LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

In the Matter of:	)	
	)	
PROFESSIONAL PEACE OFFICERS ASSOCIATION.	)	
	)	
CHARGING PARTY.	)	
	)	
V.	)	UFC 9.19
	)	
COUNTY OF LOS ANGELES AND CHIEF ADMINISTRATIVE OFFICER.	)	
	)	
RESPONDENTS.	)	
	)	

Appearances:

For the Charging Party: Loew & Marr, by Cecil Marr

For the Respondents: Goldstein & Kennedy, by, Charles H. Goldstein and Deborah H. Petito

Hearing Officer: James T. Barker

Hearing Officers Report

1. The procedural setting

Barker, Hearing Officer: The hearing in the instant matter was held at Los Angles, California on July 22, 1988, pursuant to a Notice of Hearing issued on June 17, 1988 by the Executive Officer of the Los Angeles County Employee Relations Commission, herein called the Commission; and pursuant also to a Notice of Rescheduling of Hearing issued by the Executive Officer on June 24, 1988.

The proceedings arose from a charges filed on May 10, 1988 by Professional Peace Officers Association, herein called PPOA or the Charging Party, alleging that the County of Los Angeles and the Chief Administrative Officer, herein

called the County (or, where appropriate, the CAO), had engaged in unfair employee relations practices in violation of Section 12, subsections a (1) and (3) of the Employee Relations Ordinance, herein called the Ordinance.

The County timely filed an Answer and an Amended Answer replying to the charges and raising certain affirmative defenses.

At the hearing the parties were represented by counsel, and were permitted to make opening statements, introduce relevant evidence, and to examine and cross-examine witnesses. The parties reached certain stipulations which were memorialized in the record. During the course of the hearing the Charging Party was permitted to amend the charge to add additional allegations of violations of subsections a. (1) and (3) of the Ordinance, and the County amended its answer to deny said allegations. The parties waived closing statements and elected to file post-hearing briefs. Purusuant to request of the parties and a Notice of Extension of Time to File Briefs issued by the Executive Officer, the parties timely filed briefs with on August 17, 1988, and the briefs were received by the Hearing Officer on August 19, 1988.

2. Background Facts

On March 23, 1988, [all dates hereinafter refer to the calendar year 1988, unless specified otherwise] the County sent a letter to the County Coalition of Unions, herein

called the Coalition, requesting that the Coalition meet and confer over a proposed No-Strike Charter Amendment, a copy of which was attached. The meet and confer request was in accordance with an Ordinance amendment adopted by the Los Angeles County Board of Supervisors, herein called the Board, on November 24, 1987, as an outgrowth of an agreement upon amendment language achieved between the County and the Coalition.

The text of the portions of the proposed Charter amendment directly pertinent here is as follows:

> Sec. 49.5 (a) No officer or employee of the County shall organize, promote, encourage or participate in any strike, work stoppage, work slowdown, sick-out, or other related concerted activity in the nature of a strike, or in any picketing, distribution of literature, or other demonstration in furtherance thereof, against the County.
>
> (b) Nothing in this section shall be construed to limit, impair, or affect the right of a public employee to express or communicate a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment. Nothing in this section shall be construed to limit or prohibit any lawful informational picketing or any lawful demonstrations or activities for the purpose of communicating grievances of employees of the County, or to mobilize support for the viewpoints of County employees.

On or about March 30, the County received a letter from the Coalition stating that the County would have to request to meet and confer over the proposed charter amendment with each employee representative.

Also on March 30, the County sent a letter to PPOA requesting they meet and confer over the proposed No-Strike Charter Amendment.

On or about April 1, the County received a letter from PPOA containing inter alia the following:

> PPOA has recently concluded negotiations for both bargaining units [Units 612 and 621], and the Memoranda of Understanding for both such Units contain full understanding and waiver clauses. See Article 22 of both MOU's
>
> In light of the foregoing, PPOA is interpreting your March 30 letter as a request to reopen MOU negotiations during the term of the MOU. PPOA rejects that request on behalf of both bargaining units, and suggests that you comply with the provisions for "renegotiation" contained in each MOU. See 612 MOU at Article 6; 621 MOU at Article 4.

Thereafter, on April 12, the County sent a letter to PPOA stating that PPOA's refusal to meet and confer was a waiver of its right to meet and confer on the proposed Charter Amendment.

Subsequently, on April 18, PPOA sent a letter to the County informing the County that PPOA "does not 'waive' its right to negotiate regarding the proposed Charter amendment..." but, in fact, "...insists that such negotiations be conducted as provided in existing memoranda of understanding." Additionally, the PPOA letter stated that if the County "...disagree(s) with PPOA's position, the County's administrative remedy is before the Employee Relations Commission." PPOA requested it be advised within

ten days whether or not the County "intends to file a charge against PPOA..." pursuant to provisions of the Ordinance.

In response, on April 21, the County sent a letter to PPOA containing the following:

> It was earlier indicated to you by or letter of April 12, 1988 that proposed Charter amendments do no fall within the scope of matters contained in individual memoranda of understanding and therefore, are not subject to their full understanding, modifications, waiver clause.
>
> Since you did not avail yourself of the offer to negotiate the proposed Charter amendment that was contained in our letter of March 30, 1988, we will deem such failure a waiver of your right to do so.

3. The charges

The charges filed with the Commission by PPOA alleged, (1) the County refused to bargain in good faith by insisting on bargaining notwithstanding the "waiver"; (2) the language of the proposed Charter amendment has not been approved by the Board of Supervisors as a management proposal and therefore the County's demand to meet and confer regarding that language is inconsistent with its duty to meet and confer in good faith; and (3) the County's offer to bargain was a sham. At a point early in the hearing PPOA moved to amend the charge to add the following: the proposal made by the County is an impermissible subject of bargaining because the proposal encompasses matters which are preempted by State law. The Hearing Officer granted the request to add to amend the charges over the objections of the Respondent.

Accordingly, the Respondent amended its answer to deny that the matter is preempted by State law, and to additionally contend that, (a) the subject matter of the proposed Charter amendment is one within the power of local government and the voters of local jurisdictions to deal with and (b) that as representatives of law enforcement employees barred from striking, the Charging Party has no standing to challenge the proposed Charter amendment.

4. Pertinent Facts

A. The MOUs and the composition of the representation units

The parties stipulated that PPOA represents two bargaining units in the County, identified respectively as Unit 612 and Unit 621. Both units currently have MOUs with the County which were approved by the Board of Supervisors; and both MOUs contain a full understanding, modification and waiver article. Documents in evidence establish that the MOU covering Unit 612 (Union Exhibit 14) terminates by its terms on January 31, 1990; the Unit 621 MOU (Union Exhibit 4) terminates on September 30, 1989.

The parties futher stipulated that Unit 612 is compised of employees in the following classifications:

> Sergeants, Lieutenants, Supervising Deputy D.A. Investigators, Lieutenant D.A.s.

The parties also stipulated that Unit 621 is compised of employees in the classifications Custody Assistants and Correction Officers.

It was further stipulated by the parties that Sergeants, Lieutenants, Supervisors, Investigators and D.A.s are all Peace Officers within the meaning of Penal Code Section 830.1.

Additionally, the parties stipulated that there is in the MOU covering Unit 612 a No-Strike/No-Lockout Article, hereinafter referred to as No-Strike Article; that the MOU of Unit 621 does not contain any no-strike or no-lockout provision.

Article 13 is the No-Strike Article of the Unit 12 MOU. It contains the following language:

> During the life of this Agreement no work stoppages, strikes, slowdowns or picketing shall be caused of sanctioned by PPOA, and no lockouts shall be made by the County.
>
> In the event any employees covered by this agreement, individually or collectively, violate the provisions of this Article and PPOA fails to exercise good faithin halting the work interruption, PPOA and the employees involved shall be deemed in violation of this Article and the County shall be entitled to seek all remedies available to it under applicable law.

The Full Understanding, Modification, Waiver article of the respective MOUs covering Unit 612 and Unit 621 are identical in wording and content. The provisions are set out at Appendix A, attached hereto.

The parties also stipulated that during the last negotiations for the current MOUs there were no discussions between the County and PPOA regarding a no-strike provision which would be effective beyond the term of the MOU.

Lee Mealy, President of PPOA, testified that each member of Unit 612 is a sworn peace officer, and he agreed during cross-examination that they retain that status twenty-four hours a day, seven days a week whether on duty or off. However, he testified on direct examination there are employees in the unit having auxiliary, support and staff functions that are not directly related to law enforcement. As examples, he cited employees who are members of the Sheriff's Information Bureau, basically an in-house publicity organization; employees who work operations assignments; and employees who are aides to Department Executives. Mealy characterized the latter as strictly staff assignment. Mealy further testified that PPOA respresents in Unit 612 Field Supervisors who are sergeants in patrol functions and Sergeants who are sergeants in jail functions. Mealy conceded that employees in these staff functions or who serve as aides to Sworn personnel may move to a field assignment by virtue of the process of rotation of positions; and that in the same sense that they rotate, pursuant to County practice employees in the operations, staff and aide assignments may be called

upon in event of a shortage of manpower to fill line positions.

B. The Meet and Confer Request

1. Background

The parties stipulated that, (1) the Los Angeles County Charter, hereinafter called the Charter, Section 32, vests the Director of Personnel with certain authority; (2) the position of Personnel Director in the County has been merged with the position of CAO and, therefore, all references to Personnel Director in the Charter refer to the CAO; (3) the Board has delegated duties and authority to the CAO; (4) any agreements reached between the County and any Union on a proposed Charter Amendment must be approved by the Board; and (5) that the Board may choose not to approve a proposed Charter Amendment even though the County and the Union have an agreement on the language through the meet and confer process.

Richard G. Dixon is the incumbent CAO, having held that position since March 1, 1987. He outlined his duties as encompassing service as the Chief Staff Officer for the Board of Supervisors, with duties to recommend to the Board those actions that he deems necessary, and when the Board takes such actions, either on his recommendation or on its own motion, to see that the Board's policies are implemented.

Dixon further testified that his duties with respect to the meet and confer process are to employee and direct individuals who perform that function on behalf of County Management.

Dixon testified that the proposed Charter amendment was among the actions which he had contemplated in 1987 as a recommendation to the Board. He had been and was at the time of the hearing also contemplating recommending a proposed Charter amendment relating to Executive Service for upper-level managers in the County.

Dixon testified that both his practice and the expectation of the Board is that prior to recommending action to the Board, he review the matter and include in his review input from interested parties which he has elicited. With respect to the no-strike proposal, Dixon testified that his understanding of the state of case law was such as to have necessitated following his normal practice of eliciting input from interested parties, including the recognized employee groups.

With respect to the meet and confer process generally, Dixon testifed that neither his understanding of his own authority nor time-honored practice require him to go to the Board prior to instructing his subordinates to meet and confer with unions regarding proposed Charter changes. He further testified, in substance, that the Board expects that in making his recommendations he will have fulfilled all

conditions precedent, including solicitation and consideration of the positions and input of the interested parties. With respect to the no-strike Charter amendment, Dixon testified that this would have involved following the meet and confer provisions.

Dixon testified further that the negotiators in the meet and confer process report through the chain of command to him on all issues.

Dixon also testified that he consults with individual members of the Board on a wide variety of issues.

Dixon testified in some detail concerning the steps taken in formulating County positions in preparation for overall two-year bargaining, including staff input, review, and development of overall broad parameters to guide negotiations in three major areas of (1) overall economics having substantial fiscal and budgetary impact, (2) more limited, less global issues that individual operating departments wish considered and (3) more global but less directed overall economic issues. He testified further that in the overall [i.e., MOU] bargaining, the process is commence knowing that an agreement will be achieved. He also testified, in substance, that in the course of negotiations broad parameters become defined into specific issues which may fall within or exceed the previously fashioned parameters. Many times by agreement between the unions and negotiators for the County the results of the bargaining

process may be jointly recommended to the Board. Other times, it becomes Dixon's duty to recommend to the Board an "ultimate MOU that is the result of good faith bargaining that best serves...the needs of the County". Dixon testifed that to date the Board has in every instance ratified those recommendatios.

With respect to the process of meeting and conferring on individual MOUs involving Charter changes that might occur, Dixon testified:

> Frankly, in many instances we do not begin the bargaining with an absolute conviction that when its all done, we will recommend anything to the Board. It is entirely possible that because of the input we get during the meet and confer, or because of other changing circumstances, I will conclude when it's all done that I don't wish to recommend any action to the Board. I don't view as I begin the formal MOU's that that is an option.

2. Formulation of the Charter Amendment

In evidence as Union Exhibit 16, is a letter dated February 3, 1988 to Dixon from Supervisor Pete Schabarum in which it is noted that "there is certain sentiment on the part of some members of the Board to place on the November 1988 ballot an amendment to the County Charter which affects employees' wages, hours and working conditions." Noting the necessity of initiating a meet and confer process, the letter adds: "In order to meet the required deadlines to allow this matter to be considered by the voters, it is

requested that you initiate the meet and confer process, using the proposed ordinance and amendment to the Charter language, enclosed herewith, as the intended subject matter."

In evidence also is a Memorandum dated December 16, 1987 from the County Counsel and Registrar-Recorder addressed to the five Supervisors. The Memorandum (Union Exhibit 15) sets forth critical dates and time constraints for placing measures on the June 1988 primary election ballot. It contains a handwritten notation including the entry "Gold", the name "Marcus" and a date 12-28-87. Also a notation "Bd Papers" and "Circulate" appears in the upper right hand corner of the memo. Dixon testified that to the best of his recollection he had not asked that the Memorandum be "written" and "guessed" that he first saw the memorandum two days after the date it was issued. Dixon identified "Marcus" as the Deputy Director of Personnel in charge of Employee Relations, and testified, in effect, that the memorandum was circulted to Messrs. Goldstein and Marcus and to his Senior Managers on 12-28-87.

Dixon further testified that prior to the date of the memorandum he was contemplating recommending a proposed no-strike Charter amendment to the Board but that as of December 16, 1987, neither the proposed no-strike amendment nor "any similar amendment" had been formulated in his office or in his chain of command.

In context of Union Exhibits 15 and 16, Dixon testified that he had become a candidate for CAO based upon action taken by the Board in December 1986 and that in becoming a candidate, and in anticipation of being interviewed by the Board, he had given consideration to and formulated thoughts concerning any changes that he would recommend if he were selected for the CAO position. Included was a no-strike Charter amendment.

According to the testimony of Dixon, during the time he was preparing to take office as CAO and shortly thereafter he discussed with each of his senior managers the "sorts of things" he contemplated seeking to achieve. These discussions included recommeding to the Board placing the no-strike Charter amendment on the ballot. Dixon recalled specific discussions but could not recall when they took place. He testified these discussions may or may not have initially included Elliot Marcus, Deputy Director of Personnel, but that they clearly would have included Marcus' immediate superior Don Dice, Assistant CAO, with whom he recalled discussing the proposal on numerous occasions. Dixon testified that ultimately the discussions included Marcus. He recalled the discussions with Dice as having taken place "many months before" late December 1987.

Dixon described his discussions with Dice as relating to content and "various approachs that such an amendment could take" but not to specific language. The discussions

ranged from precisely how the amendment "could be cast..to assure the continuity of public service", on the one hand, and on the other, to how "to preserve the...right of expression of individuals." Additonally, Dixon testified that he discussed with Dice the fact that it appeared certain goups of employees were already prohibited from striking, and the advantages or disadvantages of treating them separately in the Charter amendment.

With specific reference to the ordinance forms, analysis and certification which constituted the enclosures accompanying the February 3 letter from Supervisor Schabarum (Union Exhibit 16), Dixon testified that prior to February 3, he had seen "one or more versions of a document that would have largely [that] effect". He testified that he recalled seeing various such documents in several circumstances involving discussions with the County Counsel as to the form and nature of such a proposal. Dixon was unable to recall whether those documents contained the precisely same amendment language as is contained in the attachments to Supervisor Schabarum's February 3 communication. Dixon testified, however, that the "purpose for the preparation" of those documents had nothing to do with Union Exhibit 16. In this regard, Dixon testified that the County Counsel frequently receives requests from individual members of the Board to draft and dispatch to them proposed ordinances which may or may not "see the light

of day". Dixon further testified that it was his belief that the proposal enclosed with Supervisor Schabarum's February 3 letter was drafted by the County Counsel, and that it was his "best guess" that the proposal itself had been drafted in response to one of his own earlier requests made during the course of several discussions he had had with the County Counsel that a proposal be drafted. Dixon summarized that he believed the document was generated in the course of his discussions with County Counsel and speculated that Supervisor Schabarum gained access to it either by requesting it or in some other manner, liked it and sent the February 3 letter.

Dixon could not recall precisely what action he may have taken in response to Supervisor Schabarum's communication, but speculated that he would have confirmed that he was contemplating making such a recommendation and knew that if he were to make such a recommendation a condition precedent would be initiation of the meet and confer process as indicated in the second paragraph of the letter. According to Dixon, however, he probably told Supervisor Schabarum and subsequently told others that he had not yet crossed the bridge of whether or not he would make such a recommendation to the Board.

Dixon additionally testified that as of February 3, he was probably more committed to the likelihood of making the recommendation, his interests having been accelerated by

reason of a stike involving professional registered nurses which he viewed as causing a serious public service crisis. He testified that the "turmoil" surrounding the stike may have caused Supervisor Schabarum to write the letter. Dixon testified that some brief work stoppages involving Nurses took place in early September 1987, and intermittantly thereafter, and that the County had anticipated only relatively minor sick-outs prior to the the strike. He added that nothing since 1965 had reached the magnitude of the nurses strike. The stike was enjoined in late January, according to the testimony of Dixon.

The wording of the proposed Charter amendment contained in document dispatched by Marcus to the Coalition is identical to that contained in the proposed Charter amendment included as an attachment/enclosure to Supervisor Schabarum's February 3 letter. Dixon denied that the County's proposal had been soley on Supervisor Schabarum's letter and attachments. He testified, "Not only was it not soley based on it, it was not at all based on it."

During the hearing, Counsel for PPOA indicated his intention to call as a witness Blaine Meek to testify concerning certain alleged admissions made by the County's representative at the bargaining table with California Association of Professional Employees, an organization not involved in the present proceedings. This related to PPOA's charge that the language of the proposed Charter amendment

has not been approved by the Board of Supervisors as a management proposal and that Supervisor Schabarum was the individual appointed to the negotiations relating to the proposed Charter amendment and not the CAO. Counsel for the County interposed objections to the receipt of this testimony and the Hearing Officer sustained, giving PPOA an offer of proof as to the testimony it would elicit. The offer of proof was: If Brian Meek were permitted to testify that he would testify the he's the Chief spokesman for several bargaining units represented by an organization known as C.A.P.E. That in the course of representing those bargaining units, he entered into discussions with County representatives involving the subject matter at issue here, that is the proposed Charter amendment pertaining to no-strike. That in the discussions, the County representative made the admission that no changes in this matter would be made without the approval of Mr. Schabarum and that the proposal itself had been drafted by Mr.Schabrum, or at least at Mr. Schbarum's specific request.

4. Preparations for the Meet and Confer

Dixon testified that in the month of March he instructed his senior staff to initiate the meet and confer process on a proposed no-strike Charter amendment "for potential recommendations to the Board" for placement on the November 1988 ballot. He was aware of the "calendar of events" that pertained if he chose to recommend to the Board

that the proposal be placed on the November ballot. He testified that although he had discussed the matter with the staff "for months on and off", he had "deliberately not instructed them to initiate the normal meet and confer near the end of the time available to us, because both they and the people they would have to meet and confer with were extraordinarily busy in terms of our normal two-year bargaining prior to that."

Dixon testified that before going to the bargaining table he ascertains the County's initial position and instructs the staff accordingly. Further, as the table progresses he is perceptive of what happens at the table to change the position of the County. In regards the meet and confer request concerning the proposed no-strike Charter amendment, Dixon testified that the staff discussions which he had had prior to and after the February 3 letter that had resulted formulation of the County's initial position. Dixon did not provide substantive, descriptive detail or documentation of any input by the staff in the formulation of the language submitted to the bargaining units.

Elliot Marcus testified that in his position as Deputy Director of Personnel he functions as the Director of the Employee Relations programs and as the Chief Negotiator for the County. He is responsible for coordinating bargaining strategies of the Employee Relations personnel who report to him.

Marcus testified that he first learned of the proposed no-strike Charter amendment in February or early March of 1988. He notified the Coalition of the intention of the County to seek a Charter amendment and of the rediness of the County to meet and confer within ten days. He testified that he followed this procedure of notifying the Coalition because of the County-wide impact identical to Civil Service rules which the County had negotiated with the Coalition, a confederation of 11 County unions who join together for discussion of matters having uniform application or effect on County employees. Marcus testified also that PPOA is part of the Coalition. He testified also concerning the exchange of correspondence between the County and the Coalition, on the one hand, and between the County and PPOA, relating to meeting and conferring concerning the proposed Charter amendment.

Marcus testified that he was advised through channels by Don Dice of the proposed Charter amendment. He testified also that he had no recollection of conversations with Dixon or his senior staff prior February 1988. He further testified that prior to that he could have reasonably speculated that, "given the makeup of the Board of Supervisors, given the management policy of Richard Dixon, given the fact that the electorate had once passed it..... that at some time in the future they were going to go for a Charter proposal..." in 1988 or at a special election in

1989. He also testified that management has not yet determined whether to recommend the Charter amendment to the Board.

4. The 1987 negotiations

Lee Mealy testified that in his capacity as President of PPOA he participated in the negotiations between the County and Unit 612 which commenced on October 22, 1987 and continued through five meetings followed by a meeting on December 18, 1987 which resulted in the final tenative agreement. Mealy identified and gave testimony relating to Union Exhibits 5 though 12 which pertain to those meetings. Mealy's testimony and Union Exhibit 11 reveal that at the December 7 meeting tenative agreement was achieved on both the full understanding and no-strike clause. He recalled no discussion taking place prior to December 7 concerning either the merits or meaning of those clauses. The Union's proposals for the 1988/89 MOU presented at the October 15, meeting had proposed no change in either clause, and during the negotiations no change in either clause was proposed by either party. During the entire course of negotiations, according to Mealy, there was no detail discussion of either the full understanding or strikes and lockout clauses; only inquirey designed to tie down that the meaning of the clauses were understood with an eye to expediting the bargaining process. Mealy testified that he first learned of the County's intention to propose a no-stike Charter

amendment when the March 23/30 correspondence between the County and the Coalition relating to the amendment (Union Exhibits 17 and 18) was exchanged.

Jeffrey Hauptman participated in both the Unit 612 and Unit 621 negotiations on behalf of the County. Hauptman testified that he is in charge of the Employee Relations Program for the Sheriff's Department and his duties include serving as County negotiator for two-year negotiatons with PPOA, among other unions. He testified that his authority to negotiate comes from Marcus. Hauptman's responsibilities also include administration of MOUs.

Hauptman testified that he negotiated the last two contracts with PPOA, and had negotiated other contracts with PPOA in the late 70's. He testified that the Unit 612 MOU contains a no-strike clause and a full understanding clause. He testified that academically he knew that the latter clause was first negotiated in the early 70's, having learned this from his review of earlier MOUs when he became involved in the late 70's. Similarly, Hauptman testified that the no-strike clause was present in the Unit 612 MOU when he first negotiated in the late 70's. He additionally testified that at the time he was at the bargaining table with Unit 612, no changes in either the full understanding clause or the no-strike clause was negotiated. Hauptman further testified, in essence, that these clauses, as they appear in the present MOU were just carried over from the

previous MOUs. Hauptman testified that he did not learn of the proposed Charter amendment until April after the meet and confer letters had been dispatched.

The parties stipulated that if called as a witness, Jim Barker, employed as a Business Agent for PPOA, would testify that he negotiated with the County leading to the MOU covering Unit 621; that the County was represented by Jeffrey Hauptman; that during the course of those negotiations (which commenced in September 1987 and concluded before December 4, 1987, after six or seven meeting) the County presented a series of proposals identified as Union Exhibit 1; that PPOA presented proposals identified as Union Exhibit 2; that Union Exhibit 3 represents a summary of the completed negotiations, which summary was initialed or signed by representaties of both parties; and that Union Exhibit 3 was entered into the final MOU, which is in evidence as Union Exhibit 4.

The parties further stipulated that if called Jim Barker would testify that there was no discussion during the negotiations of a full understanding or waiver clause, although the resulting MOU does contain such a clause that was agreed to by another party. He would further testify that there was no discussion of a no-strike clause by either party to the negotiations, nor was there any notice given PPOA by the County of any possible no-strike clause in the form of a Charter amendment.

4. The Full Understanding Clause

Dixon conceded on cross-examination that in late 1987 and early 1988 he was aware that a majority of bargaining units were in negotiations for MOUs of varying terms from the usual two years to include also terms as long as three years and as short as one year. He deliberately did not instruct his senior staff to negotiate in those negotiations concerning a proposed no-strike Charter amendment. He explained that he was contemplating a matter which he felt clearly transcended the terms of the MOUs and was separate from the workload of his staff. He viewed the proposed Charter amendment as having application to all County employees as long as they were in the employe of the County. He emphasized also, in this regard, that the Nurses strike in January had moved him further in the direction of the proposed Charter amendment which he had been contemplating for over a year. He knew of no facts which would have put the unions on formal notice during the course of negotiations for MOUs which took place in late 1987 and early 1988 that the County was contemplating a Charter amendment involving a no-strike clause. He noted that at a point in time there was on the Board Agenda a motion by Supervisor Schabarum to move in the direction of a no-strike amendment, and that he may have spoken informally to individuals, including leaders of some of the bargaining units concerning such a possibility.

Dixon further testified that he was not aware at the time he issued instructions to his staff to negotiate concerning the proposed Charter amendment that PPOA was objecting to such negotiations on the basis of the full understanding clause of the MOUs. He became aware of this subsequently.

Marcus testified that County negotiators do not have authority during the meet and confer to reach agreement on matters which go beyond the term of the MOU, noting, in this connection, however, that certain MOU articles can have a term longer than the MOU itself. Marcus testified that it was his understanding that the full understanding clause of an MOU would not bar the County from meeting and conferring on a provision which was not susceptible in and of itself of being included in an MOU.

Marcus conceded that, in substance, a Charter amendment, like the Civil Service rules which were renegotiated, are not permanent, and once in place can be removed or replaced by subsequent action of the parties. Macus also testified that the parties to negotiations can agree to ask the Board to place a Charter amendment on the ballot, and testified further that he was not contending that under no circumstances could the parties decide to resolve a matter within the scope of bargaining by including in an MOU a request to the Board to submit the matter to the voters in the form of a proposed Charter amendment.

Mealy testified that he had no knowledge of any provision in the MOUs of PPOA that resolved the matter "forever"; that all agreements reached in MOUs are for the term of the agreement and thereafter subject to negotiation. Hauptman testified in a similar vein.

Mealy further testified that PPOA did not and does not desire to reopen negotiations on the issue of a no-strike Charter amendment because the request to do so was viewed by PPOA as breaching the very foundation of the contractual agreement. He testified that to do so would interrupt the contract, leading to "chaotic" results, and would possibly open the door to other issues. He testified, however, that the subject was "definitely" a subject for meeting and conferring. In this context, counsel for PPOA had asked Mealy whether, in the event the instant unfair were resolved adverse to PPOA, PPOA would desire to meet and confer. Mealy answered, "No." Counsel for the Union expressed the opinion that Mealy had misunderstood the question. Counsel for the County claimed otherwise and in its post-hearing brief cites this testimony as supportive of the County's waiver contention.

5. <u>The Impact of the proposed amendment</u>

Mealy testified that the proposed Charter amendment is "an anti- or no-job action" Charter amendment. He testified that traditionally in the history of labor relations in Southern California, law enforcement agencies have engaged

in some type of job action when negotiations come to an impasse. He testified that he did not agree that the Sanitation Workers decision of the Supreme Court affects all members of the bargaining unit, and noted that there are employees in the unit that have auxiliary and support functions that are not directly related to law enforcement. He testified that the decision "probably would" bar job actions by so-called "front-line" personnel. He defined "job actions" as any action that may have an adverse impact on the employing agency such as sick call-in/"blue-flu" to protest adverse or stalled negotiations; "roving blue-flu" in which there is no specific pattern to a type of job action relative to time, facility or individuals involved; a work-slow down; a work speed-up; working by the letter of the law; and out-and-out strike. Mealy further testified that job actions could be implemented without having a negative impact on public service; that "blue-flu" job actions probably enhance public service on a short-term basis due to the overstaffing during that "condition". He testified also that the purpose of job action would be to cost the County money but not to inhibit public service.

The Contentions of the Parties

I

It is the threshold contention of the Charging Party that the County's proposed Charter amendment (hereinafter called the County's proposal) is an impermissible subject of

bargaining in that the subject matter area has been preempted by State law. In this regard, citing Younger v Board of Supervisors of San Diego County (1959) 93 Cal. App. 3d 864, 869, 155 Cal Rptr. 921, 924; Ferrini v City of San Louis Obispo (1983) 150 Cal. App. 3d 239, 246, 197 Cal Rptr. 694, 698 and Professional Fire Fighters, Inc. v City of Los Angeles (1963) 60 Cal. 2d 276, 294, 32 Cal Rptr. 830, 841, the Charging Party asserts that the "Home Rule" Doctrine distilled by and through the evolutionary process of the cited cases does not permit public entities, including County governments, to enact laws inconsistent with State legislation, or in instances wherein there has been an intent shown on the part of the State to preempt the field. With particular emphasis on Professional Fire Fighter and the decision of the California Supreme Court in Baggett v Gates (1982) 32 Cal. 3d 128, 140, 185 Cal. Rptr. 232, 238, the Charging Party alleges that the state has preempted the field of public sector labor-management relations, including labor-management relations involving police departments.

Moreover, asserts the Charging Party, the decision of the Court in County Sanitation District No. 2 of Los Angeles County v Los Angeles County Employees Association, Local 660, (1985) 38 Cal 3d. 564, 571, 214 Cal Rptr 424, 428-429 reaffirmed that long-standing preemption principal when it outlined the provisions of MMBA which relate to employees' rights to concerted activity.

Drawing upon cited portions of the language of the plurality opinion, the Charging Party contends:

> Because Sanitation Workers establishes that MMBA covers areas of management-employee relations impinging upon the right to strike, local governmental entities have no right to legislate in that area.

Moreover, contends the Charging Party, both the contentions of the County voiced through Counsel, and the testimony of CAO Dixon, to the effect that Sanitation Workers and state law forbid strikes by law enforcement personnel, reveal a recognition on the part of the County that the issue of unlawfulness of strikes is settled by reference to state law. According to the Charging Party, although it disagrees with the preclusion contention of the County, the County has thus admitted that its proposal is preempted.

It is the further contention of the Charging Party that the County's offer to meet and confer was a mere pretext bacause (1) the County merely wished to complete the requisite "meeting and conferring" without regard to the possiblity of reaching agreement, and (2) there could have been no meaningful meeting and conferring because of the County's interpretation of State labor law.

Expanding on these contentions, the Charging Party asserts that in People ex rel Seal Beach Police Officers Association v City of Seal Beach (;1974) 36 Cal. 3d 591, 597,601 205 Cal. Rptr. 794, 797, 800 it was concluded that

"The meet-and-confer requirement of section 3505 [MMBA] is compatible with city council's constitutional power to propose charter amendments." It is the contention of the Charging Party that a public entity must meet and confer with regard to any matter within the scope of barganing, including those which are subject to charter proposal. Further, the Charging Party contends, there is no inication in Seal Beach that the meet and confer requirement intended for charter proposals is any less rigorous than that required in normal MOU negotiations.

It is the view of the Charging Party that the evidence fails to show a willingness on the part of the County to meet and confer in good faith to endeavor to reach agreement on the issues presented by the proposed Charter amendment. Indeed, contends the Charging Party, the evidence establishes that the County's offer to "meet and confer" was merely a pretext to ensure that the legal prerequisites to the proposed Charter amendment were fulfilled; that the County was merely "going through the motions".

Additionally, with direct reference to Unit 612, but with implication amplifying the absence of good faith on the part of the County, the Charging Party avers that the County's "repeated" contention that the proposed amendment has no effect on Unit 612, reveals that the "meet and confer" request was a "sham" demonstrating the absence of any intention on the part of the County to reach agreement.

Finally, the Charging Party alleges that the requested negotiations were barred by the full understanding clauses of the respective MOUs. It is the view of the Charging Party that unique facts attend the instant case which distinguish it from others considered by the Employee Relations Commission, namely, (1) the CAO knew of the imminent Charter proposal during the MOU negotiatons and deliberately concealed that fact from both the employee organizations and his own subordinate negotiators; and (2) the employee organziations were thus deprived of information which they needed to assess during the MOU negotiations, the impact or law thereof of the full understanding provision. Having chosen to conceal the facts and to deprive PPOA of the opportunity to clarify any misunderstanding so as to avoid mid-contract negotiations on an issue which has traditionally been part of the MOU, the County may not now assert that a lack of definiteness bars the effect of the full understanding clause.

Moreover, in this respect, contends the Charging Party, at least with respect to Unit 612, it is apparent that both parties reached agreement with regard the "No-Strike" provision which both parties had a right to expect would end their obligation to meet and confer during the term of the contract. In practical effect, contends the Charging Party, both the full understanding and no-strike provisions had been of long standing in the MOUs and presented no

ambiguity. According, asserts the Charging Party, the County's threat to unilaterally implement a Charter proposal regarding the same subject matter, unless PPOA agree to immmediately meet and confer, was a violation of its duty to meet and confer "at reasonable times".

II

On the other hand the County contends that the Charging Party has no standing to raise any of the issues to be resolved in this case because PPOA is an organization composed of law enforcement personnel and persons engaged in related duties who are barred from striking by judicial decisions, citing Sanitation Workers, and detailing evidence relating to the composition of the respective units.

Closely related to this contention, and in reliance on Sanitation Workers, Seal Beach and application of MMBA, California Government Code Sections 3509 and California Labor Code 923, the County denies that the proposed amendment is preempted by state law.

The County cites the following from the Court's decision in Sanitation Workers:

> After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the resolution of future disputes in this area: strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health and safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to deter-

mine on a case-by-case basis whether the public interest overrides the basis right to strike.

Although we recognize that this balancing process may impose an additional burden on the judiciary, it is neither a novel nor unmanageable task. Indeed, an examination of the strike in the instant case affords a good example of how this new standard should be applied. The 11-day stike did not involve public employees, sch as firefighters or law enforcement personnel, whose absence from their duties would clearly endanger the public health and safety...

In context of this explication, the County asserts that the proposed amendment deals "singularly with the no-strike issue" and since none of the employees have the legal right to strike, they have no standing to challenge the proposed amendment, because the proposal does not affect nor change any term or condition of their employment. Similarly, with respect to the preemption issue, the County avers that the Court in Sanitation District found that public employees had a limited right to strike based upon common law and not statutes or the Constitution; and eschewed an opportunity to find that any local action was preempted by state law, while explicitly stating limitations and exceptions to the granted right to strike.

Further, contends the County, in Seal Beach the Court had a vehicle in which to decide that any local government

Charter amendment barring strikes was prempted by state law but chose, instead, to require local government to meet and confer regarding Charter amendments which affect wages, hours, and working conditions, including one limiting or prohibiting public employee strikes. This failure to reach the conclusion that the no-strike charter amendment was preempted by state law, contends the County, demonstrates the lack of legal support for the Charging Party's "preemption of MMB position".

Next, the County asserts that it did not violate the Ordinance or bargain in bad faith by insisting on meeting and conferring despite the existence of a full understanding acticle.

Initially, the County emphasizes the evidence establishing that the MOU covering Unit 621 does not contain a No-Strike provision; only that covering Unit 612 does. Thus, contends the County, PPOA's argument that by virtue of having No-Strike provisions in its MOUs the parties have already fully discussed the subject matter is "spurious" with regard bargaining unit 621.

But, in any event, contends the County, PPOA's argument as it pertains to Unit 612 also lacks logical or legal support. Referencing testimony of Mealy, Hauptman and Marcus to the effect that the parties could not reach an agreement on a subject which is beyond the term of the MOU, the County asserts that, as the proposed Charter amendment covers the subject of strikes beyond the term of the MOU, the inclusion of the No-Strike Article in the MOU, as well as the Full Understanding Article, was not intended to prohibit meet and confer on the proposed Charter amendment.

In this context, asserting that mutual agreement between the County and PPOA to change the content of a voter-adopted Charter amendment would not be sufficient to accomplish the purpose, the County points to the fallacy of the PPOA's contention that, like any other provision in the MOU, the proposed amendment would be subject to change by mutual agreement of the parties.

Asserting that negotiatons between the parties are governed by the California Government Code Section 3500 et seq (MMBA) and the Ordinance, and noting also that the Full Understanding Article had been contained in the MOUs of the parties for over a decade before the County was required by Seal Beach to meet and confer regarding proposed Charter amendments, the County contends that there can be little doubt that the Full Understanding article, when initially included in the MOUs, was never intended to bar the County from placing proposed Charter amendments on the ballot.

Further, avers the County, the lack of negotiations in recent years regarding the article, even after proposed Charter amendments became subject to meet and confer in 1984, supports the position that the original purpose of the article never changed to bar meet and confer over proposed Charter amendments.

Moreover, contends the County, citing Los Angeles County Professional Police Officers Association v County of Los Angeles Sheriffs Department and the Director of Personnel, UFC 9.11, the Full Understanding Article has been contrued by ERCOM as only barring meet and confer regarding matters that were specifically discussed during negotiations. Noting that the County's proposed Charter amendment was not discussed during any negotiations leading the the current MOUs, the County contends, under ERCOM's own decisional law, the Full Understanding article contained in the County's MOUs should not be a bar in the instant case to the County's insistence on meeting and conferring on the proposed Charter amendment.

Moving from this premise, the County contends, citing case law, that full understanding and zipper clauses in agreements to prevent parties from negotiating during the term of an agreement are generally disfavored and strictly construed by courts and administrative agencies dealing with employee relations. In the absence of an express waiver of the right to negotiate on a particular matter, asserts the

County, legal precedent holds that the legal obligation of parties to negotiate regarding wages, hours, and other terms and conditions of employment, even during the term of an agreement, is not barred. Against this background, the County contends further that, as testimony of record reveals, the proposed Charter amendment is far broader in scope than any strike prohibition which could be encompassed in an MOU. It recounts, also, that with respect to the Civil Service Rules, no employee organization raised the Full Understanding article as a bar to the County's unilateral implementation of those rules; and that employee organizations met and conferred and reached agreement regarding amendments to the Ordinance during the term of the MOUs despite the existence of the Full Understanding article. In the view of the County this demonstrates strong past practice between the parties showing that the Full Undertanding clause was not considered by the parties as a bar to mid-term met and confer on issues not expressly covered by the MOU or discussed in the negotiations leading to the MOU.

The County next contends that the CAO does not lack sufficient authority to initiate meet and confer on the proposed amendment. In this regard, and as evidence of the existence of this sufficient authority, the County summarizes applicable Charter provisions, the unrefuted testimony of CAO Dixon regarding his duties and the

delegation of duties and responsibilities from the Board in the area of Civil Service and employee relations. Building on this foundation, the County notes that the CAO initiated the meet and confer because under Seal Beach the Board could not act on any proposed charter amendment which affects wages,, hours, and/or working conditions without the County meeting and conferring with employee organizations.

From this premise, the County notes that the area of necessary authority of negotiators in the public sector converges from that in the private sector, in that, in the latter, negotiators must come to the bargaining table with pre-existing authority to reach agreement, whereas in the public sector all authority to reach agreement rests in the governing body. It is the contention of the County, therefore, that public sector negogotiators do no have and are not expected to have authority to reach agreement, as evidenced by the language of MMBA Section 3505.1 providing, in substance, that if the public agency and recognized employee representative reach agreement, they shall jointly prepare a written memorandum of such understanding "which shall not be binding," and present it to the governing body for determination.

Thus, contends the County, it is not bad faith for public sector negotiators to come to the table without the necessary authority to reach agreement; or to do as CAO

Dixon testified he routinely does, authorize subjects of meet and confer without explicit Board approval to do so.

The County contends that, contrary to the assertion of the Charging Party that Dixon received approval and authorization from only one member of the Board (Supervisor Schabarum) to conduct the meet and confer, Dixon did, in fact, possess the authority to recommend and initiate the meet and confer process without prior Board approval.

It is the further contention of the County that in refusing to meet and confer on the proposal, the Charging Party waived its right to do so and gave the County the right to take unilateral action with respect thereto.

In this regard, the County interprets as an express refusal to meet and confer, the testimony of PPOA respresentative Mealy to the effect that even if ERCOM's decision was to require PPOA to meet and confer PPOA would not want to do so. The County notes that the Charging Party did not know whether the parties would have reached an agreement to present to the Board because PPOA never participated in the process. It is the contention of the County that consistent with case law in the private sector, if the County requests PPOA to bargain and PPOA refuses to do so, the County may unilaterally implement its proposal. Moreover, the County contends, citing testimony of its Chief Negotiator Marcus with respect to negotiations conducted earlier regarding Civil Service Rules, the right of the

County to unilateral implementation here finds precedent from County/Union experience.

Similarly, the County contends that cases decided in the private sector hold that a union may not refuse to negotiate merely because it does not believe the employer will alter its position or that it can convince the employer to do so.

In the total context of the above, asserts the County, the Charging Party waived its right to raise any argument that it was denied the benefits of MMBA or the bargaining process.

Further, asserts the County, the contention of the Charging Party regarding the affect upon the status of the instant matter arising from the failure ot the County to file unfair employee relations charges, lacks merit. In the view of the County, allegations of laches are unfounded because, asserts the County, it followed each and every step required under ERO regarding the proposed Charter amendment and did not have to file a charge. The County avers that, by promptly notifying PPOA that it considered PPOA's refusal to meet a waiver, the County was preserving its right to act and placing PPOA on notice that PPOA's inaction would not prevent the County from taking unilateral action. Accordingly, contends the County, as it did not sit on its rights, the equitable doctrine of laches barring relief to a

party which has done so to the prejudice of the other party, is not here applicable.

Finally, the County argues that because the deadline for placing the proposed Charter amendment on the November 1988 ballot has passed, the issue is not moot but requires resolution. This is so, contends the County because the potential exists for the County placing this proposal on the ballot at a later date, and because it is possible for the Board to enact in ordinance form at any time the same Charter amendment.

Recommended Conclusions of Fact and Law

It is recommended that the charge be dismissed.

On the basis of the reasons advanced by the County, as summarized above, it is concluded that the issue raised by the Charges herein is not moot and requires resolution. The decision of the County not to filed unfair employee practice charges against PPOA cannot be construed as having misled PPOA and thus to preclude the County from pursuing its rights under the Ordinance.

It is concluded and found that the Charging Party did not prove by the preponderance of the credible evidence that the County violated the Ordinance.

I

The separate contentions of the respective parties relating to preemption and standing must be rejected.

In agreement with the County, there exists no basis in case law for holding that the state has preempted the field of public sector labor-management relations to the extent of precluding the County from seeking to amend the Charter in the manner and to the extent of the proposed Charter amendment.

To reach the conclusion urged by the Charging Party, namely, that the state through the operation and reach of the provisions of MMBA has preempted the field of labor-management relations so entirely and completely as to preclude local government entities from taking action impinging upon the right to strike, would require ignoring highly pertinent and cogent observations of the California Supreme Court contained in its Sanitation Workers Opinion wherein the Court stated:

> On its face, the MMBA neither denies nor grants local employees the right to strike. This omission is noteworthy since the Legislature had not hesitated to expressly prohibit strikes for certain classes of public employees. 214 Cal. Rptr. 424, at 429
>
> * * * *
>
> Thus, the absence of any such limitation on other public employees [than firefighters] covered by MMBA at least emplies a lack of legislative intent to use MMBA to enact a general strike prohibition. Id.
>
> * * * *
>
> ....yet, an examination of other California statutes [than Labor Code section 923] governing public employees makes it perfectly clear that section 3509 was not included in the MMBA as a means for prohibiting strikes. Id.

* * * *

> Therefore, plaintiff's assertion that section 3509 must be read as a legislative prohibition of public employee strikes cannot be sustained. Id., at 430.

* * * *

There derives from this Opinion of the California Supreme Court scant support for the view of the Charging Party with respect to preemption.

In its Opinion the court observed that the Legislature may wish to legislate a prohibition against strikes by categories of public employees other than firefighters. The content of the Opinion, including that cited above in explication of the County's contentions, leaves little doubt that the court viewed strikes by law enforcement personnel as a proper area of legislative interest. However, this adds nothing in case law supportive of the Charging Party's preemption argument. The issue is not whether the Legislature has the authority to act to prohibit strikes by law enforcement personnel. Clearly it has the necessary authority to so act. The point is that it has not done so and the MMBA does not serve to bar action by local or county governmental entities. Seal Beach and cases cited and discussed therein reenforce this conclusion.

It is concluded that the proposed Charter amendment is not preempted by state law and is not facially inconsistent with or frustrative of the declared policies and purposes of the MMBA. See Sanitation Workers, supra; Huntington Beach

Police Officers Assn v City of Huntington Beach (1976) 58 Cal App 3d 492, 501-502, 129 Cal Rptr 893.

However, contrary to the County, merely because Sanitation Workers recognized that strikes by law enforcement personnel may be prohibited by proper legislative action, and contains no prohibition against enactment of a strike prohibition at the county level through Charter amendment, it does not follow that the Charging Party has no standing to challenge the action of the County in the instant case by filing charges under the Ordinance.

As recognized by the County, the proposed Charter amendment is broader in scope and more far reaching and inclusive than is the No-Strike clause of the Unit 612 MOU; and, of course, the Unit 621 MOU does not contain a No-Stike Article. While strikes would be prohibited by Unit 612 personnel under both the Charter amendment and the MOU No-Strike provision, the Charter amendment contains a more encompassing proscription than does the literal language of the MOU against job actions which the Charging Party contend are permissible under the MMBA, if not Constitutionally protected.

Resolution here of this latter contention by the Charging Party is not deemed required or appropriate under the issues framed. However, the contention is neither facially specious nor devoid of rational substance. Thus,

the presence of the claimed potential for impermissible proscription under the proposed Charter amendment of a variety of peaceful concerted activity, in the circumstances defined, is a sufficient basis to give PPOA in its capacity as the certified majority representative of Unit 612 personnel, as well as of Unit 621 personnel, standing in the instant case to challenge the proposed Charter amendment.

II

However, it is found that the Charging Party failed to convincingly demonstrate that the County's offer to meet and confer was a mere pretext and sham. Evidence sufficient to cast doubt upon the likelihood that the meet and confer process would dissuade the County from proceeding with the proposed amendment is not alone sufficient to sustain the burden of proof which the Charging Party had in this case. It is essential that the parties come to the bargaining table with an open mind and a willingness to make concessions if pursuaded as to the merits of a contervailing position or proposal. However, nothing in good faith bargaining precludes approaching the bargaining table with proposals well-defined and supported by convictions evolved from preparation, forethought, study, research and empirical insight into the justification for proposals believed to be sound. Moreover, no party to the collective bargaining process in either the public or private sector is required by law to make concessions. Such was the condition and state

of mind with which the County appears from the record evidence to have initiated the meet and confer process, first with the Coalition, and then with PPOA. Proof that the meet and confer process would have been a futility is lacking; partly attributable, it would seem, to the decision of PPOA not to embark upon the process and thus to test the good faith of the County.

Nor was it sufficient for the Charging Party to show that Supervisor Schabarum was a significant force driving the effort to place the question of a Charter amendment proscribing strike activity before the voters. The Charging Party had the burden of showing that the County resorted to the meet and confer process with PPOA merely to fulfill the required conditions precedent to pro forma Board approval, and for no substantial or proper reason. The Charging Party failed to make this showing.

The evidence of record contains no substantial support for a finding that CAO Dixon lacked sufficient authority to initiate the meet and confer process. The record does not contain proof of that. It is found that he possessed full authority to do so. Ordinance provisions defining the authority and responsibilities of the Personnel Officer/CAO, the stipulation of the parties in this regard, and Dixon's unrefuted testimony concerning his authority to initiate the meet and confer process, all support this conclusion. The

differences in the degree of final authority possessed by and required of negotiators in the private sector, and that possessed by and required of their counterparts in the public sector, a point emphasised by the County, is well defined and warrants no extensive discussion here. The fact that the language of the proposed amendment had not been approved by the Board in advance of its presentation for meeting and conferring; and that any accord reached by the parties through the meet and confer process would have required final approval of the Board, does not serve, in the context of the instant record, to lend support to the contention that the request to meet and confer was a sham or pretext because County negotiators were assertedly without authority to act, and would have been merely "going through the motions."

Similarly, the record does not establish by the requisite preponderance of the evidence that CAO Dixon had abdicated his authority and/or responsibility in the meet and confer area to Supervisor Schabarum; or that the Board, as a whole, had done so and had made Supervisor Schabarum its alter ego, as it were, or agent with full authority to act on its behalf. In other words, while the proof of record is such as to compell the conclusion that CAO Dixon and Supervisor Schabarum were of like mind on the subject of the proposed Charter amendment, and absent compelling input from PPOA, the course set in motion by CAO Dixon would very

likely proceed to "fruition" in the form of a submission of the proposed amendment to the Board for approval, that same proof falls short of demonstrating that the outcome of the meet and confer process had been fully and finally predetermined in advance. Contrary to the Charging Party, the emphasis placed by the County in the present proceeding on "repeated" assertion that the proposed amendment would have no effect on Unit 612 personnel, does not categorically prove the existence of a County mind-set immune from input from PPOA through the meet and confer process.

The record evidence revealing a strong predisposition on the part of CAO Dixon to proceed to propose the amendment to the Board must be evaluated in context of Dixon's further testimony that he still had reached no fixed decision whether or not to "cross that bridge." To a degree this testimony is self-serving, but it is consistent with other unrefuted testimony of Dixon to the effect that the meet and confer process has in the past resulted in ageement between the parties to the process on proposals to be submitted for Board action; and has resulted also in a decision on his part not to proceed with a recommendation to the Board. The point is that the Charging Party was unable to present evidence sufficient to support a finding that the meet and confer process forseeably would have been a futility excusing PPOA from participating in it.

The offer of proof made by the Charging Party with respect to the purported admission allegedly made by County representatives during the course of negotiations with C.A.P.E. to the effect that no changes would be made without the approval of Supervisor Schabarum, or at his specific request, even if viewed in its most favorable light, does not materially assist the Charging Party. Although it strongly suggests that the County negotiators and Supervisor Schabarum were strongly predisposted toward the proposal, it fails to prove that counter proposals to modify or abandon the proposal forcefully presented and convincingly supported by PPOA through supporting legal memoranda, data, verbal pursuasion, and the like, were foredoomed to fall on unreceptive minds and deaf ears. Moreover, the proffered testimony would have opened the instant hearing to cross-examination, rebuttal testimony and evidence pertaining to negotiations not at issue here, and to exploration of context, setting, circumstances, discussions and precise identification, source of knowledge and degree of authority of the "County representatives" who allegedly made the purported statements. The ruling rejecting the testimony is reaffirmed here.

III

The contention of the Charging Party that the County refused to bargain in good faith by insisting on bargaining notwithstanding the existence in the MOUs of a Full

Understanding, Modification, Waiver Article has been carefully and fully examined. It is concluded that the provision did not bar meeting and conferring on the proposed Charter amendment, as requested by the County.

Applicable here is the language of ERCOM in its Decision and Order in UFC 9.11, cited by the County:

> As we have heretofore held, the basis 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. 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 interpretation is consistent with the policy of the Ordinance, hence the Commission adopts it. [Footnote citation deleted]

This decision is fully consistent with private sector precedent, of which that cited by the County in its brief is representative and typical. Moreover, the clause in the instant case contains the same "within the scope of negotiations" language considered by ERCOM in UFC 9.11. While the Charging Party correctly notes that the "NO-Strike" provision was "clearly" within the scope of negotiations, at least with respect to Unit 612, and that the Stikes and Lockout Article was proposed by both parties

and subject to tenative approval (Union Exhibits 15 and 16), the record suggests that there was no real give and take discussion on either of the articles; that they were merely adopted in the parties' run-down/touch-all-bases "housekeeping" consideration of certain of the existing MOU provision, some of which, like the Full Understanding provision, had a longstanding history of inclusion in the MOUs .In connection with neither the Strikes and Lockout Article nor the Full Understanding Article did the parties open a discussion touching upon amplification or clarification of intent and meaning.

Also to be considered is the fact that the meeting and conferring process which the County sought to initiate would have involved consideration of a Charter amendment No-Strike proposal significantly broader in scope than that contained in the MOUs. Clearly, there was no consideration given during the 1987/88 MOU negotiations involving Unit 612 and Unit 621 to including an unequivocal "zipper" against meeting and conferring during the term of the MOUs with respect to included subject matter which might be affected by Charter amendment. Indeed, any attempt to have so imbue the clause would have raised serious enforcement and legal questions.

It is a fundamental principal on contract law and of contract interpretation that the parties are presumed to have intended a valid contract and whenever two

interpretations of a provision are possible, one making it valid, enforceable and lawful and one making it unlawful and unenforceable, the former interpretation will be used. Applying this principal to the initial intent of the parties with respect to the Full Understanding clause, it must be assumed that no encompassing "zipper clause" of the type described was intended by the parties when it was first negotiated and included in the MOUs of Unit 612 and Unit 621, and there is no evidence of record suggesting that the initial intent and meaning of the clause has changed over the years. The practice of majority representatives in the County, to the extent revealed in the record of the instant case i.e., Civil Service Rules, appears consistent with the conclusion that the initial intent of the parties in negotiating Full Understanding provisions had not been altered.

In the circumstances, absent compelling reasons to the contrary, the Full Understanding clause may not be interpreted as precluding resort to the meet and confer process with respect to the proposed Charter amendment. Stated otherwise, there is nothing in the record of this case to suggest that the parties intended to foreclose meeting and conferring on proposed Charter amendments the effect of which would modify MOU provisions, or engaged in practice embuing the Full Understanding clause with that meaning or effect.

The Charging Party contends these compelling circumstances are present here in the form of a deliberate concealment of the fact by the County that the Charter amendment proposal was imminent and known to CAO Dixon at the time of the 1987/88 MOU negotiations.

The record evidence is consistent with a finding that for reasons of staff work load and collective bargaining strategy the CAO did not include the potential of a proposed Charter amendment in the agenda of the 1987/88 MOU bargaining sessions. However, the record evidence fails to support the conclusion that, to the extent negotiating strategy influenced this determination not to include discussion of a possible no-strike Charter amendment in the MOU negotiations, the determination was for the purpose of achieving the invidious objectives attributed by the Charging Party.

Rather the evidence is more fully compatible with the conclusion that, at the time of the MOU negotiations, the necessary groundwork and evaluative process prefatory and essential to proposing the no-strike Charter Amendment had not yet been accomplished to the satisfaction of the CAO; that he had not made the final decision to propose the amendment; and that at the time of the MOU negotiations he had not yet "crossed the bridge" of deciding his course of action for accomplishing the required conditions precedent to proposing the Charter amendment to the Board. Again,

there are overtones in the record that the delay of not informing PPOA during the course of MOU negotiations was a stratagim, but the evidence is not convincing in that respect. It is essential to note that the meet and confer request relating to the proposed Charter amendment was first issued to the Coalition; that some recognized representative had completed negotiations; that Unit 612 and Unit 621 were not the only interested parties affected by or within the ambit of the meet and confer request issued by the County. The preponderant evidence is that the County did not view the proposed Charter amendment as being barred by the Full Understanding clause, as it appears in MOUs, including those of PPOA, and treated the subject matter as one appropriate for collective bargaining (meeting and conferring) not in the context of the two-year MOU negotiations but in the broader scope and scale historically associated with issues having "global" connotation and impact. It may be argued, as the Charging Party does, that this view of the effect of the Full Understanding clause was incorrect. But the evidence indicates that it was a reasonable view not without facial validity or legal support. These considerations militate strongly against the notion that the asserted attempt by the County to disregard or ignore the Full Understanding clause of the MOUs of Unit 612 and Unit 621 is indicative of an absence of good faith and supportive of a finding of bad faith.

The Charging Party submitted ERCOM Decisions and Orders (Union Exhibits 27 through 30) in cases UFC 14.4; 14:21; 6.125; and UFC 6.154 which have been fully considered and which are believed distinguishable. They require no conclusion different from that above reached.

It is found that meeting and conferring on the proposal to amend the Charter to include a No-Strike provision was not barred by the Full Understanding clause of the MOUs, and the County's attempt to implement the meet and confer process in the face of the Full Understanding clauses of the MOUs did not constitute a refusal to bargain in good faith.

Recommended Conclusions of Law

The Respondents did not engage in unfair employee relations practices as alleged in the charge, as amended.

Recommended Order

The charges be, and they hereby are, dismissed.

James T. Barker
Hearing Officer

September 2, 1988

Appendix A

ARTICLE 22 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, and 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 right and agrees that the other shall not be required to negotiate 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 all 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.