organization.

Contrary to its earlier expressed intent, the Department did not implement the program on November 1, 1977.

Apparently no further formal discussion or correspondence took place between the parties until a meeting on April 20, 1978 between the Department, the Department of Personnel, PPOA, and another employee organization. At this meeting PPOA was given additional information on the program, including a statement that the agility test would be linked to performance evaluation and that implementation was now 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 IV classification." PPOA is the certified representative for employees in certain arduous Class IV classifications (Unit 612). The form provided that the test would be administered annually, that failure to successfully complete any portion of it would result in an employee being given an "Improvement Needed" evaluation, and that if after six months the employee was still unable to successfully pass the test he may be given an "Unsatisfactory" evaluation and terminated. Employees hired prior to January 1, 1976 who failed to satisfactorily complete the physical agility test would be referred to Occu-

pational Health Services for remedial programs and would be retested within six months, with additional failures handled on an individual basis.

On April 24, 1978 PPOA's Executive Director wrote the Sheriff's Department to request to "meet and confer in good faith and negotiate the Department's proposals, recommendations, and date of implementation for the physical fitness, agility and examination program." A similar letter was sent by PPOA on April 27, 1978 to the County's Department of Personnel.

On May 5, 1978 the Sheriff's Department Administrative Chief responded in part as follows:

> [W]e do not consider this an appropriate matter for the meet and confer process.
>
> Although we disagree on the issue of negotiability, we believe that our previous discussions have been of value and your input to date has been fully considered as our planning has continued. Certainly, our proposed program is subject to consultation as provided under Section 6(a) of the Los Angeles County Employee Relations Ordinance (9646). Therefore, we are available to continue our consultation meetings. . . .

There appears to be no dispute that neither party made any negotiation proposals with regard to the program in the negotiations for the 1976-77 and 1977-78 MOUs. No MOU was apparently signed for the 1978-79 fiscal year.

On May 26, 1978 PPOA filed the unfair charge UFC 9.11 which led to the hearing and ultimately to this decision.

Article 24B of the 1976-77 and 1977-78 MOUs provided:

> B. Except as specifically provided herein, it is

> agreed and understood that each party hereto voluntarily and unqualifiedly waives its right, 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.

The record is unclear whether the program has as yet been implemented, but the Commission is informed there has been no implementation.

## The Position of County

Implementation of a Medical Examination and Physical Agility Testing Program is not a proper subject for negotiation in that Section 5 of the Ordinance gives County the exclusive right to set standards of services offered to the public, and includes the level of physical skill needed to apprehend and control criminals.

Even if the subject were negotiable, the lanugage of Article 24B of the MOU forecloses negotiations during the life of the contract.

Charging Party's demand to negotiate is without merit or basis in fact in that bargaining unit employees employed prior to January 1, 1976 would be exempt from receiving negative performance ratings, discipline, or discharge for failure to pass the test, and promotional opportunities for unit employees are to classifications that are not classed as physically arduous.

## The Position of PPOA

The implementation of a physical testing program is a proper subject for negotiations in that the testing program imposes additional performance criteria on unit employees (a requirement that they pass a physical agility test program or a medical examination) and affects wages, hours and other terms and conditions of employment by requiring preparation for the tests and posing a threat of discharge.

The zipper clause does not constitute a waiver of the right to bargain in that the zipper clause in the PPOA MOU does not clearly and unequivocally waive the right to negotiate with respect to all matters, but refers only to matters "within the scope of negotiations"; that is, to matters discussed at the bargaining table prior to reaching agreement on the MOU.

## Discussion

We address ourselves to the two issues:

1. Whether the projected physical agility test was a "negotiable" matter.

2. Assuming the matter was negotiable, whether PPOA by agreeing to Article 24B, the zipper clause in the 1977-78 MOU precluded itself from claiming an unfair labor practice charge in May 1978 when County announced that it would

implement the program on July 1, 1978.

As stated by Hearing Officer Rule:

> 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 physical ability of its peace officers but the methods and effect of such evaluation will change conditions of employment and thus be subject to negotiation.

County's contention to the effect that no negative impact would befall employees hired prior to January 1, 1976 is unconvincing. Pre-January 1, 1976 hirees, under the proposed "grandfathering" language, would be required to take the annual agility test and medical examinations; the test results would become a permanent part of the employee's record; and the employee would be required to participate in a remedial program if the results are unsatisfactory. Further, if on a retesting in six months there is an "additional failure," the situation "will be handled on an individual basis." Such a consequence clearly affects "working conditions."

County apparently does not challenge the Hearing Officer's finding as to the post-January 1, 1976 hires that 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 recognizing that they recognize they must pass a yearly agility test or face discipline and discharge does not change the MOU, which can only be

changed in negotiations. Mr. Rule properly points out that:

> Were this not true, a company or agency might well take advantage of 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 contract would not apply to him.

We turn now to the question of the effect of the waiver, or so-called "zipper clause." Did Article 24B effectively preclude PPOA from challenging the physical agility testing program?

In resolving this issue, it is important to consider the situation as it existed on April 20, 1978. Notwithstanding the various discussions the parties had beginning in May 1976, it was not until April 20, 1978 that County stated the program would be implemented on July 1. PPOA was then given a copy of the annual in-service physical agility test form for all employees hired after January 1, 1976 to sign acknowledging the existence of the test, the manner it would be administered, and the consequences of a failure to pass the test within six months after an original failure. On April 24, 1978 PPOA requested a "meet and confer" session. On May 7, 1978 the Sheriff's Department refused to treat the matter as an appropriate one under the meet and confer process. By then, negotiations for the 1978-79 MOU had commenced. There was, at that point, during the appropriate renegotiation period, a refusal to negotiate regarding the effect of the proposed physical agility test program upon working conditions. Regardless of any prior waiver, all working conditions were then negotiable.

Who, then, had the duty to pursue the matter further? PPOA wanted to negotiate a matter properly within the scope of negotiations. The Sheriff's Department refused to consider the matter as appropriately within the meet and confer process. The unfair charge was a logical next step in resolving that dispute.

Mr. Rule makes the following observations as to the situation at that point:

> 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 the change. PPOA did not want the implementation of the agility testing program. The program was not in effect, was certainly not 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.

PPOA states the same proposition in other terms:

> The meet and confer process works because the areas of substantial disagreement are few and the parties accept a tacit understanding regarding a myriad of subjects within the scope of the duty to meet and confer which is based on the maintenance of the status quo. If the agreement as to thousands of elements of that status quo had to be reduced to writing and included in the MOU, the areas of disagreement would multiply and the meet and confer porcess would be diverted from the resolution of the few matters of substantial concern to bickering over language to be employed to describe the accepted practices of the parties.

There is an inconsistency in County's position that the agility test was not a negotiable subject but that in May 1978 negotiation was barred by a waiver of matters within the scope of negotiations.

We find that the physical agility program was not made an issue in negotiations in 1978 and therefore the extension of the 1977-78 MOU, which by its terms refers only to matters "within the scope of negotiations" did not refer to that matter.

As we have heretofore held, the basic policy of the Ordinance is to promote a "meet and confer" process concerning terms and conditions of employment and no clause of an MOU may be interpreted to abandon or waive that process in the absence of clear and convincing evidence that the parties intended to restrict that process. Court decisions have upheld such waivers when the intention of the parties and the language used has been unequivocal.[1/] In this instance, there was no evidence whatsoever that the parties intended to waive negotiations on the physical agility test; and the language employed in the waiver clause (Article 24B) referred to matters "within the scope of negotiations." The interpretation of PPOA that those words waive only matters previously negotiated appears reasonable and the record is devoid of any proof to the contrary. That

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1/ ERCOM recognizes that its Decision and Order in UFC 14.4 has been successfully challenged by County at the trial court level. Notwithstanding Judge Foster's Judgment, we reaffirm our discussion in the earlier decision and believe it also applies to the instant proceeding. Judge Foster found that: "During negotiations of the June 23, 1976 Agreement the County insisted on maintaining a tight 'zipper' clause in the Agreement as a price of final settlement and made concessions of an economic and noneconomic nature in order to obtain such an Agreement." Such concessions can be claimed in all cases, but no supporting evidence was presented in that case, or this, to establish as a fact there was a "trade-off" with respect to the specific issue involved, or any intention and agreement by the Union to forego its right to process an unfair practice charge against a unilateral change in conditions of employment.

interpretation is consistent with the policy of the Ordinance, hence the Commission adopts it.

## Order

Based on the above reasoning and on the information that the program still has not been implemented, the Commission orders County to negotiate its proposed agility testing program (including the medical examination) with PPOA before proceeding further with said program.

Dated at Los Angeles, California, this 16th day of April, 1979.

David Ziskind, Chairman

Lloyd H. Bailer, Commissioner

William Levin, Commissioner

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