

CONDENSED HEARING OFFICERS REPORT: ADDA'S PETITION FOR CERTIFICATION

LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION

CASE NO: CP 01-06
HEARING OFFICER'S REPORT

In the Matter of Unit Determination Between

ASSOCIATION OF DEPUTY
DISTRICT ATTORNEYS,
Petitioner,

And

LOS ANGELES COUNTY,
Respondent.

INTRODUCTION

Petitioner, or ADDA, filed a petition on or about January 12, 2006 to be the exclusive representative of a bargaining unit comprised of non-supervisory Deputy District Attorneys (DDA's) grades I-IV, employed by the Los Angeles County Office of District Attorney. Thereafter the Los Angeles County Employee Relations Commission (ERCOM or Commission) ordered a hearing to determine the propriety of a bargaining unit limited to DDA's and Robert D. Steinberg was appointed Hearing Officer. Evidentiary hearings were held on March 29 and April 16, 2007. Helen L. Schwab, Esq. Green & Shinee, represented Petitioner. The County was represented by John M. Garrisi, Principal Analyst, CAO/Employee Relations Division. Post hearing briefs were received on or before June 18, 2007.

ISSUE AND SUMMARY RECOMMENDATION

The Parties stipulated the following issue was properly before the Hearing Officer: Is a unit Limited to Deputy District Attorneys grades I-IV appropriate (emphasis added) for collective bargaining? ADDA argues it is. The County argues it is not (suggesting the only appropriate bargaining unit is all non-supervisory attorneys employed by the County). For the reasons set forth *infra* the Hearing Officer agrees with the Petitioner and recommends a collective bargaining unit of DDAs grades I-IV be found appropriate.

BACKGROUND

The following facts are undisputed. Between 1969-1989, DDAs were included in a collective bargaining unit along with non-supervisory Deputy Public Defenders (DPDs), law clerks and senior law clerks. (Unit 801).

In 1988 a petition was filed on behalf of the DDAs to sever Unit 801 and ERCOM sent this petition to hearing because an alleged significant schism had developed between the DDAs and DPDs. The hearing was held in abeyance because of a petition to decertify Local 660 as the Unit 801 bargaining representative was filed (Case No EC-29). Local 660 was decertified in February 1989 as the result of an adverse election where 731 of the 884 employees voted against Local 660 representation. Since that time, and now for 18 years, DDAs as well as DPDs have been without a recognized bargaining representative.

RELEVANT STATUTORY PROVISIONS

Meyers Milius Brown Act (Gov't Code Sections 3500-3511: Sec. 3507 (d) allows local governments to adopt reasonable rules and regulations regarding the creation of "an appropriate unit" for the purposes of collective bargaining.

LOS ANGELES COUNTY EMPLOYEE RELATIONS ORDINANCE

Sec.5.04.160: "The Commission shall have the following duties and powers. . . to arrange for and supervise the determination of certified employee representatives for appropriate units . . ."

Sec.5.04.200: "In the determination of appropriate employee representation units, the following factors, among others, are to be considered:

- Which unit will assure employees the fullest freedom in the exercise of rights granted under this chapter;
- The community of interest of the employees;
- The history of employee relations in the unit, among other employees and the County
- The effect of the unit on the efficient operation of the public service and sound employee relations;

SUMMARY OF PARTY ARGUMENTS

DISCUSSION

The focus of the County's argument is that an umbrella unit of all non-supervisory attorneys employed by the County is the only appropriate bargaining unit consistent with the criteria set forth in ERO Sec.5.04.200.

The County still relies upon the 1969 recognition of the combined DDA and DPD unit, at a time when there were no other non-managerial attorney classifications, and the fact that 11 MOUs were negotiated, as historic evidence favorable to its position that a more concentrated, departmental unit of attorneys is inappropriate. One may assume the bargaining experience was successful, at least until the final agreement was negotiated, but the more antiquated period of success was replaced by some tow decades of disharmony, if not dysfunction, between the two attorney classes, which has meant neither the DDAs or the DPDs enjoy the benefits of collective bargaining through representatives of their own choosing, a fundamental right granted to employees under the MMB and the County ERO.

Based on the testimony of senior deputy district attorneys and the labor official of SEIU, who attempted to represent the combined unit, it must be concluded that it has been, and will continue to be, impossible for the DDAs and DPDs to function cohesively in one unit forth benefit of all. Their goals as attorneys are at the opposite ends of the spectrum. One side seeks to prosecute and convict, supporting legislation such as "Jessica's Law," that is harsh on defendants and restrictive of their civil rights. Defenders, on the other hand, are both by their nature and the demands of their positions intent on protecting the rights of the accused and support liberal political agendas. They continually do battle in court and history has proved an inability to overcome their differences when not litigating in order to achieve common objectives in collective bargaining.

The relevant history of the unit once involving DDAs is, then, a mixed bag, with some success in the unit combined with DPDs, but an ultimate failure nonetheless. Resulting n both the DDAs and the DPDs being on the outside of the collective bargaining arena for the past two decades (Footnote 11: For which the DDAs, themselves, must accept responsibility for not fully pursuing their own collective bargaining unit prior to 2005-2006). Rather than promote collective bargaining in support of the ERO's goal of promoting self-organization to the benefit of the populace as a whole, the 20-year experience of the combined unit has neutralized, if not defeated, collective bargaining for the professionals involved. There should be no prejudice to DDAs because they are all employed by one office or department. Intra-departmental bargaining units, such as the separate sworn and non-sworn employees of the

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Sheriff's Department are not prohibited. (Footnote 12: See also, e.g. DA Investigators, PD Investigators and others with unique unit occupations tending to place all within the employ of one department, primarily or exclusively).

Separate units of DDAs and/or DPDs are found though out the State, and a separate DPD unit was ordered by the California Court of Appeal in Alameda County Assistant Public Defenders Association v. County of Alameda (citation *supra*). On balance history, if not favoring the acceptance of a unit favoring DDAs, is no less than neutral.

In addition to the criteria of historic employee relations, there are three (out of seven) other critical factors relevant to the establishment of appropriate bargaining units. Two of those criteria, assuring employees the fullest freedom in the exercise of Ordinance rights and that of a community of interest, certainly favor a DDA only unit. The final criteria, that being the effect of the unit on the efficient operations of the public service and sound employee relations is, at least today, neutral.

With the deputy district attorneys all employed within the same department, reporting to the same managerial hierarchy and all striving for the same immediate and ultimate goals, economic, philosophical and political, a representation unit limited to DDAs must by nature, afford them the fullest freedom in pursuit of organizational and bargaining unit rights protected by the ERO . . .

Of all possible units, the greatest community of interest exists with a representation unit limited to DDAs for reasons stated earlier. Beyond common interests, terms and conditions of employment under management with an effective voice in labor relations, they are an insulated group in that they are hired by DA management with little, if any, interchange between them and attorneys in other County departments. That the community of interest criteria favors the petitioned-for unit should be self evident, but the Commission's attention is again draw to the Alameda County Assistant Public Defender case before the Court of Appeal, where Alameda County was effectively rebuked for attempting to place public defenders in a broader professional unit against

their wishes, and where there was no broader unit in existence.

The only argument left to defeat the instant petition is a claim that the recognition of this unit limited to DDAs will adversely affect the efficient operation of the County service and is inimical to sound employee relations. The County argues this will occur as the necessary result of an inevitable proliferation of bargaining units consistent of different attorney classes. Standing alone, the mere increase in the number of bargaining units is not sufficient to deny the appropriateness of a representational unit limited to DDAs. Several different possibilities may occur, and what does occur should be appropriately dealt with by the Commission at the time the situation arises rather than the Commission now committing a pre-emptive strike, as it were.

That there may be one or more units of attorneys seeking separate representation may not just be idle speculation, but a sizeable increase in bargaining units prone to practicing one-upmanship in collective bargaining is purely speculative. (Footnote 14: What sounds plausible to the Hearing Officer are three groupings of attorneys, those engaged in prosecutorial efforts, those engaged in criminal defense, and all other unit of County Attorneys, but again, when and if such a distribution occurs or is sought is purely speculative, and it is possible as not that one or more of the attorney types will be content to be non-represented) Other County attorneys may be content to reap the derivative benefit of DDA collective bargaining and/or upon observation, conclude they as professionals do not need labor organization protection.

CONCLUSIONARY FINDINGS AND RECOMMENDATION

The ADDA has petitioned the Commission to find that all non-supervisory DDAs, grades I-IV, constitute an appropriate unit for purposes of collective bargaining with the County. None of the attorneys employed by the County are currently part of a certified bargaining unit, and no labor organization is opposed to a bargaining unit limited to DDAs. The County's claim the unit is inappropriate, is unpersuasive.

For the full text of the Hearing Officer's Report please email theverdict@sbcglobal.net or go to deputyda.com.

SUMMARY OF THE EVIDENCE AT THE HEARING OF THE ADDA'S PETITION BEFORE ERCOM HEARING OFFICER ROBERT D. STEINBERG

In prior newsletters, ATTORNEY NOTES detailed the testimony presented to ERCOM in adjudicating the petition of the ADDA to be a DDA only bargaining unit. Those accounts have been edited and reproduced to assist readers in placing ERCOM's ruling in context.

The ADDA's requested hearing before ERCOM (*The Employee Relations Commission of Los Angeles County*) began on March 29. The ADDA was represented by Helen Schwab and Derald Brenneman of the law firm of Green and Shinee. The opposition was a team of representatives sent by the Chief Administrative Officer (CAO), consisting of lead representative John Garrisi and assisting representatives Maurice Cooper and Marie Pasqual. Robert D. Steinberg presided over the matter as Hearing Officer.

In her opening statement, Ms. Schwab detailed the history of DDA attempts at representation. Originally, DDAs and PDs were represented together by an SEIU affiliate. However, the group was constantly bogged down by feuding between PDs and DDAs, and the two sides were unable to choose bargaining representatives. The DDAs and PDs finally petitioned ERCOM in July of 1988 for permission to separate from each other. At the same time a number of PDs and DDAs sought to decertify and go forward without any representation. ERCOM postponed the severance petition, and granted the decertification request in February of 1989. In a clever twist, ERCOM declared the request to sever moot.

The CAOs Representative, Mr. Garrisi, opened by stating the county's policy "against proliferation of bargaining units." Garrisi explained that if DDAs are given their own bargaining unit, DPDs, DAPDs and Child Support Attorneys will each want their own units. The effect would be a disaster because the county would have to deal with too many parties. Garrisi also noted that the original DDA and PD bargaining group was found by the county to be an appropriate group in 1969. Despite the fact that strife within the group caused it to implode, there was no reason to disturb the county's initial finding that a joint group was appropriate.

Garrisi's argument was quickly placed in doubt by the first ADDA witness. Hyatt Seligman, a 28 year veteran of the DAs office, took the witness stand and demonstrated the archaic nature of Garrisi's argument. Seligman picked up where Schwab left off, detailing his efforts in the early 90s to have DDAs recertify as a bargaining unit, except without PDs. Seligman's efforts gained a great deal of momentum as DDAs recognized that, without the corrosive effect of fighting between DDAs and PDs, this new bargaining group could

quickly choose a representative who could deal aggressively with the county over wage and workplace issues. Although many PDs were critical of Seligman's efforts, by 1992 he succeeded in gathering sufficient signature cards to petition ERCOM for a DDA only bargaining group. Seligman appeared before ERCOM and, in a virtually uncontested proceeding, convinced ERCOM that an independent DDA-only group would be an appropriate bargaining unit. ERCOM ruled that DDAs countywide should be permitted to hold an election to decide if this group could represent them.

However, Seligman was soon beseeched with requests from PDs to reconstitute the joint unit. In a move that he admitted he has come to regret, Seligman withdrew the request for an election for a DDA-only group, and resubmitted as a request for a joint unit. However, Seligman soon learned that the vast majority of PDs only wanted a bargaining unit that would align with a large, left leaning national organization like the AFL-CIO or SEIU, not an independent local group. The result was a disaster, PDs swamped the election with "NO" votes and the proposed bargaining unit was "torpedoed."

Walter F. Daugherty then took the witness stand and verified many of the points raised by Seligman. Daugherty testified that he was the Executive Officer of ERCOM from 1979 to 1993. He was the Interim Executive Officer in 2006 when the ADDA's current petition was filed. Daugherty testified that the previous joint DDA and DPD bargaining unit actually came into existence in 1974. In 1988, after years of dissension and infighting, the unit came to ERCOM to petition for the severance of DPDs and DDAs. But no hearing took place because soon after the severance was filed, a petition was filed to decertify. ERCOM decided to go forward on the decertification hearing, making the severance motion moot. Daugherty stressed that the standard in ERCOM for certifying a bargaining group is an "appropriate unit," not a "perfect unit."

Bart Deiner from the Service Employees International Union then testified. He described his duties as Special Assistant to the President of Local 721, formerly Local 660. He described his efforts, on behalf of SEIU's leadership, to organize PDs, APDs, DDAs and Child Support Attorneys into one SEIU bargaining group. In a surprising moment, Deiner somberly noted that although SEIU initially wanted all these attorneys in one SEIU group, SEIU has conclusively found that DDAs and DPDs will never be able to operate together. Said Deiner, "[a] strong majority of DAs" will always want their own unit. "[W]e heard loud and clear from DDAs that their position in the justice system put them at odds with PDs. . . . and this would carry over as to employment issues."

Even more surprising, SEIU tried to address the CAOs concerns about "proliferation of bargaining

units." SEIU offered to consolidate 2 or three other units that had a commonality of interest but were separate, just so that there wouldn't be an increase in the number of bargaining units countywide because of the addition of DDA and DPD bargaining units (there are currently approximately 50 units countywide). However, the county refused to back away from its opposition to certifying a DDA only bargaining unit, thereby condemning DDAs and DPDs to remain in a dysfunctional and disorganized relationship.

Steve Ipsen, President of the ADDA, then took the witness stand. During his testimony, Ipsen detailed the recent rocky relationship between the ADDA and SEIU. This rocky relationship culminated in the hotly contested 2005 ADDA Officer Elections. A slate of candidates, lead by Ipsen, ran for re-election to ADDA Officer and Board of Directors positions. Ipsen's slate favored an independent DDA bargaining group loosely aligned with ALADS (the Association of Los Angeles Deputy Sheriffs). This slate was opposed by a slate of candidates who favored working PDs and APDs in a joint bargaining unit affiliated with SEIU. The Ipsen slate won by a ten to one margin.

Additionally, Ipsen noted that the ADDA membership greatly favored the Association's involvement in "tools of the trade" issues. This included the ADDA's successful advocacy of tougher criminal laws, such as Jessica's Law. Ipsen was the final witness for the ADDA.

On cross exam, Garrisi quizzed Ipsen about Ipsen's assignment working in the Antelope Valley Courthouse. Garrisi then asked Ipsen if PDs and APDs also worked in the same building. Ipsen agreed. Garrisi then challenged Ipsen, asserting that PDs and APDs worked in the same building; therefore they are similar in their classes of employment. Ipsen replied "yeah, the PDs and APDs work in the courthouse too . . . so do court clerks, deputy sheriffs, probation officers and judges."

The hearing was continued to the morning April 16 so that Garrisi could present witnesses for the CAO. Garrisi began the CAOs presentation on April 16 by performing an abrupt about face. During the March 29 hearing, Garrisi had steadfastly maintained, in arguments with the participants and observers, that DDAs, DPDs and APDs were salaried and exempt employees. This class of employees is ineligible to receive overtime, but not required to account for all workweek hours on an hour-for-hour basis. But during the April 16 hearing Garrisi abandoned this argument. During a break, Garrisi stated that DDAs, like DAPDs and DPDs, are nonsalaried and exempt employees. When observers

noted to Garrisi that DAPDs and DPDs were treated as "salaried and exempt" employees, Garrisi explained that the classification is administered differently in each Department, and that the CAO would seek to end any treatment in PD and APD offices that allowed DAPDs and DPDs to be supervised as "salaried and exempt."

Next, Garrisi attempted to spackle over the deep chasm between DDAs and DPDs, detailed by the ADDA's witnesses. Garrisi called to the stand Director John Paul Bernardi of the Bureau of Prosecution Support Operations. Bernardi's duties include supervising the Training and the Appellate Divisions, which includes the Professional Responsibility Unit and the Brady Compliance Section.

In response to a line of questions from Garrisi, Bernardi quickly detailed similarities between DDAs and other county lawyers, such as education and licensing.

When queried as to whether DDAs were considered law enforcement, Bernardi seemed to equivocate, saying "law enforcement is kind of a broad term. If your saying, 'are we peace officers?,' no. We're not peace officers. But law enforcement in the sense that we're part of the enforcement of criminal justice in a broader sense, which would bring in the criminal courts too. Yeah." Bernardi then smiled and said "You might say we think of ourselves as law enforcement. Yes." But, after further questioning Bernardi added, "DDAs do not arrest." Bernardi then discounted the importance of DA badges, noting "It's primarily symbolic. It's a form of identification that is more readily recognized by those in law enforcement circles . . . [t]hat's all it is."

Garrisi concluded his examination by exploring the operation of the 9/80 program in the DA's office. Presumably, Garrisi was attempting to draw parallels between the operation of the DAs office and the PD's office, which offers the 9/80 program countywide to a large percentage of DPDs. In response to Garrisi's inquiry about 9/80, Bernardi stated "It's just in the civic center area. Most Deputy District Attorneys can request a 9/80 schedule, assuming it does not interfere with the normal operation of the office." In regards to the availability of the 9/80 program in the Bureau of Central Operations, Bernardi stated "[t]here's recently been a -I believe there's recently been a

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SUMMARY: ERCOM

limitation of the availability of the 9/80 program in Central Operations. That's our component in the criminal justice center." Bernardi explained, "[n]ow it hasn't been abolished." "In Central Operations it was - that Bureau was having a problem keeping all of the courts staffed; keeping all of the courts running on time." "And it was eliminated for, I believe, some." "I don't believe all of the Deputy District Attorneys in Central Operations."

(Note: Months earlier the 9/80 program had been completely terminated in Central Operations. In a memo to all Central Trials Deputies dated December 12, 2006, the 9/80 program was terminated for all attorney staff effective "as of the first of year 2007." No Central Trials DDAs were on the 9/80 schedule when Bernardi testified on April 16, 2007.)

Ms. Schwab began her cross examination by immediately addressing Bernardi's characterization of the 9/80 program. After a testy exchange, Bernardi conceded that well over half of LA DDAs are not given the opportunity to have 9/80 work schedules.

Although Garrisi had seemed to raise the issue of the availability of 9/80 to DDAs earlier in the hearing to demonstrate the similarity between DDAs and DPDs, Bernardi denied knowing about the operation of the 9/80 program in the PD's office.

Ms. Schwab then followed up this line of questioning by asking if it was possible for DDAs to transfer to the PD's Office. When asked with the fact that the PD's Office would be a completely different employer than the DA's office, Bernardi replied, "[w]ell, technically, not. Were all employees of the County of Los Angeles. Not the District Attorney. DA's can transfer to the Public Defender's Office. I can think of one offhand who has done that. I know of several Public Defenders who have transferred to the DA's Office. And I know a DA who has transferred to County Counsel." But when asked earlier if DPDs could attend the DA's Saturday Seminars, Bernardi laughed and replied "We don't want to train the other side."

Garrisi presented three more witnesses after Bernardi. Christopher John Chadwick was the first of these witnesses. He testified about his employment with the CAO as a Senior Analyst and his experience compiling compensation and classification studies. Chadwick noted that there were instances of different classes of employees who were lumped into the same bargaining group.

Chadwick also testified that since the 1970s, the county has sought to keep parity between DDAs and PDs so that the prosecution and defense are balanced and the scales of justice are not tipped.

But on cross exam by Schwab, Chadwick conceded that, although compensated similarly, investigators from the PDs and the DAs offices each had their own separate bargaining unit. However, in a moment that seemed incongruous with Bernardi's testimony, Chadwick quickly ducked into the role District Attorney Investigators play in law enforcement, namely that they "are peace officers." On follow-up questions, Schwab also elicited from Chadwick acknowledgements that DDAs are subject to more stringent background checks and are issued badges. But then Chadwick deflected further questions by stating that he was unfamiliar with District Attorney Policy and Procedures.

The next witness by the CAO was Debra Lynn Popkins. Although not employed by the CAO, Ms. Hopkins represents LA County management in Healthcare labor discussions. Garrisi had her acknowledge that registered nurses and nurse practitioners were part of the same LA County bargaining group. She then detailed that registered nurses and nurse practitioners have different, non-interchangeable differences in their duties.

However, on cross exam she conceded she knew nothing at all about the job duties of PDs and DAs. Further, she conceded that registered nurses and nurse practitioners share the same mission: to deliver patient care. They don't oppose each other. She also knew of no political cause that would divide nurse practitioners from registered nurses.

James Andrew Adams followed Popkins on the witness stand. Adams identified himself as the Division Director of the Employee Relations Division of the CAO. Adams was nonchalant as to multiple classifications of employees being lumped in the same bargaining unit. Citing a variety of differences in nurse positions, Adams indicated that lumping professionals together is "really problematic, but it's doable." Adams then set his sights on the ADDA's petition and testified that if it were granted, there would be demands by four different classes of attorneys demanding their own bargaining units. Further, the similarity between APDs, DPDs, Child Support Attorneys and DDAs dictated that forcing them into the same bargaining unit was feasible.

But under cross-examination, Adams' confidence in his conclusions seemed misplaced. Adams was forced to acknowledge that none

of the other groups (APDs, DPDs and Child Support Attorneys) had submitted, or were even circulating, petitions for certification, and that there was no indication they would even want individual bargaining units. Adams also described his role supervising the 56 different Memoranda of Understanding (MOU) the county has with various employee bargaining units. He conceded that 90% of the language in each MOU is boilerplate.

Although he deflected most questions about differences between PD and DDA jobs, Adams stated that the county tried to make compensation the same for all attorneys. However, differences in management may result in PDs benefiting because they are not required to account for all workweek hours on an hour-for-hour basis (consistent with a "salaried" designation). However, in a moment that seemed to draw laughter, he retorted "well if we let DDAs have their own unit, we'll be forced to hear DDA complaints such as the fact that DDAs aren't docked the same as PDs."

Adams was the final witness called by Garrisi for the CAO. After Garrisi concluded, Helen Schwab called ADDA Sr. VP Frank Tavelman to testify in rebuttal.

Tavelman clarified fundamental differences between DDAs and PDs, explaining that PDs and APDs have client obligations not found in the duties of a DDA. For instance, DDAs do not have an attorney-client privilege, APDs and DPDs do. In fact, in addition to statutory discovery obligations, DDAs have an obligation to reveal exculpatory information. Also, DDAs are required to work closely with peace officers, and even deal with them as members of the same agency (i.e. DAIs). In testimony that quickly discounted the testimony of the Healthcare Management Representative, Ms. Popkins, Tavelman explained that ninety percent of the interaction between PDs and APDs is adversarial. Tavelman further explained "registered nurses and nurse practitioners don't oppose each other, it's not like one is trying to kill the patient while the other is trying to keep him alive."

Garrisi had no cross examination for Tavelman and attempted to excuse him from the witness stand. However, ERCOM Hearing Officer Steinberg had his own questions. Steinberg asked Tavelman if it was true that PDs and DDAs could simply "transfer" back and forth between departments. Tavelman explained that the process would actually require the applicant to be rehired, with the applicant's prospects in maintaining his status through a lateral placement uncertain due to the discretion of the agency.