LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

In the Matter of

Los Angeles County Professional Peace Officer's Association, Charging Party	)	
and	)	No. UFC 9.7 Report of Hearing Officer
County of Los Angeles, Sheriff's Department and Peter J. Pitchess, Sheriff Respondents	)	

The undersigned was appointed by the Los Angeles County Employee Relations Commission to serve as Hearing Officer in the above captioned matter, in which the Charging Party alleged the commission of certain unfair employee relations practices by the Respondents. The Respondents filed a motion for a Bill of Particulars which was granted and subsequently filed to which Respondents thereafter filed an Answer to Charge which admitted certain allegations of the charge but offered affirmative defenses. Pursuant to the charge and Notice of Hearing issued by the executive officer of the Commission, a hearing was held at the Hall of Administration on March 25, 1975, at which time the parties were afforded the opportunity to offer evidence and arguments upon the issues. Appearing for the Charging Party was Lester G. Ostrov of Bodle, Fogel, Julber, Reinhardt & Rothschild. Appearing for Respondents was John M. Baskett, Deputy County Counsel. Upon the filing by the parties of written briefs on June 10, 1975, the hearing closed. The undersigned, having duly considered all the evidence and arguments offered by the parties, submits this Report in accordance with Section

6.10 of the Commissions's Rules and Regulations.

I. THE ISSUES

The charge alleges that the Respondent employer engaged in unfair employee relations practices within the meaning of Section 12 (a) (1) and (3) of the Employee Relations Ordinance on the following basis:

On or about July 11, 1974 and August 2, 1974 the employer instituted unilateral changes in the method of compensating employees represented by the Los Angeles Professional Peace Officer's Association who participated in the California Police Olympics, without first negotiating with said association, the certified representative of such employees.

The answer submitted by the Respondents admits the factual basis set forth above, and in the amended charge, but denies the existance of a departmental practice or policy constituted thereby and affirmatively defends by stating that reimbursement for travel to and participation in the California Police Olympics could not be made under Section 48 of Ordinance No. 4099 (Administrative Code of the County of Los Angeles) and further that pursuant to Article 20-Full Understanding, Modification, Waiver, the department was under no obligation to negotiate the change of such compensation. On these grounds the Respondents deny that they or either of them committed any unfair employee relations practices.

The fundamental issue, as contended by the Charging Party at the hearing, was that there was an existing practice to allow the time to be taken without loss of pay for the Police Olympics and that

the practice was unilaterally changed without prior notice or an offer to meet and confer with the recognized certified bargaining agent and as such ther was a failure to bargain.

Respondents urge the issue as being "whether or not a County Department upon discovery that an ultra vires practice has occurred has the right to unilaterally cease and desist that practice."

Respondents statement of the issue pose a two stage analysis; first, was there an authorative determination that the practice in question. improper or ultra vires, and second, if the first was considered in the affirmative, was there the right to unilaterally cease and desist that practice.

Charging Party further contends that the desirability merits, propriety or, presumably, the legality of the practice are irrelevant as a basis for relieving Respondents from the duty to meet and confer.

Finally, Respondents contend that article 20 of the Peace Officers, Unit 611 Memorandum of Understanding (identical to Article 19 of the Supervisory Peace Officers, Unit 612 Memorandum of Understanding) entitled "Full Understanding, Modification, Waiver" relieve the Respondents from any obligation whatsoever regarding the past practice here involved.

II. THE FACTS

The basic factual situation is not in issue and is accurately stated in Charging Party's post hearing brief as follows:

"For several years prior to 1974 employees of the Sheriff's Department participated in the annual California Police Olympics, a program of various athletic events in which representatives of various police and sheriff departments compete against one another. Los Angeles

County Sheriff's Department employees were encouraged to participate and elimination trials were held during the year to select the teams in the various events.

For several years prior to 1974 participants were permitted to participate during regular on-duty hours and their participation time was treated as duty time, that is if they were scheduled to be on duty, they received their normal salary without any loss of time or money for the period they were gone for the Olympics. They did not receive overtime for time spent at the Olympics and if the competition was on a normal off-day, they did not receive any extra compensation or day off in lieu. When the Olympics were held in or near Los Angeles County no special arrangements were made for travel time. When the Olympics were some distance away, reasonable travel time was treated in the same manner as participation time.

During verbal presentations to team representatives prior to the 1974 Olympics representatives of managment confirmed that the prior practice of compensation, as described above, would be followed in 1974 and that both participation and travel time (the Olympics were held in Sacremento) would be treated as on-duty time. On July 11, 1974, this policy was confirmed by teletype.

On August 2, 1974, shortly before the commencement of the Olympics a teletype order was issued by respondents rescinding the prior teletype and the prior practice and advising participants that time spent in the Olympics could not be considered a duty assignment (although it would be covered by Workmans Compensation). As a result of this order the employees who participated lost salary or credited time (such as accrued overtime or vacation time) for the days on which they participated in or traveled to and from the Olympics... At no time, however, did the

Respondents notify the charging party or offer to negotiate with it regarding the August 2, 1974 change in the method of compensation of these employees."

III. ARGUMENTS

A. Do the clauses 19 and 20 of the respective memoranda of understanding, both entitled Full Understanding Modification, Waiver eliminate the past practice here involved so as to relieve the Respondents of the duty to meet and confer?

The so called "zipper clause" in question reads as follows:

"A. This Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein. Any other prior or existing understanding or agreements by the parties, whether formal or informal, regarding any such matters are hereby superseded or terminated in their entirety.

"B. Except as specifically provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its 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 the parties hereto and, if required, approved

and implemented by County's Board of Supervisors.

"D. The waiver of any breach, term or condition of this Memorandum of Understanding by either party shall not constitute a precedent in the future enforcement of all its terms and provisions."

While such language represents careful draftsmanship and tends to eliminate vague or extraneous agreements or understandings of the past, it in no way defeats the impact of legitimate past practice. Mr. Justice Douglas speaking for the majority of the United States Supreme Court in the Warrior & Gulf case (United Steelworker v. Warrior & Gulf Navigation Co., 363 US 574, 578-579) gave definition to a labor agreement in these terms:

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. See Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv.L.Rev. 999, 1004-1005. The collective agreement covers the whole employment relationship. It calls into being a new common law-the common law of a particular industry or of a particular plant. As one observer has put it:
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> > '...(I)t is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many

> people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishers the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.' [Cox, Reflections Upon Labor Arbitration, 72 Harv.L.Rev. 1482, 1498-99 (1959).]"

If Justice Douglas or Archibald Cox left any doubt Professor Benjamin Aaron did not. In addressing the National Academy of Arbitrators (Benjamin Aaron; "The Uses of the Past in Arbitration," Arbitration Today, Jean T. McKelvey (ed.), Proceedings of the Eighth Annual Meeting, National Academy of Arbitrators, BNA, Inc. 1955) he stated:

> "In the first place, a collective agreement is something quite different from a life insurance contract or an agreement for the purchase and sale of goods. It is but a means to an end and, as Harry Shulman has so aptly observed,
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> 'The object of collective bargaining is not the creation of a perfectly meaningful agreement-a thing of beauty to please the eye of the most exacting legal draftsman. Its object is to promote the parties' present and future collaboration in the enterprise upon which they are dependent.'
>
> In the second place, even the construction of commercial contracts is not as inflexible as is commonly supposed. Referring to the familiar statement that 'usage is admissible to explain what is doubtful but never to contradict what is plain,' Williston makes the following comment:
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> 'If this statement means that usage is not admitted to contradict a meaning apparently plain if proof of the usage were excluded...it is inconsistent with many decisions and wrong in principle.' "

Without belaboring further authority I must reject Respondents argument that the Full Understanding, Modification, Waiver provisions of

the memoranda of understanding operate to limit or foreclose the issue before us.

B. Was there a past practice sufficient and of contractual standing to require the meet and confer procedure under the ordinance in the absence of an affirmative defense?

The California Supreme Court held in the case of Fire Fighters Union v City of Vallego, 12 C.3rd 608, 616-617 (1974) that the legislature has found public and private sector employment relations sufficiently similar to warrent similar bargaining provisions and that, accordingly, the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to in interpreting the scope of bargaining required in the public sector.

The evidence is overwhelming and essentially uncontroverted that such a past practice existed and was part and parcel of the contractual fabric that bound the parties. I so find.

C. Was there an authoratative determination that the past practice was improper, ultra vires or illegal?

The testimony of George F. Caro, of the County General Administrative Office (Record pages 111-119) reveals a painful lack of authoratative investigation or determination on the subject. Caro, who describes himself as an analyst testified,

> "I simply gave him my own opinion that if the Department pursued the idea of paying these people for this function, that we would probably oppose it and would have legitimate grounds for that." (page 114)

He testified further that his academic background was in management and finance indicating no training or expertise in law or accounting.

I find no basis in the testimony or in Respondents brief urging the generalities of the California Constitution, Article 13 Section 25 which demonstrates any impropriety let alone illegality of

the practice in question. At this late date, a post hearing brief is hardly the place for an authoratative determination negating the practice (even if one could be found).

D. Are the desirability, merits, propriety or legality of the practice relevant as a basis for relieving Respondents from the duty to meet and confer?

Perhaps it becomes unnecessary to rule on this point in the light of the finding above that no impropriety or illegality has been demonstrated. In the interest of avoiding future conflicts and providing appropriate guidelines, however, a partial ruling seems in order.

While Secretary of Labor, Arthur Goldberg, later of the United States Supreme Court gave exceptional perspective to the labor-management relations and management's so called reserved rights in the following statement:

> "The written document does not represent labor's imposition on management's reserved rights; rather it represents the basis on which both parties agree to go forward. In examining the meaning of an agreement, it is proper to inquire about the conditions under which the bargain took place with a presumption that the normal practices which did exist are expected to continue, except as the agreement would require or justify alteration and except as conditions make such circumstances no longer feasible or appropriate. Both parties have rights to stability and protection from unbargained changes in wages, hours, and working conditions."

Similarly, Los Angeles City Employee Relations Board in a recent case, In Re United Fire Fighters of Los Angeles City, Local 112, IAFI, AFL-CIO and City of Los Angeles, Decision U-3 (Unfair Employee Relations Practice Charge No. 12) overruled the defense argument that the existing practice was in violation of the City Administrative Code and therefore the fire department was not required to negotiate. The Board stated the following principle:

> The Board is of the opinion that it does not have to rule on the legality of practice in question. Presuming illegality, the meet and confer question is as to what lawful policy and practice shall be established. The interpretation of the Administrative Code is a valid subject for the bargaining table. While there is no compulsion on either party to agree to anything, there is an obligation to meet and confer in good faith and to endeavor to reach agreement on matters within the scope of meeting and conferring, as outlined in Section 4.830 of Ordinance.

The fact that legality may require change does not in and of itself justify unilateral action as to the nature of the change or relieve the parties from the duty to meet and confer in good faith.

IV. CONCLUSIONS AND RECOMMENDATIONS

For the reasons set forth above I conclude that Respondents by issuing the teletype order on August 2, 1974 referent to the Police Olympics did unilaterally change the existing practice and did thereby commit an unfair labor practice within the meaning and purview of Section 12 (a) (1) and (3) of the Employee Relations Ordinance by failing to negotiate with the Charging Party.

Accordingly, it is recommended that:

(1) Said order of August 2, 1974 be rescinded and the past practice be reinstated, subject to negotiation.

(2) All personnel deprived of any benefits and emoluments thereby be made whole under the terms of the prior practice expressed in the teletype order of July 11, 1974.

Paul W. Rothschild
Hearing Officer

Dated: July 9, 1975