CITY OF LOS ANGELES
BEFORE THE EMPLOYEE RELATIONS BOARD

DECISION NO. U-164

IN THE MATTER OF *SEIU, LOCAL 347* *Claimant,* - and - *LOS ANGELES CONVENTION CENTER,* *Respondent.*	*UNFAIR EMPLOYEE RELATIONS PRACTICE CLAIM NO. 1415*
Ninety day limit for unfair charge filing; discharge alleged to be in retaliation for protected conduct.	

DECISION AND ORDER

Pursuant to a Notice of Hearing dated April 25, 2003, a hearing in the captioned matter was held on May 13 and May 22, 2003 before Hearing Officer Wayne Estes to resolve a claim of unfair employee relations practice pursuant to §4.860 c, §4.810 f (4), §4.810 f (6), and §4.810 f (8) of the Los Angeles City Employee Relations Ordinance ("Ordinance"). The above-named parties had a full and adequate opportunity to present evidence, examine and cross-examine witnesses under oath, argue orally, and file post-hearing briefs to the Hearing Officer. The Hearing Officer's Report and Recommendation was received by the Board on August 7, 2003. A copy of that report is attached hereto. The Board provided copies of the report to the parties for their review and comment. On August 27, 2003, Claimant filed exceptions to the report. Respondent did not submit exceptions to the Hearing Officer's Report and Recommendation nor did it file a rebuttal to Claimant's exceptions.

The Hearing Officer's Report and Recommendation was considered by the Board at its meeting of September 22, 2003. At that time both parties addressed the Board, after which a majority of the Board adopted the Hearing Officer's Report and Recommendation, thereby dismissing the claim.

The Board agrees with the Hearing Officer's conclusion that Respondent did not violate Section 4.860 a (1) of the Employee Relations Ordinance as alleged in Unfair Employee Relations Practice Claim No. 1415. As found by the Hearing Officer, although UERP 1415 was not time

barred, Claimant failed to prove that the discharge of Charles Cole was motived even in part by the protected conduct in which he engaged.

ORDER

Based on a consideration of the entire record and for the above reasons and pursuant to Section 4.810 (f) of the Los Angeles City Employee Relations Ordinance, the Employee Relations Board of the City of Los Angeles hereby dismisses Unfair Employee Relations Practice Claim No. 1415 in its entirety.

BY ORDER OF THE BOARD.

Edna E. J. Francis

Edna E. J. Francis, Chairman

DATED: September 22, 2003
Los Angeles, California

CITY OF LOS ANGELES
EMPLOYEE RELATIONS BOARD

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EMPLOYEE RELATIONS BOARD

In the Matter of	**Report of**
	R. WAYNE ESTES
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 347	Hearing Officer
Claimant	Date: August 6, 2003
and	
CITY OF LOS ANGELES LOS ANGELES CONVENTION CENTER	**UNFAIR EMPLOYEE RELATIONS PRACTICE CLAIM NUMBER 1415**
Respondent	

This proceeding arises under the Employee Relations Ordinance of the City of Los Angeles, Chapter 8, Division 4, of the Los Angeles Administrative Code and the Rules and Regulations of the Los Angeles City Employee Relations Board ("the ERB"). It involves Unfair Employee Relations Practice ("UERP") Claim 1415 against the City of Los Angeles, Los Angeles Convention Center ("the Convention Center"), filed on January 21, 2003, by the Service Employees International Union ("SEIU"), Local 347, on behalf of Charles Cole. Pursuant to the Employee Relations Ordinance and the Board's Rules and Regulations, R. Wayne Estes was selected to serve as Hearing Officer.

Hearings were held on May 13, 2003, and May 22, 2003, in Los Angeles, California. The parties were afforded full opportunity for the examination and cross-examination of

witnesses, the introduction and receipt of relevant exhibits, and for argument. Both parties filed post-hearing briefs which were received by the Hearing Officer on or about July 29, 2003.

APPEARANCES

On Behalf of the Claimant:

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On Behalf of the Convention Center

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RELEVANT PROVISIONS OF EMPLOYEE RELATIONS ORDINANCE

A. EMPLOYEE RELATIONS ORDINANCE PROVISIONS

The following are excerpted to relevance:

Sec. 4.857. Employee Rights

Employees of the City shall have the right to form, join, and participate in the activities of employee organizations of their own choosing pursuant to the provisions of this chapter for the purpose of representation on matters of employee relations, other than those excluded herein. City employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the City. No employee shall be interfered with, intimidated, restrained, coerced or discriminated against because of his exercise of these rights.

Sec. 4.859. City Management Rights

[I]t is also the exclusive right of City management ... to take disciplinary action for proper cause....

Sec. 4.860. Unfair Employee Relations Practices.

a. It shall be an unfair employee relations practice for management:

(1) To interfere with, restrain, discourage, or coerce employees in the exercise of their rights granted in this chapter; ....

THE TESTIMONY AND DOCUMENTARY EVIDENCE

Charles Cole was discharged by the Los Angeles Convention Center from his part-time Security Officer position on May 20, 2002. Mr. Cole worked for the Convention Center as a part-time Security Officer from 1993 until his discharge. Mr. Cole's part-time position was exempt from the City's civil service protection. Although Mr. Cole was part of the SEIU Local 347 bargaining unit, his status precluded his protesting his discharge under the arbitration provision in the parties' Memorandum of Understanding. Mr. Cole had been involved in a number of grievances as a Union shop steward. Several of these had been resolved in a manner satisfactory to the Union. Mr. Cole had been involved in three disciplinary matters. He received a verbal reprimand in March, 1999, for driving a cart on the sidewalk around a gate. In October, 2000, he was accused of sexual discrimination, but the charge was dismissed. Also in 2000 he was accused of making an illegal U-turn in front of a

fire station. He successfully challenged this accusation and no action was taken against him.

Incidents occurring on February 17, 2002, were the basis for Mr. Cole's discharge. Prior to the work shift, the Security Officers met to receive their assignment and any special instructions. On this date Ms. Sophia Leonia Mackey was the Lead Security Officer responsible for conducting the morning briefing since there were no supervisory personnel on the premises. Ms. Mackey is also a union steward.

Six persons were present at this briefing and testified as to what occurred. Their testimonies are not in total harmony. From sorting out and evaluating this testimony for credibility and also considering written statements entered into evidence, it appears that the events on that day included the following:

At the beginning of the briefing, Mr. Cole had interrupted and questioned Lead Officer Mackey about starting on time and ordered her to start the meeting.

In conducting the pre-shift briefing, Lead Officer Mackey discussed the importance of officers being in uniform. Ms. Mackey indicated that officers out of uniform can be sent home. Mr. Cole challenged this statement and told Lead Officer Mackey that she was not his supervisor and she could not send him home. Officer Mackey replied she could send him home. The conversation heated up and Mr. Cole said that leads had no authority, had no power and were nobody. Officer Miranda entered the conversation and Mr. Cole called him a snitch and told him he could tell his "daddies." Mr. Cole told Mr. Miranda to stay out

of his face. Much of this agitated conversation from Mr. Cole was based on an earlier incident in which Mr. Cole had come to work with the improper pants, but was not disciplined. He felt that Mr. Miranda had told supervision about this. Officer Mackey had said that if he came out of uniform, she would send him home. Mr. Cole's intemperate remarks evidently grew from this earlier incident.

It appears that Mr. Cole's attitude and words can accurately be described as angry, disrespectful, and belligerent. Several other officers entered into the conversation, urging Mr. Cole to be quiet. The ensuing heated conversations disrupted the briefing session.

Both following and before the discharge of Mr. Cole, he sought help from several sources.

Prior to his discharge, he talked to a representative of SEIU, Local 347, in regard to filing a grievance. He was told his status prevented his filing a grievance. He had no other contact with the local until he met with the ERB in late December.

Both before and after his discharge, Mr. Cole contacted the City of Los Angeles Office of Discrimination Complaint Resolution and he filed a complaint with the ODCR on June 27. On August 27, the ODCR closed his file because he was seeking relief from the California Department of Fair Employment and Housing.

He filed a complaint with the DFEH on August 16. On September 19 this agency closed his case and issued a "right to sue" letter.

Mr. Cole consulted an attorney toward the end of September and in early November the attorney indicated that he would not take his case.

Mr. Cole contacted the National Labor Relations Board at the attorney's suggestion. The NLRB advised him that the agency lacked jurisdiction and advised him to contact the Employee Relations Board of the City of Los Angeles. Mr. Cole talked by telephone with and met with a representative of the ERB. Mr. Cole was advised to contact the SEIU, Local 347. The Union filed UERP No. 1415 on January 21, 2003, and the ERB referred the matter to a formal hearing.

ISSUE

The parties did not enter into a stipulation regarding the issue. The Hearing Officer determines that the issues are:

1. Was Unfair Employee Relations Practice Claim 1415 filed in a timely manner?
2. If the answer to the question in issue 1 is the affirmative, did the Employer, the Los Angeles Convention Center, violate the Employee Relations Ordinance of the City of Los Angeles in discharging Mr. Cole on May 20, 2002?
3. If the answer to the question in issue 2 is in the affirmative, what is the appropriate remedy?

POSITION OF THE CLAIMANT

ERB Rule 8.03 is not jurisdictional and Mr. Cole's efforts following his discharge warrant tolling of the 90 days filing period. Mr. Cole did not sit idly by while the time period was running. He contacted the ODCR, the DFEH, a private attorney, and the NLRB which referred him to the ERB, which led to the Union's filing of the UERP claim. Many of these agencies required several weeks for their consideration.

There is no statutory bar to the processing this claim. Mr. Cole's conduct in trying to process his claim provides clear support and justification for tolling the ninety days time period set out in Rule 8.03.

Mr. Cole's conduct during the February 17 briefing was protected under the ERO and well within the normal activities of a shop steward and the Convention Center violated Mr. Cole's rights under the ERO.

Even if Mr. Cole's conduct was not protected, he has a viable claim under a Wright Line analysis. The discharge was based upon the Employer's animus toward Mr. Cole's activities as a shop steward. The Employer's true motive was to discriminate or retaliate against Mr. Cole more so than any concerns over his conduct on February 17. The evidence established that the animus toward Mr. Cole's union activities served as a motivating factor in the discharge action. Once this is established, the burden shifts to the Employer, which must show that it would have discharged Mr. Cole regardless of his protected activity. Officer Mackey testified that Security Director Shea told her

that the incident was not the only reason Mr. Cole was terminated.

The animus being shown, the Employer did not establish under Wright Line that it would have discharged Mr. Cole absent this animus.

Mr. Cole's comments during the February 17, 2002, briefing about a lead officer's authority to send an employee home who was out of uniform constituted a protected speech activity under the ERO, as were his comments about the briefing starting on time. The discharge violated the protected speech provision of the ERO, Section 4.860a(1).

POSITION OF THE RESPONDENT

The unfair claim should be denied because it is untimely filed and there is no provision for tolling of the statute of limitations based on the facts of this case.

The Union did not file the unfair claim until January 21, 2003, which was 246 days after his discharge.

The only provision for tolling under Rule 8.03 allows for tolling until the claimant knew or should have known of the alleged violation.

The conduct of Mr. Cole on February 17 was not protected activity under the ERO.

The Union was unable at the hearings to establish that there was Union animus which contributed to Mr. Cole's termination. The Employer would have terminated Mr. Cole because

of his conduct irrespective of animus, even assuming such existed.

Mr. Cole was not working on any pending grievances for any of the witnesses at the hearing at the time of his termination. Mr. Cole had worked on several past grievances which had been favorably resolved with the management

There was no testimony by any of the witnesses that anyone observed Mr. Cole being treated with contempt or disdain by management because he was a shop steward. Mr. Cole himself did not testify of disparaging or differential treatments that caused him to believe that his termination was motivated because of his union activities.

There was no evidence of animus toward Mr. Cole that would have caused the burden to shift to the Employer to provide an affirmative defense.

The evidence produced at the hearing showed that Mr. Cole was disruptive and insubordinate in his demeanor toward Lead Officer Mackey during the pre-shift briefing on February 17, 2002. Such conduct is not protected as free speech.

The claim should be denied because there is no remedy that would make the Claimant whole. In the 2003 Los Angeles Superior Court case, City of Los Angeles vs. Los Angeles Employment Relations, the judge held that remedies for a violation of the ERO are limited to determining the validity of charges of unfair employee relations practices and orders to cease and desist which are not in conflict with other provisions of law. Mr. Cole seeks to have his termination overturned and to be reinstated to his

position with the Convention Center, which exceeds the scope of ERB's authority under this decision.

DISCUSSION

Preliminary Matters

There is no doubt that UERP claim 1415 was initially filed past the ninety (90) day period for filing UERP claims as set out in ERB Rule 8.03. The question here is whether the circumstances justify a tolling of the time period. The Claimant has persuasively argued that Rule 8.03 is not jurisdictional in nature. It has pointed out how the Public Employment Relations Board (PERB) handles unfair practice charges under the Meyer-Milias-Brown Act (MMBA) and how other comparable statutes handle such issues. The 90 day rule of the ERB is not a creature of the statute as set forth in the ERO. It seems reasonable and fair to conclude that Rule 8.03 is not jurisdictional, but is subject to tolling under the proper circumstances.

Mr. Cole did not sit idly by while the time period was running, but made several diligent efforts to present his claim and seek a remedy before the UERP filing in January, 2003. He mistakenly and unsuccessfully sought help from numerous city, state and federal agencies as well as the assistance from a private attorney. Each of these efforts consumed considerable time before he at last contacted the ERB and the Union in December.

There is no statutory bar to the processing of this claim with the ERB. Mr. Cole's conduct in trying to process his claim

provides a clear support and justification for tolling the ninety days time period set out in Rule 8.03. This conclusion is based on the unusual and compelling circumstances of this case and does not reflect on the validity of Rule 8.03, as such.

The Merits

The Claimant contends that the discharge of Mr. Cole was a violation of Section 4.860a(1) of the Employee Relations Ordinance.

First, the Claimant claims that the conduct of Mr. Cole was protected activity as a shop steward. The record indicates that the actions of Mr. Cole during the briefing session were not the activity of a shop steward engaged in protected activity in behalf of the employees he served as a shop steward. Rather, the evidence indicates that his intemperate, insubordinate and disruptive outbursts grew from an earlier personal experience he had in regard to uniforms. His insubordinate comments and conduct were not a part of any protected activity.

Next, the Claimant contends that even if Mr. Cole's actions were not protected activity, the Wright Line [251 NLRB 1083, 1089 (1980)] doctrine applies and that the Claimant has satisfied the prima facie requirement of proving that the Employer demonstrated an animus toward Mr. Cole because of his union activities. This being so, the Claimant claims that the Employer has the obligation of proving that it would have taken the same action irrespective of the animus. The Claimant argues that this affirmative defense was not established by the Employer.

The Claimant failed to prove that the required animus existed toward Mr. Cole. Obviously, Mr. Cole merely being a union steward does not establish the animus. Neither does the fact that Mr. Cole had successfully pursued several grievances.

The only significant evidence of any such animus is Ms. Mackey's testimony that Security Director Shea had told her that the February 17 incident was not the only reason Mr. Cole was discharged. However, this hearsay comment was ambiguous in nature and is not sufficient to alone establish the required animus. Neither Mr. Cole nor any of the witnesses testified of any disparaging, contemptuous, disdainful or differential treatment of Mr. Cole by Management.

That Mr. Cole did not receive progressive discipline and Management's investigation of the incident do not provide a basis for finding the required animus against Mr. Cole.

The Wright Line prima facie requirement of animus not being established, there is no need to proceed to the second phase of that holding.

It is not the Hearing Officer's role to make a judgment concerning whether there was cause under the MOU for Mr. Cole's discharge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At the time of events at issue in this matter, Charles Cole was employed as a part-time Security Officer by the Los Angeles Convention Center.
2. Mr. Cole was discharged from his position as a part-time Security Officer because of his actions on February 17, 2002.
3. Unfair Employee Relations Practice Claim 1415 was filed in a timely manner.
4. The Convention Center did not interfere with, restrain, coerce or discriminate against Mr. Cole because of his protected activities.
5. The Convention Center's action in discharging Mr. Cole was not motivated, in whole or in part, by his Union activities.
6. The Los Angeles Convention Center did not violate the Employee Relations Ordinance when it discharged Mr. Cole on May 20, 2002.

RECOMMENDED ORDER

1. Unfair Employee Relations Practice Claim 1415 shall be dismissed in its entirety.

August 6, 2003
Date

R Wayne Estes
R. WAYNE ESTES - Hearing Officer

WITNESSES

1. Sam Bailey, Jr., called as a witness by the Claimant.
2. Ceola Beard, called as a witness by the Claimant.
3. Martin Howard, called as a witness by the Claimant.
4. Charles Cole, called as a witness by the Claimant.
5. Sophia Leonia Mackey, called as a witness by the Respondent.
6. Jose Miranda, called as a witness by the Respondent.
7. John Shea, called as a witness by the Respondent.
8. Merilee Brown, called as a witness by the Respondent.

EXHIBITS

Board's Case File

1. Notice of Hearing - April 14, 2003
2. Unfair Employee Relations Practice Claim - January 21, 2003
3. City of Los Angeles response to UERP No. 1415 - March 6, 2003

Claimant's Exhibits

1. 4-8-02 Notice of Intent
2. Status memo - Campbell to Holcolm - 2-27-02
3. Correspondence Local 347 to Shea - 4-3-02
4. Cole's summary of events - 2-17-02
5. Correspondence Shea to Cole re termination - 5-20-02
6. Part-time Employees Handbook excerpt
7. Grievance initiation re part-time hours - 5-7-99
8. MOU excerpt, Article 4.6
9. Grievance initiation re radios 5-7-99
10. Grievance initiation re uniform allowance -5-7-99
11. Settlement agreement ARB-1874 - 4-7-00
12. Grievance initiation - 10-15-00
13. Memo Shimamoto to security officers - 3-14-01
14. ODCR Intake Form - 5-7-02
15. ODCR Discrimination Complaint - 6-27-02
16. Correspondence ODCR to Cole - 8-27-02
17. DFEH right-to-sue - 9-19-02
18. DFEH Complaint Form - 8-16-02
19. Diagram
20. MOU
21. Grievance initiation - 9-28-01
22. Handwritten note to Javad - 1-25-02

Respondent's Exhibits

1. Letter to Cole from ODCR - 5-28-03
2. Memo to Brown from Casanova - 3-5-03
3. Document - Convention Center provisions for exempt employment

4. Document - Convention Center provisions for exempt employment signed by Cole 11-14-97
5. Document - Convention Center Part-Time Exempt Employment Orientation Handbook - revised 9-94