CITY OF LOS ANGELES
BEFORE THE EMPLOYEE RELATIONS BOARD

DECISION NO. U-152

IN THE MATTER OF	)	
	)	
ENGINEERS & ARCHITECTS ASSOCIATION,	)	
	)	
Claimant,	)	
- and -	)	*UNFAIR EMPLOYEE RELATIONS PRACTICE CLAIM NO. 1306*
	)	
LOS ANGELES WORLD AIRPORTS,	)	
	)	
Respondent.	)	
	)	
Alleged unlawful unilateral change.	)	

DECISION AND ORDER

Pursuant to a Notice of Hearing dated January 9, 2001, a hearing in the captioned matter was held on March 12, 2001 before Hearing Officer Michael Prihar 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 November 29, 2001. A copy of that report is attached hereto. The Board provided copies of the report to the parties for their review and comment. No exceptions to the report were filed.

The Hearing Officer's Report and Recommendation was considered by the Board at its meeting of January 28, 2002. At that time both parties declined the opportunity to address the Board, after which 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) and/or (3) of the Employee Relations Ordinance as alleged in Unfair Employee Relations Practice Claim No. 1306. As found by the Board's Hearing Officer, Respondent's Pay Grade Assignment Policy and Procedure was a long-standing provision of which the Charging Party had been notified yet had failed to make a timely request to meet and confer.

DECISION NO. U-152

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. 1306 in its entirety.

BY ORDER OF THE BOARD.

Edna E. J. Francis

Edna E. J. Francis, Chairman

DATED: January 30, 2002
Los Angeles, California

CITY OF LOS ANGELES
EMPLOYEE RELATIONS BOARD

In the Matter of:

Engineers and Architects Assn.,
Charging Party,

and

City of Los Angeles,
Department of Airports,
Respondent.

Hearing Officer's
Finding of Facts, Conclusion of Law,
and Recommendations

UERP 1306

Michael Prihar, Hearing Officer

APPEARANCES:

For the Charging Party:

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BACKGROUND AND POSITION OF THE PARTIES

On March 12, 2001, the Hearing Officer, pursuant to his appointment by the City of Los Angeles Employee Relations Board (ERB), conducted a hearing on UERP 1306 at the Respondent's facilities located at 10285 Post Way, Los Angeles, California. The Hearing Officer administered an oath to all witnesses and the named advocates for the parties were given the opportunity to examine and cross-examine these witnesses. They were also provided with the opportunity to submit relevant evidence and propound arguments in support of their respective positions. Closing arguments were submitted in the form of post-hearing briefs.

Nuri Manii (Manii) is a Respondent employee and a member of a bargaining unit represented by the Charging Party. He was promoted from a Management Analysts I to a Management Analyst II position and shortly thereafter downgraded to his former Management Analyst I position. He grieved the downgrading and during the investigation the Charging Party received copies of policies and related documents that Respondent had relied upon as the basis for its asserted right to downgrade Manii. The principal authority for the Respondent's actions was the following language in Sections 11 and 12 of the June 1996 update to Pay Grade Assignment Policy and Procedure (hereinafter the Policy).

> 11. All paygrade advancements will be "tentative" for the first 6 months (12 months for management level positions) while the employee serves an official probationary period. Failure during probation will result in the employee being returned to his/her former paygrade.
> 12. After probation is completed, any downward reassignment may occur at the voluntary request of the employee, the termination of a completed assignment, or a situation which would be in the best interests of the Department. Should an involuntary reassignment to a lower paygrade position occur, an employee may file a grievance in accordance with appropriate procedures.

A review of the Policy, the Memorandum of Understanding (MOU), and its files and records led the Charging Party to conclude that Sections 11 and 12 of the Policy conflicted with the following provisions of MOU Article 1.9, Management Rights.

> **Article 1.9 Management Rights**
> As the responsibility for the management of the City and direction of its work force is vested exclusively in its City officials and department heads whose powers and duties are specified by law, it is mutually understood that except as specifically set forth herein no provisions in this MOU shall be deemed to limit or curtail the City officials and department heads in any way in the exercise of the rights, powers and authority which they had prior to the effective date of this MOU. The Association recognizes that these rights, powers, and authority include but are not limited to, ... take disciplinary action for proper cause, ...; provided, however, that the exercise of these rights does not preclude employees and their representatives from consulting or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.

One argument raised by the Charging Party was that the referenced pay grade reduction constituted discipline and, pursuant to the provisions of MOU Article 1.9, discipline may only be imposed for proper cause. The "best interests of the

Department" language in Section 12 was added another disciplinary criterion to the existing proper cause criterion.

The Charging Party's second argument challenged the patent ambiguity inherent in the definition of "best interest" as the phrase appears in Policy Section 12. It was argued that this language suggests a conflicting criterion for discipline in the form of a downgrade that was at odds with the "proper cause" language in MOU Article 1.9.

The Charging Party's third argument was that the Section 11 of the Policy imposed a second probationary period and a new condition of employment.

Because the provisions in Sections 11 and 12 modified the existing MOU and affected the conditions of employment of the bargaining unit, the Respondent was obligated to meet and confer with the Charging Party prior to implementing the disputed provisions and it failed to do so, hence the filing of the instant charges.

The Respondent asserted that the particular language in Sections 11 and 12 of the Policy had been in effect since at least 1984 and has remained the significantly the same since then, even though other sections of the Policy may have been amended. Additionally, the Charging Party was aware of the language for several years and has never requested to meet and confer over its implementation. In support of that claim the Respondent cited a 1987 grievance (also filed by Manii) that raised issues pertaining to this very language and was ultimately resolved through arbitration. Additionally, the Charging Party was also contacted on several occasions over the years for its input regarding any changes to the Policy. That prior arbitration and the prior notices established the Charging Party's historical awareness of the language cited as the basis for the current unfair labor practice charges. These documents also serve as evidence of the Charging Party's attendant opportunities to confer over the Policy. By failing to do so at any prior occasion the Charging Party waived its right to meet and confer.

Finally, the authority for the Policy stemmed from the City's Charter, the City's Administrative Code, and the City's Administrative Office Rule 12. According to these the downgrade referenced in Sections 11 and 12 of the Policy did not constitute discipline; therefore, the Policy was not in conflict with MOU Article 1.9 provision regarding discipline for proper cause.

ISSUES

The issues presented by the charges were:

1. Did the Charging Party have prior extensive knowledge of the contested language in the Policy and did its failure to object or oppose that language during such period constitute a waiver as to the right to bring forth this action?
2. If the answer to issue 1 is in the negative, do Policy Sections 11 and/or 12 references to downgrading an employee to a previous position (in the former Section) and to a downward reassignment (in the latter Section), constitute employee discipline?
3. Do Policy Sections 11 and/or 12 references to downgrading an employee to a previous position (in the former Section) and to a downward reassignment (in the latter Section), constitute changes in conditions of employment?
4. If the answer to issue 2 is in the affirmative, does this language constitute a conflict with, or modification of, the "discipline for proper cause" language found in MOU Article 1.9?
5. If the answer to issue 3 or 4 is in the affirmative, did this conflict or modification constitute a change in conditions of employment such that it should have been the subject of meet and confer sessions between the Charging Party and the Respondent?
6. If the answer to issue 5 is in the affirmative, did the Respondent fail to meet and confer with the Charging Party so as to have engaged in an Unfair Labor Practice as alleged by the Charging Party?

LIST OF EXHIBITS

I. Joint Exhibits (J.Ex.)

1. Memorandum of Understanding Article 1.9, Management Rights
2. ERB Charge UERP 1306 with rider.
3. Pay Grade Assignment Policy and Procedure, Section 3.55 (the Policy)
4. December 1, 2000 Respondent's response to the UERP charges.
5. April 25, 1996 letter with attachment from Gary Thompson, Respondent's Personnel Officer, to the Charging Party regarding impending changes to Section 3.55 of the Administrative Manual (the Policy) and inviting review and comments.
6. City Charter Section 112, rev. 6-28-95.
7. City Charter Section 1016 (current version)

8. MOU Article 3.0, Grievances.

II. Charging Party Exhibits (C.Ex.)

1. October 5, 2000 letter from Charging Party's counsel to Vince Campbell, Sr. Personnel Analyst I, regarding ARB 1936, grievance of Nuri Manii.

III. Respondent Exhibits (R.Ex.)

A. January 29, 1992 letter from Charging Party's Executive Director to Respondent's Personnel Officer regarding proposed revisions to the Administrative Manual.

B. March 13, 1995 letter from Respondent's Personnel Officer to the Charging Party regarding updates to the Administrative Manual.

C. December 8, 1997 letter from Respondent's Personnel Officer to the Charging Party regarding updates to the Administrative Manual.

D. December 17, 1997 letter from Charging Party's Executive Director to Respondent's Personnel Officer regarding proposed revisions to the Administrative Manual.

E. November 5, 1987 letter from Respondent's Personnel Officer to the Charging Party regarding updates to the Administrative Manual.

F. June 1989 version of the Pay Grade Assignment Policy and Procedure.

G. December 1984 version of the Pay Grade Assignment Policy and Procedure.

H. January 29, 1993 Charging Party's fax cover sheet with two pages of handwritten notes regarding discussions relating to changes in the Administrative Manual.

I. December 31, 1997 letter from Mary Albers, Respondent's Senior Personnel Analyst, to Robert Duncan, the Charging Party's Executive Director, regarding revisions to the Administrative Manual.

J. City Administrative Office Rule 12 re. "Pay Grades Within Position Classifications."

K. February 26, 1988 memo from the Charging Party to General Managers and Department Personnel Officers re. "Changes in Department Personnel Policies, Rules, and Regulations."

L. November 16, 1987 grievance filed by a member of Charging Party's bargaining unit and alleging that a promotion given to another employee violated the Policy.

SUMMARY OF TESTIMONY

I. Charging Party's Witnesses:

A. Angel Calvo (Calvo): Calvo has served as a Staff Coordinator for the Charging Party since April 10, 2000 and he participates in contract negotiations. He also serves as a Business Agent for Unit members in various Departments and he oversees and coordinates the efforts of other Business Agents. Through his assignments he acquired familiarity with the MOU provisions for the six City bargaining units represented by the Charging Party. According to Calvo, the Article 1.9, Management Rights, language is also found in the five other MOUs the Charging Party has with the City.

Calvo testified that he became aware of the contested Policy language after he received a copy of the Policy (J.Ex. 3) in response to an October 2000 request for information relating to the Manii grievance, ARB 1936. (C.Ex. 1). Calvo also received a copy of an April 25, 1996 letter addressed to the Charging Party (J.Ex. 5) wherein the Respondent gave notice of proposed changes to the Policy and invited comments from the Charging Party. The letter indicated that the Policy was included as an attachment.

The Charging Party did not employ Calvo in 1996. He testified that a search through the Charging Party's files failed to produce the original of the April 1996 letter from the Respondent. He also spoke with two staff members, Richard Masin (Masin) and Tim Wikert (Wikert), who worked for the Charging Party at that time and they were unable to recall seeing the letter. Neither Masin nor Wikert provided any information about when they first learned of Sections 11 and 12 of the Policy. Calvo did not speak to the Charging Party's former Executive Director who had left following an internal reorganization.

Since starting work for the Charging Party, Calvo has been assigned to service bargaining unit working for the Respondent Department. He did not recall ever

receiving a notice of any proposed updates of the Administrative Manual for the years 2000 and 2001. If such notices had been sent to anyone else in the Charging Party's office he presumed it would have been redirected to his attention.

After receiving the copy of the 1996 letter (J.Ex. 5), Calvo called Respondent's representative Vince Campbell (Campbell) and asked if the Charging Party had responded to the 1996 letter. According to Calvo, Campbell did not recall any response. Calvo then asked Campbell to meet and confer with the Charging Party over the asserted changes in the bargaining unit work conditions. Campbell declined to do so. According to Calvo, a portion of his conversation pertained to the question of when Sections 11 and 12 became a part of the Policy. Calvo's exact testimony as to the best of his recollection was:

> "I can't remember the exact question that I asked, but the tone of the conversation was of when did this happen. And I think he made reference to the date on the policy of 6 of '96." (Tr. 60)

Calvo also testified that he has dealt with discipline of bargaining unit members as their representative. During those occasions the discipline ranged from a notice to correct deficiencies to a discharge, and included oral counselings, memoranda, and suspensions of less than five days. He claimed that a demotion to a lower pay grade was a form of discipline within that range. The demotion constituted discipline because it impacted an employee's wages, future promotional opportunities, and retirement benefits. A demotion might also affect working conditions such as the size of the employee's workspace, access to parking space, and access to improved equipment such as a better computer.

When he searched for materials pertaining to the Policy he looked in three boxes that were located in a storage area in a separate location. His search only went back to 1996. He did not know how long the Policy had been in effect and he did not ask anyone about its duration. Calvo was also unaware, before this hearing, of any prior Respondent notices to the Charging Party about any proposed changes to Administrative Manual.

Calvo examined a copy of a January 29, 1992 letter from the Charging Party's then Executive Director, Robert Duncan (Duncan) wherein Duncan requested to meet

and confer over some proposed changes in the Administrative Manual. (R.Ex. A). Calvo claimed he did not find that letter in the Charging Party's files, but he again stated that his search did not go beyond the 1996 records. He therefore did not know if the parties conducted their meet and confer as per Duncan's request.

Calvo also examined a series of letters from the Respondent to the Charging Party referencing proposed changes to the Administrative Manual and inviting comments. (R.Ex. B [1995]; R.Ex. C [1997]). There was another letter, one dated December 17, 1997, from Duncan to Gary Thompson (Thompson), the Respondent's Personnel Officer, acknowledging receipt of proposed changes to the Administrative Manual and requesting the opportunity to meet and confer. (R.Ex. D). The letter went on to state that for staff member Masin would contact Respondent representative Mary Albers (Albers).

Calvo said he asked Masin if he remembered receiving the 1996 notice about the Policy. He did not, however, ask Masin if there was a practice of receiving Respondent notices about proposed changes to the Administrative Manual, and Masin did not volunteer that he was familiar any related information. According to Calvo, Masin also did not mention anything about his involvement in discussions pertaining to the 1997 changes. Masin did not deny familiarity with the Policy; he just did not volunteer any information. The conversations with Masin and Wikert lasted about five to ten minutes.

Wikert, not Masin, was the Business Agent assigned to the Respondent's operations in 1996. Wikert, however, ceased working for the Charging Party approximately two months before the hearing.

Calvo did not try to contact Nadine Baron (Baron), the Business Agent who serviced the Airport before Wikert.

II. Respondent's Witnesses:

A. Mary Albers (Albers): Albers is a Senior Management Analyst II who has worked for the Respondent for approximately ten years, the last two in this classification. The other eight years she worked as a Senior Personnel Analyst. One of her assignments in that position was overseeing the updates to the Administrative Manual. Each year she gathered the sections of the Manual that were to be updated and

then send the proposed changes to the unions with a notice of the impending changes and an invitation to comment on the changes or meet and discuss them. The final versions of the updated policies were disbursed to the employees so that they could update their copies of the Manual.

Albers said it was her practice to contact union representatives and inform them of impending changes to the Manual and provide them with copies of the proposed changes. It was in line with that practice that she made repeated attempts to contact the Charging Party representative assigned to the Respondent Department in February 1993, Barbara Grasso (Grasso), to discuss the proposed 1993 changes. Albers notes regarding her conversation with Grasso were introduced to support her testimony. (R.Ex. H).

When she was doing this the Charging Party had specifically requested that she highlight the proposed changes on the copies she sent to its staff. She complied with that request. Albers examined and identified memos of the type she had sent to the Charging Party in the past. (R.Exs. B, C). She also prepared the April 25, 1996 letter to the Charging Party regarding the proposed 1996 changes to the Manual. (J.Ex. 5). She could not, however, recall with certainty what materials accompanied that letter. She examined and identified a December 1997 letter she mailed to the Charging Party (R.Ex. I) wherein she enclosed highlighted copies of proposed 1998 changes to the Manual. Along a similar vein, Albers identified notice letters that were sent to the Charging Party by a predecessor Respondent employee, a letter she retrieved from the Respondent's archives. (R.Ex. E).

Albers identified prior versions of the Policy, beginning with a 1987 version (R.Ex. F). She observed that the language in sections 11 and 12 of that version of the Policy were substantively similar to that in the 1996 version. (J.Ex. 3). After examining sections 9 and 10 of a 1984 version of the Policy (R.Ex. G) Albers noted that it too contained language that was similar to the contested sections 11 and 12 language.

Albers could not recall if the Charging Party responded to the April 1996 letter (J.Ex. 5). She testified, however, that the Charging Party was typically the only union that would at times contact her regarding the impending changes. Those contacts

consisted of discussions during telephone calls. There were never any meet and confer sessions because none were requested.

Albers testified that her duties also included the handling of disciplinary actions that ranged from oral warnings to terminations. She never encountered a demotion as a form of discipline during her tenure. She explained that Policy Sections 11 and 12 were not intended to serve as vehicles for disciplining employees. They provided the Respondent with a chance to evaluate an employee's performance in a higher position. If the employee was not deemed capable of performing satisfactorily at that higher level the employee could be returned to the former position in a non-disciplinary manner. She acknowledged, however, that pursuant to the language in Section 12 even after an employee passed the Section 11 probationary period the employer could reassign the employee to a lower classification for any situation "which would be in the best interest of the Department." Albers could not speculate as to what may create such a situation and she could not recall any experience with such a situation. She acknowledged that if she were that employee she would regard such a reduction as a penalty.

B. Lorraine Richard (Richard): Richard is the Respondent's Assistant Personnel Officer, a position she held since 1989. On her instructions staff members searched through the Department's archives for records and documents relating to the charges.

Among the discovered documents was a February 1988 memo from the Charging Party to the Respondent requesting the Respondent to highlight or underline in notices to the Charging Party of proposed changes in the policies. (R.Ex. K). Richard testified that she personally responded to the request. As reflected in her notes that were on the exhibit, she contacted the Charging Party and discussed the nature of changes that would be highlighted.

Another document discovered in the search was a 1987 grievance filed by Bargaining Unit member Manii regarding denied pay grade advancement. Manii cited the Policy as the basis for his grievance.

APPLICABLE LAW

Sec. 4.800. Statement of Purpose.
It is the purpose of this chapter to establish policies and procedures for the administration of employer-employee relations in city government, the formal recognition of employee organizations and the resolution of disputes regarding wages, hours and other terms and conditions of employment.

Sec. 4.801. Definition of Terms.
The words and terms defined in this section shall have the following meanings in this chapter. Any term not defined herein which is defined in the Meyers-Milias-Brown Act shall have the meaning set forth therein.

Meet and Confer in Good Faith (or Meet and Confer) – The mutual obligation of the city's management representatives and representatives of recognized employee organizations personally to meet and confer within a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation.

Sec. 4.830. Meeting and Conferring and Consulting.

a. **Meeting and Conferring.**

(1) The scope of meeting and conferring in good faith between management representatives and representatives of recognized employee organizations includes, but is not limited to wages, hours, and other terms and conditions of employment within the employee representation unit.

Sec. 4.850. Advance Notice to Employee Organizations.

a. A determining body or official shall give reasonable advance written notice to each qualified employee organization affected, of any ordinance, rule, resolution or regulation within its jurisdiction directly relating to matters within the scope of representation proposed to be adopted by the determining body or official and shall give such organization an opportunity to consult with the determining body or official, subject to the restrictions on the right to consultation contained in Section 4.830b(4).

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; ...

(3) To refuse to meet and confer in good faith at reasonable times, places and frequencies with representatives of recognized employee organizations or to refuse to consult upon request with qualified employee organizations on matters which are properly within the scope of representation, where no recognized employee organization exits.

ANALYSIS AND FINDING OF FACTS

Pertinent portions of Section 3504.5 of the Meyers-Milias-Brown Act (MMBA) provide:

> "Except in cases of emergency, . . . the governing body of a public agency, . . . shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or

> regulation directly relating to matters within the scope of representation proposed to be adopted . . . and shall give such recognized employee organization the opportunity to meet with the governing body or such boards and commissions.

Pertinent portions of MMBA Section 3505 provide:

> "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations ... and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

In *Vernon Fire Fighters v. City of Vernon* (1980), 107 Cal.App.3d 802, 165 Cal.Rptr 908, the court addressed issues that arose from the city council's unilateral modification of a practice that allowed fire fighters to wash their cars while on duty under certain conditions. One issue was whether or not the action involved a matter that fell within the purview of the MMBA and obligated the city to meet and confer with the union before enacting the disputed measure. The court noted that "[t]he scope of negotiations under section 3504 corresponds to that in the private sector, as seen in the similarity of the statutory provisions relating to each, and that "the bargaining requirements of the National Labor Relations Act (hereinafter NLRA) and cases interpreting them may properly be referred to for such enlightenment as they may render . . ." (citation omitted).

The California courts often look to federal law for guidance in interpreting state provisions whose language parallels that of the federal statutes (citations omitted) and it is now widely recognized that sections 3504 and 3505 of the MMBA borrowed language from section 158, subdivision (a)(5) and subdivision (d) of the National Labor Relations Act, 29 U.S.C. § 141, *et seq. City of Vernon*, at 814.

The City of Los Angeles Employee Relations Ordinance (the Ordinance) Sections 4.860.a. (1) and (3), Unfair Employee Relations Practices, provides in relevant parts that it shall be an unfair employee relations practice for management to: "interfere with, restrain, discourage, or coerce employees in the exercise of their rights

granted in this chapter," and, "to refuse to meet and confer in good faith at reasonable times, places and frequencies with representatives of recognized employee organizations ... on matters which are properly within the scope of representation ... ." Ordinance Section 4.830.a.1 identifies the scope of meet and confer sessions between management and representatives of recognized employee organizations to include, but not limited to wages, hours, and other terms and conditions of employment. There is an evident similarity between Ordinance Section 4.830.a.1 and MMBA Section 3505, and the similarity between Ordinance Sections 4.860.a.1 and 4.860.a.3 and Sections 158(a)(1) and (5) of the NLRA. Additionally all three, the NLRA, the MMBA, and the Ordinance, share a common purpose of establishing processes to resolve disputes regarding wages, hours, and working conditions. The similarity in purpose and the similarity of the critical language strongly suggest that federal and state court and administrative decisions interpreting these similar provisions under the NLRA and the MMBA may be regarded as sources of interpretative guidelines.

In *Murphy Diesel Company* (1970) 184 NLRB 757, enfd. 454 F.2d 3030 (CA7, 1971), the NLRB found that the employer violated the NLRA by revising and expanding work rules governing employee absenteeism and tardiness without bargaining with the union. The changed plant rules included penalties for their violation and as such were deemed to have affected conditions of employment. The changes were therefore mandatory subjects of collective bargaining. 184 NLRB at 762.

Without distinction as to whether the downgrading of an employee constitutes discipline, the provision in Section 12 of the Policy that allows for the downgrading of a bargaining unit member could affect that employee's earnings, promotional opportunities, and retirement benefits. As such it would constitute a change in the employee's conditions of employment and would therefore be a mandatory bargaining subject.

Again without addressing the issue of whether such a downgrading constitutes discipline, the Section 11 provisions for a probationary period and downgrading during that period also entails concerns relating to an employee's job security and opportunities for advancement. Such provisions relate to the terms and conditions of employment and

are therefore mandatory subjects for bargaining. *Fire Fighters Union, Local 1186 v. City of Vallejo*, (1974) 12 Cal.3d 608, 618.

The courts will carefully examine an employer's defense based on waiver by a union to ensure protection of a party's statutorily derived rights. *Oakland Unified School District v. Public Employee Relations Board*, (1981) 120 Cal.App.3d 1007, 1011.

In *Stockton Police Officers' Assn. v. City of Stockton*, (1988) 253 Cal.Rptr. 183, the employer provided the union with notice of a proposed change in the city's psychological counseling program. The court noted that under Section 3505 of the MMBA once the union received the notice it incurred the burden of requesting to meet and confer. In that case the union's request approximately six months after receipt of notice was untimely and constituted a waiver of the right to meet and confer over the changes.

The overwhelming evidence presented by the Respondent established a practice of notifying the Charging Party, as well as other unions, of changes in the Policy. The challenged provision in Section 11 creating another probationary period following an upgrade made pursuant to the Policy has been in existence at least since 1984. (R.Ex. G). The same is true of the disputed provision allowing for the downward reassignment, or reduction in pay grade, in situations that would be for the best interest of the Department; and, Section 12 of the 1989 version of the Policy provided an employee that was the subject of such a downward reassignment with the right to file a grievance.

Credible testimony by Respondent witnesses Mary Albers and Lorraine Richard established the Respondent's practice of notifying the Charging Party of any changes to the Policy. Their testimony was supported by extensive documentation. Additionally, the Manii 1987 grievance specifically cited the Policy as the basis for the grievance. (R.Ex. L). Since the language regarding the probationary period and the disputed language regarding the Department's authority to make downward reassignments was already contained in the Policy at least as of 1984, and assuming that Charging Party's representatives reviewed that Policy in preparation for that arbitration, it was concluded

that the Charging Party had notice of the disputed language at least as of the filing of that grievance in 1987.

The record indicated that the Charging Party's organizational structure had undergone significant staffing changes in recent times. The Charging Party's sole witness, Angel Calvo, had only been on staff since April 2000. His testimony, therefore, was primarily hearsay in its nature, and his research into the Charging Party's files had been limited to files from 1996 to date. The record also indicated that inaccessibility prevented the Charging Party from conferring with former staff members who serviced the Respondent's bargaining unit members, therefore he could not provide even hearsay testimony to suggest that the Respondent's claims of prior notice and invitations to discuss changes in the Policy were provided, as claimed.

In *United Paramedics of Los Angeles v. Board of Pension Commissioners of the City of Los Angeles*, (1989) Employee Relations Bd. Decision U-80, the Board dealt with arguments similar to those presented by the Charging Party in this matter. The respondent in that earlier case had sent notice of a proposed rule change to that charging party and it in turn asserted that it had no record of receiving the notice. The rule change took place and notice of the change was again sent to the charging party as well as to other organizations. Again the charging party had no record of receiving that notice. The disputed matter appeared on another agenda approximately four months later and that agenda was also mailed to the charging party and again it denied any record of receipt. The charging party claimed that it learned of the change about one month later and it then filed the charges that the Board addressed. The Board held that the respondent had given adequate notice and that there was a presumption that the notices were received notwithstanding the failure of the charging party's records to reflect receipt. The Board held that the charging party's failure to respond and make a timely demand to meet and confer constituted a waiver.

Accepting the present Charging Party's position that it has no records of prior notice or of receipt of the notices mailed by the Respondent (R.Exs. B, C, and E) nor of letters originating from its offices and evidencing receipt of notice of proposed changes (R.Exs. A, D, and K), nevertheless, the evidentiary record persuasively

established that for many years the Respondent has served notice of the disputed Policy provisions. There is both credible testimony and supporting evidence establishing Charging Party's notice of that language and the Hearing Officer concluded as a matter of fact that the Charging Party had notice of the disputed language years before the year 2000. As such, the failure by the Charging Party, for whatever reason, to request to meet and confer over that language until the latter part of 2000 constituted a waiver of any right it might have otherwise had under the Ordinance.

RECOMMENDED DECISION AND ORDER

The Department of Airports did not violate the City of Los Angeles Employee Relations Ordinance Section 4.860.a.1 and/or 3 when it refused to meet and confer with the Charging Party over long standing provisions in the Department's Pay Grade Assignment Policy and Procedure, Section 3.55, of the Department's Administrative Manual where, as established by the entire record, the Charging Party had notice of the provisions and by failing to submit a timely request to meet and confer over those provisions it waived its rights to do so under the Ordinance.

In accordance with Ordinance Section 4.810.f.4, the City of Los Angeles Employee Relations Board hereby orders that Unfair Employee Relations Practice Claim 1306 is dismissed.

Respectfully submitted,

Michael Prihar, Hearing Officer

Los Angeles, California
November 28, 2001