Kennewick General Hospital, Decision 4815-B (PECB, 1996)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

UNITED STAFF NURSES UNION, LOCAL 141, Complainant,	)	CASE 10947-U-94-2547
	)	DECISION 4815-B - PECB
	)	CASE 11279-U-94-2640
vs.	)	DECISION 5052-B - PECB
KENNEWICK PUBLIC HOSPITAL DISTRICT 1 d/b/a KENNEWICK GENERAL HOSPITAL, Respondent.	)	CASE 11397-U-94-2675
	)	DECISION 5594-A - PECB
	)	DECISION OF COMMISSION

Hafer, Price, Rinehart and Robblee, by M. Lee Price, Attorney at Law, appeared on behalf of the complainant.

Conner, Gravrock and Treverton, by William W. Treverton, Attorney at Law, appeared on behalf of the employer.

This case comes before the Commission on a petition for review filed by Kennewick General Hospital, seeking to overturn a decision issued by Katrina I. Boedecker.[1]

BACKGROUND

Kennewick Public Hospital District 1 (employer) and United Staff Nurses, Local 141 (union) are the parties in this matter. The union filed three unfair labor practices complaints, all alleging the employer refused to bargain and interfered with employee rights in violation of RCW 41.56.140. The union's charges relate to the employer's transfer of bargaining unit work outside of the bargaining unit represented by the union.

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[1] Kennewick General Hospital, Decision 4815-A, 5052-A, 5594 (PECB, 1996).

The Employer

Prior to the events giving rise to this dispute, the Women and Children's Clinic and the Columbia Center Clinic were operationally under Kennewick General Hospital, which was directly under the administration of Kennewick Public Hospital District 1. The hospital district is administered by a seven-member board of publicly elected Commissioners.

The Women and Children's Clinic is separate from the hospital, located on the ground floor of a building built and owned by the Kennewick Public Hospital District at the far end of the district's property, near the corner of Dayton and 10th Street in Kennewick, Washington. The Columbia Center Clinic occupies space in Columbia Center Mall that is leased to Kennewick Public Hospital District from the owner/operator of the Columbia Center Mall.

A brochure provided to new employees, entitled "KGH History Mission Purpose", states in part:

> Kennewick General Hospital manages outpatient services to include: Home Health Care, Columbia Center Clinic, Tri-Cities Oncology Center, Physical Therapy, and the Women and Children's Clinic.

The same brochure also states:

> Two years ago the Hospital saw a need to provide medical and obstetrical services to women and children of the community. Thus, the Women and Children's Clinic was opened by KGH to provide ...

According to a report published by the Division of Municipal Corporations of the Office of State Auditor for the period January 1, 1992 through December 31, 1992, Kennewick Public Hospital District 1 does business as Kennewick General Hospital and provides the

following health care services: (1) Kennewick General Hospital operates a 71-bed acute-care hospital and related health care services, including home health care, at Kennewick, Washington; (2) Women and Children's Clinic; and (3) Columbia Center Clinic.

The Union

In 1990, the Public Employment Relations Commission conducted a proceeding under Chapter 391-25 WAC, to resolve a question concerning representation involving registered nurses employed by this employer.[2] The statement of results of prehearing conference issued in that proceeding, on May 2, 1990, states that the parties stipulated the employer was "'Kennewick General Hospital' (Kennewick Hospital District)". Nurses working at the two clinics were on the stipulated eligibility list for voting in the representation election. In later correspondence in that case, the employer clarified that the "Director of the Women and Children's Clinic" and the "Director of the Columbia Center Clinic" were excluded from the bargaining unit.

Beginning with the first collective bargaining agreement negotiated by the employer and the USNU, the parties bargained the wages, hours and working conditions of the clinic nurses. The parties' collective bargaining agreement for the period between May 9, 1993 and December 31, 1993, included provisions for orientation training which covered the clinic nurses.

The "New" Corporation

Michael Tuohy is referred to in this record as both superintendent of the Kennewick Public Hospital District and as administrator of

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[2] Case 8523-E-90-1434. The petition was filed on April 2, 1990. The USNU sought to replace the Washington State Nurses Association as exclusive bargaining representative of the employees involved.

Kennewick General Hospital. In a memorandum addressed to the "KGH Board of Commissioners" under date of November 12, 1992, Tuohy stated in part:

> Historically, the Kennewick Public Hospital District has operated as if the District and the licensed Hospital it operates are one and the same entity. All activities of the District are conducted through the organizational structure of the Hospital, ...
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> ...
>
> [W]e believe that you should consider the option of conceptually treating the District as separate from the hospital and begin to look at those activities that might best be pursued outside of the structure of the licensed hospital, but nevertheless within the District.

On December 17, 1992, the board of the Kennewick Public Hospital District passed Resolution #1992-15 stating, in part:

> WHEREAS, the Kennewick Public Hospital District "District" owns and operates Kennewick General Hospital "Hospital" as well as other health care delivery systems which are unrelated to the health care mission of the Hospital but are in furtherance of the District's statutory purpose which authorizes the District to provide health facilities within the territory of the District unrelated to hospital based services, such as Columbia Center Clinic and the District's Women's and Children's Clinic as well as other facilities and health care operations;
>
> WHEREAS, the District's current accounting system commingles the District's revenues and expenditures of the Hospital with the revenue and expenditures of the District's non-hospital operations;
>
> WHEREAS, it is necessary and essential that the operations of the District, both hospital and non-hospital, which are separate and distinct operations, other than common ownership and administration, be accounted for as separate and distinct operations;

> ...
> BE IT RESOLVED by the Board of District Commissioners at its Thursday, December 17, 1992 meeting that the Administration of the Kennewick Public Hospital District be, and the same is, hereby directed to henceforth maintain separate accounting for all revenue and expenditures of the District's Hospital from the other non-hospital operations of the District, such as the Columbia Center Clinic and the Women's and Children's Clinic, and to do all things necessary to implement the mandate of this resolution.

Thus, the employer decided to separate non-hospital operations, including the two clinics, from the hospital, for accounting purposes.

Articles of Incorporation of "Practice Management, a nonprofit corporation" were filed with the Secretary of State's office on December 28, 1992. The name of the corporation's registered agent was shown as "Michael J. Tuohy, Superintendent, Kennewick Public Hospital District". The aim of the new organization was to provide a wide range of health services including the clinics and various health management and support services such as physician recruitment and retention. Practice Management took the business name of Northwest Practice Management (NPM). The Board of Directors of NPM consists of five members appointed by the Kennewick Public Hospital District. Michael J. Tuohy is President of NPM, and a member of its Board of Directors.[3]

An organization chart dated January 1, 1993, shows the two clinics directly under the superintendent of the Kennewick Public Hospital District.

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[3] Tuohy receives one salary for all his roles, which include being superintendent of Kennewick Public Hospital District, administrator of KGH, and president of NPM.

The bylaws of the Kennewick Public Hospital District adopted January 28, 1993, includes the following statement in Article I FORMATION AND PURPOSE:

> Section 1. NAME:
>
> a) The name of this District shall be **KENNEWICK PUBLIC HOSPITAL DISTRICT**, "District".
>
> b) **The District's hospital shall be known as KENNEWICK GENERAL HOSPITAL, "KGH", and the day-to-day business of the Hospital may be conducted under that name.**
>
> c) **The District's non-hospital activities shall be conducted as may, from time to time, be determined by the Board of Commissioners.**
>
> Section 2. AUTHORITY:
>
> a) **The District, a municipal corporation, was created in 1948 to provide hospital and other medical services** for the residents of the District and other persons according to the activities of the State of Washington, including Chapter 70.44 of the Revised Code of Washington. These Bylaws are adopted in furtherance of the lawful purposes of the District, to facilitate the governing of the District. The District's operations shall stay in compliance with standards set by applicable law, and the Joint commission on Accreditation of Healthcare Organizations to the extent practical and feasible.

[Emphasis by **bold** supplied.]

In furtherance of the organizational change, NPM entered into a management and consulting services agreement with the Kennewick Hospital District, and service agreements with the two clinics. By a service agreement effective June 1, 1993, NPM took over the management of Women and Children's Clinic. That agreement begins:

> THIS AGREEMENT is made and entered into this 1st day of June, 1993, by and between the Women & Children's Clinic, **an affiliate of Kennewick Public Hospital District**, ...

[Emphasis by **bold** supplied.]

By a service agreement effective November 1, 1993, NPM took over the management of Columbia Center Clinic. That agreement begins:

> THIS AGREEMENT is made and entered into this 1st day of November, 1993, by and between Columbia Center Clinic, **an affiliate of the Kennewick Public Hospital District**, ...
>
> [Emphasis by **bold** supplied.]

Both the Columbia Center Clinic and the Women and Children's Clinic were included, however, in a "Kennewick General Hospital" Department Directory dated September 2, 1993.

Negotiations for a Successor Contract

Negotiations for a new contract between the parties began during the autumn of 1993. The employer initially proposed a number of take-aways. Significantly, the employer proposed that: (1) the union waive the requirements of RCW 41.56.123;[4] and (2) the nurses relinquish a four-hour premium they had been receiving whereby they worked thirty-six hours and received forty hours pay. After several meeting days, including at least October 25, November 6, and December 2, 1993, the parties agreed to mediation.

By letter of December 16, 1993, the employer advised the union of its plans regarding the nurses at the two clinics, stating:

> We wish to notify you of a planned reduction in force at Kennewick General Hospital. On December 14, 15, and 17, 1993, in meetings with the employees, we have notified all of our employees at Women and Children's Clinic and Columbia Center Clinic that effective March 1, 1994 Northwest Practice Management

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[4] That section of the statute requires a one-year lapse after the expiration of a collective bargaining agreement before an employer can implement any change in the terms of the expired contract.

> will assume operation and staffing of the two clinics. ...

Tuohy issued a memo directly to Women and Children's Clinic employees on December 17, 1993, notifying the employees of impending changes in the operation of the clinic, and in employee benefits.

The parties discussed the issue of the clinic nurses at their initial mediation session, which was held on December 29, 1993. The union's position was that the clinics were covered by the parties' collective bargaining agreement, and that the clinic nurses could not be unilaterally removed from the bargaining unit. The employer's position was that the initial certification of the bargaining unit did not include the clinic nurses, that the entity of the clinics was a separate employer from the hospital, that the reduction-in-force decision was not a negotiable item, and that there was no violation of the parties' contract.

At a meeting on January 13, 1994, the parties again discussed their respective positions on the clinic issue. The union continued to assert that the clinics were covered by the contract, and that the nurses could not be unilaterally removed from the bargaining unit. The employer maintained its original position that the decision in regard to the clinic nurses was not negotiable.

The union filed the first of these unfair labor practice cases on February 2, 1994, alleging that the employer's plans with regard to the layoff of the clinic nurses were interference and refusal to bargain violations of RCW 41.56.140(1) and (4).[5]

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[5] Case 10947-U-94-2547. That complaint was amended on April 26, 1994, to allege the employer was refusing to recognize the union as exclusive bargaining representative of the clinic nurses, and that the employer was contending the original certification of the bargaining unit applied only to the hospital, and not the district.

The next meetings with the Mediator were on March 2 and April 1, 1994. Through mediation, the parties made some language changes, but the employer maintained its position that the four-hour premium had to be eliminated, and indicated it was unwilling to agree to a multi-year contract unless the union was willing to waive its rights under RCW 41.56.123.

Tuohy sent a memo to all employees on March 31, 1994 detailing questions and answers concerning the planned changes to the clinics and the district organization.

On April 26, 1994, the union amended its complaint to include allegations that the employer postponed its planned layoff, that negotiations for a new collective bargaining agreement were in process, and that the employer was refusing to recognize the union as the bargaining representative of the clinic nurses.

At a May 18, 1994 session, the employer made a "final" offer which included its original demand that the union waive its rights under RCW 41.56.123, in exchange for a two-year agreement. The employer proposed that the union drop its two unfair labor practice complaints, but soon retracted that proposal. The union representatives received the impression that management could not make decisions at the May 18th meeting because the "clinic issue was Tuohy's", but Tuohy had left for Seattle, and the management team would have to seek further legal advice and follow-up with Tuohy.

The employer's final proposal was put to a vote of the union membership on May 25, 1994. The proposal was rejected. Some nurses appeared before the Board of Commissioners of the Hospital District Commissioners at a meeting held on May 26, 1994, at which time the commissioners encouraged the employees to return to the negotiation process to resolve their concerns.

In response to information published by the union regarding contract issues, Assistant Administrator Linda Garner discussed the two-hour shift premium and the proposed wage increase in a memo to the nursing staff dated June 16, 1994. That memo included:

> I am eager to work with the Union toward resolution of these issues, and feel that the Hospital's latest proposal is a fair and workable agreement. I remain open to exploring alternate ideas for resolution, however, and would urge you to bring forth any ideas you may have.

There were, however, no negotiation sessions from May until August of 1994. Tuohy expressed the opinion that he did not want to have meetings that failed to produce fruitful results, and that if they were going to meet, he did not want to just "rehash" things with no change in positions. The union representative contacted the Mediator periodically, but received the impression that the employer was unwilling to meet and negotiate further on the contract. The employer continued to plan for the impending movement of the clinic nurses without discussion with the union.

The Examiner opened the hearing on the first of these matters on June 22 and 23, 1994. On August 9, 1994, the union filed a motion to amend its complaint for the second time. On August 12, 1994, the union filed its second unfair labor practice complaint.[6] It therein alleged that the employer refused to bargain based on a totality of circumstances from the beginning of the negotiations in the autumn of 1993 through the course of negotiations and mediation sessions, in violation of RCW 41.56.140(1) and (4). On August 29, 1994, the employer filed a motion in opposition to the second amendment of the union's first complaint.

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[6] Case 11279-U-94-2640.

On October 17, 1994, the employer notified registered nurses working at the two clinics that their employment with Kennewick General Hospital would be terminated on October 31, 1994. The clinic employees were to remain in their same status, covered by the "Hospital" wages and benefits, until October 31, 1994.

On October 21, 1994, the union filed the third of these unfair labor practice cases.[7] It alleged that the employer interfered with employee rights under RCW 41.56.140(1) and refused to bargain in violation of RCW 41.56.140(4), by refusing to negotiate the removal of the clinic nurses from the bargaining unit, and their transfer to NPM.

Implementation of Transfer

Out of nine nurses employed at the clinics, only two transitioned to NPM. On November 1, 1994, the wages of those two changed from those under the collective bargaining contract. The remaining seven nurses who had worked at the clinics either transferred to the hospital or found jobs elsewhere.

Proceedings Before the Examiner

Examiner Katrina Boedecker granted the complainant's "Motion for Second Amendment to Charge" on August 29, 1994. She consolidated the second and third unfair labor practice cases and held hearings on those matters on June 15 and 16, 1995.

On July 3, 1996, Examiner Boedecker issued Findings of Fact, Conclusion of Law and Order in a combined decision for all three unfair labor practice cases. She found that the employer committed unfair labor practices by: (1) threatening to unilaterally remove bargaining unit positions from the bargaining unit and attempting

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[7] Case 11397-U-94-2675.

to put the positions under a "new separate corporation" without union representation, without adequate notice to and bargaining with the union; (2) refusing to bargain with the union over the clinic nurse positions; (3) transferring or terminating bargaining unit members without advising or negotiating with the union; and (4) engaging in a course of conduct that demonstrated a lack of good faith bargaining. She ordered the employer to restore the status quo ante and to make whole any member of the bargaining unit who suffered changes in wages, hours, or working conditions by the employer's unlawful actions.

The employer filed a timely petition for review on July 23, 1996, thus bringing the matter before the Commission.

POSITIONS OF THE PARTIES

The employer argues that Kennewick General Hospital, and not Kennewick Public Hospital District 1, is the employer at issue in this case, and that the original bargaining unit excluded the nurses working at Women and Children's Clinic and at the Columbia Center Clinic. To support those assertions, it points to the parties' first collective bargaining agreement, which contained no references to the two clinics. While it acknowledges that the parties' contract for the period from May 9, 1993 to December 31, 1993 referred to the two clinics, the employer argues that both parties recognized the clinics were district clinics by that time. In the alternative, should the Commission determine that the clinic nurses were part of the bargaining unit, the employer contends that it did not refuse to bargain with the union over their status. The employer cites the contract eventually negotiated by the parties, and takes the position that no remedies are required. In the alternative, should the Commission determine that remedies are appropriate, the employer contends that the remedies ordered by the Examiner are unclear.

The union claims the employer is the hospital district, that the clinic nurses were members of the bargaining unit, that the employer unilaterally changed the status of the clinic nurses, and that the employer failed to bargain with the union prior to doing so. The union argues that the employer engaged in bad faith bargaining from October of 1993 to August of 1994, and that the employer's motion to dismiss was properly denied.

DISCUSSION

Identification of Employer and Description of Bargaining Unit

A thorough review of the record convinces us that the employer in this case has always been, and continues to be, Kennewick Public Hospital District 1, and that the bargaining unit has always included, and continues to include, the nurses working at the two clinics. Multiple reasons support that conclusion:

(1) The statement of results of prehearing conference issued in Case 8523-E-90-1434 on May 2, 1990, states that the parties stipulated to identification of the employer as "'Kennewick General Hospital' (Kennewick Hospital District)". The Commission has long held stipulations made by parties during the course of representation proceedings are binding upon the parties, absent an agreement that is abhorrent to Commission policies or a demonstration of a change in circumstances. Clover Park School District, Decision 2243-B (PECB, 1987).[8] In the absence of any timely objections, a pre-hearing statement becomes a binding stipulation controlling the further course of proceedings.[9] In the case at hand, the employer

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[8] The Commission therein affirmed reasoning based upon Community College District 5, Decision 448 (CCOL, 1978). See, also, Olympia School District, Decision 4736-A (PECB, 1994) and City of Bremerton, Decision 5385 (PECB, 1995).

[9] WAC 10-08-130(3).

did not make any timely objection to the pre-hearing statement, and the proceedings continued with "Kennewick Hospital District" as part of the identification of the employer.

(2) Nurses working at the two clinics were on the eligibility list for voting in the representation election conducted by the Commission in Case 8523-E-90-1434. Again, the employer made no objections at that time.[10]

(3) In later correspondence in Case 8523-E-90-1434, the employer clarified that the "Director of the Women and Children's Clinic" and the "Director of the Columbia Center Clinic" were excluded from the bargaining unit. This strongly indicates that the employer considered the remaining nurses at those clinics to be included in the bargaining unit, as there otherwise would have been no need to make any mention of the clinics.

(4) Beginning with their first collective bargaining agreement, these parties negotiated wages, hours and working conditions of the clinic nurses. There was specific mention of the clinic nurses in the parties' collective bargaining agreement for the period between May 9, 1993 and December 31, 1993, in the provisions for orientation training. The clinic nurses continued to be paid at the contract rates until the implementation of the change at issue in this proceeding.

(5) The State Auditor's report for 1992 showed that the district does business as Kennewick General Hospital and provides health care services which included the two clinics.

(6) In a brochure presumably printed prior to 1993, the employer stated that Kennewick General Hospital manages outpatient services, including the two clinics at issue in these proceedings.

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[10] In the absence of any evident controversy at that time, an inference is available that the clinic nurses were in the bargaining unit prior to the onset of Case 8523-E-90-1434. Apart from any motivation on the part of the employer to resist an expansion of the bargaining unit at that time, the former exclusive bargaining representative was also a party to that representation proceeding, and would have been in a position to object if the clinic nurses were being added to the unit for the first time.

(7) Tuohy's memorandum dated November 12, 1992 referred to the historical relationship of the district and the hospital operating as if the two were one and the same entity.

(8) Kennewick Public Hospital District Resolution #1992-15, dated December 17, 1992, referred to the district owning and operating the hospital and other health care delivery systems, including the two clinics at issue in this case. That resolution sets forth a mandate to separate the non-hospital operations for accounting purposes thereafter. This reinforces the notion that they had been one-and-the-same up to that time.

(9) The bylaws of Kennewick Public Hospital District 1 adopted on January 28, 1993, refer to the day-to-day business of the hospital being conducted under the name of "Kennewick General Hospital", that non-hospital activities may be conducted, and that it is the district that provides the hospital and other medical services. The record contains no evidence that Kennewick Public Hospital District 1 has divested itself of ownership of the two clinics at issue in these proceedings.

(10) Organizational charts have included the two clinics within the operations of the Kennewick Public Hospital District. An organizational chart dated January 1, 1993 simply moved the two clinics from the direct operation of Kennewick General Hospital and placed them under the Kennewick Public Hospital District itself.

(11) Both the Women and Children's Clinic and the Columbia Center Clinic appear to have always been and continue to be physically located on property either owned or leased by Kennewick Public Hospital District 1.

(12) The employer's present assertion that the bargaining unit only included those registered nurses working at the hospital is inconsistent with the testimony given by Michael Tuohy at the first hearing in these cases, held in June of 1993. That testimony was that the nurses working at the Women and Children's Clinic and the Columbia Center Clinic were considered to be part of the hospital prior to December of 1992, and that he assumed they were covered by the same collective bargaining agreement. Tuohy also testified

that the clinic nurses would be covered under the existing collective bargaining agreement until their status was decided.[11]

(13) The employer's present assertion that the bargaining unit only included those registered nurses working at the hospital is inconsistent with its own actions on December 16, 1993, when it sent a letter advising the union of a "planned reduction in force at Kennewick General Hospital". That letter actually referred to a reduction in force at the two clinics.

(14) Even as late as February 10, 1994, Tuohy's memorandum addressed to all employees referred to the two clinics as being "departments of the hospital":

> **1. What is the District and why are we suddenly hearing about it?**
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> ... The reason you have recently heard more about the District is because of some reorganization we feel is necessary to respond to the changes we see coming in health care.
>
> In people's minds the District has always been the Hospital. Since all health care activities of the District were part of the Hospital, there was no need to state a separate identity for the District.
>
> With our decision in 1992 to remove some activities from the Hospital, it became necessary to view the District as a parent corporation with the Hospital being only one of the operations under the District.
>
> **Why are the Women and Children's Clinic and Columbia Center Clinic being considered for relocation out of the Hospital?**
>
> We believe these clinics are valuable and important services operated by and for the residents of the District and surrounding communities. Unfortunately *as departments of the Hospital*, these clinics are subject to:
> ...

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[11] It was at the second hearing, a year later, that the employer took the position that the contract and the certification itself did not cover the clinics.

> ... We are also concerned that under health care reform we will be seeing additional rules and regulations of hospitals. These additional regulations would apply to hospitals and departments of hospitals, but not to clinics that are not part of licensed hospitals.
>
> In addition, both of these clinics are located in buildings separate from the Hospital.
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> For all of these reasons, we felt that it was necessary for these clinics to be relocated out of the Hospital.
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> **4. What exactly is Northwest Practice Management?**
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> Northwest Practice Management is a not-for-profit corporation organized under the laws of the State of Washington. *The sole member, and therefore 100 percent owner of Northwest Practice Management is Kennewick Public Hospital District.* The corporation is run by a Board of Directors consisting of three of the District's commissioners Sandra Matheson, Rick Reil, and Tim Neal. In addition to These Commissioners Don Cockeram and Michael J. Tuohy also serve as Board members of Northwest Practice Management.
>
> Mike Tuohy is the President of Northwest Practice Management. He receives no extra compensation for his services as a member of the Board, or as President of Northwest Practice Management. ... His only compensation is provided to him as Administrator of Kennewick General Hospital. ...
>
> Other employees of Northwest Practice Management receive salaries established and paid in the same manner as is done for Hospital employees and managers.
>
> **What other departments of the Hospital are planned to be affected by similar changes?**
>
> With the exception of Women and Children's Clinic, Columbia Center Clinic and the Home Health Department, there has been **no** discussion of transferring any other department of the Hospital out of KGH.

Emphasis by **bold** and **bold underline** in original; emphasis by *italics* supplied.

Tuohy's memorandum reinforces a finding that the clinic nurses had been part of a single operation up to that time.

It is quite clear to us, from all of the factors listed above, that Kennewick Public Hospital District 1, which is the municipal corporation that is subject to our jurisdiction under the broad terms of RCW 41.56.020,[12] has always been, and remains, the employer of the nurses in the clinics. It is also clear that the clinics were considered part of the hospital operations prior to 1993. While the employer wants to now claim that the clinics were never part of the hospital, and never part of the bargaining unit, the Commission's records and the evidence concerning its own actions clearly show otherwise. We will not allow the employer to rewrite history to achieve an outcome that it desires in order to advance its current reorganization goals.

Precedent developed under the National Labor Relations Act (NLRA) may be used as persuasive authority in interpreting similar provisions of the state collective bargaining law. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1984).[13] Our ruling here comports with the "single employer" doctrine which is applied by the National Labor Relations Board (NLRB) and courts in cases where there is: (1) interrelationship of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership.[14]

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[12] For discussion of the breadth of RCW 41.56.020, see Roza Irrigation District v. State, 80 Wn.2d 633 (1972).

[13] See, also, City of Centralia, Decision 1534-A (PECB, 1983); Mansfield School District, Decision 4552-B (1995); Ephrata School District, Decision 4675-A (PECB, 1995); and City of Brier, Decision 5089-A (PECB, 1995).

[14] Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256 (1965).

In South Prairie Construction Company v. Local 627, International Union of Operating Engineers, 425 U.S. 800 (1976), the Supreme Court of the United States upheld the lower court's determination that two subsidiaries of a corporation were a single employer where there was, inter alia, a "substantial qualitative degree of interrelation of operations and common management, one that would not be found in the arm's length relationship existing among unintegrated companies."[15] The NLRB finds single employer status when "two or more nominally separate business entities may properly be considered sufficiently integrated to warrant their unitary treatment." NLRB v. Browning Ferris Industries, 691 F.2d 1117 (3rd Cir. 1982). Where single employer status is found, the employer's are jointly and severally liable for any unfair labor practice violations. RBE Electronics, 320 NLRB No. 8 (1995).

The NLRB's decision in Asociacion Hospital Del Maestro Inc., 317 NLRB 73 (1995), is particularly relevant to the case at hand. In that case, it was determined that a teachers' association and a hospital that admittedly was a "creature" of the association constituted a single employer, even though the two entities had separate corporate forms, organizational structure, and business objectives, and functions, where (1) the hospital was set up and funded by the association to provide low-cost health services to association members; (2) there is integration of both entities top corporate management and directors, as well as common management of all financial decisions; and (3) there is lack of labor relations autonomy on part of hospital, and its relationship with the association was not arms' length.

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[15] See, also, C.E.K. Mechanical Contractors v. NLRB, 921 F.2d 350 (1st Cir. 1990); and Hunts Point Recycling Corporation, 301 NLRB 751 (1991); Farragon Corporation, 318 NLRB 37 (1995); and Lihli Fashions Corp. v. NLRB, ___F.2d___, 151 LRRM 2941 (2d Cir. 1996).

Moreover, if we were to decide that the clinic nurses were originally part of Kennewick General Hospital, but now are part of an employer separate and distinct from the hospital, precedent developed under the NLRA would require a finding that the successor employer is liable for the predecessor's unfair labor practices. The NLRB and courts commonly apply alter ego analysis to find liability where, as here, the facts indicate the successor could be considered to be "merely a disguised continuance of the old employer." See, Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945).[16]

The Refusal to Bargain Allegation

The employer claims that it did not refuse to bargain over the clinic nurse positions, but that the union did refuse to bargain by circumventing the issue throughout negotiations. The employer suggests that the union waived its right to bargain by filing an unfair labor practice charge. We find the employer's contentions without merit.

Employers have the same opportunities as unions to file charges claiming a party refused to bargain. WAC 391-45-010. The Commission's rules, unlike the Washington Rules of Court, make no provision for the filing of "counterclaims" or "crossclaims". City of Snohomish, Decision 1661-A (PECB, 1984); and City of Yakima, Decision 1124-A (PECB, 1981). In the absence of a complaint filed by the employer in conformity with WAC 391-45-050, the Commission has no basis for considering the employer's allegations that the union refused to bargain.

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[16] See, also, Golden State Bottling Company, 414 U.S. 168 (1973); C.E.K. Mechanical Contractors v. NLRB, supra; Glebe Electric, 307 NLRB 883 (1992); Commercial Forgings Company, 315 NLRB 162 (1994); D.M.S. Electrical Control Inc., 314 NLRB 372 (1994); Fire Tech Systems Inc., 319 NLRB No. 43 (1995); and Hebert Industrial Insulation Corporation, 319 NLRB No. 71 (1995).

The record shows that the union took the position that the clinic nurses were covered by the existing collective bargaining agreement, and that it conveyed its position to the employer. The employer moved forward with its decision anyway, and transferred bargaining unit members outside of the bargaining unit without notice to, or bargaining with, the union. The action was presented to the union as a unilateral fait accompli.[17]

The Commission has long held that either a decision to lay off bargaining unit employees or to transfer bargaining unit work to persons outside the bargaining unit is a mandatory subject of bargaining.[18] Even if the NPM were to be considered a completely separate entity, the chain of liability would continue when the employer transferred management of the clinics to NPM.

Course of Conduct

The employer claims it engaged in good faith negotiations in an effort to reach a settlement, and takes issue with the Examiner's conclusion that it engaged in an unlawful course of conduct. A refusal to bargain violation is predicated on a finding of bad faith bargaining in regard to mandatory subjects of bargaining, i.e., issues concerning wages, hours, and working conditions.[19]

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[17] The employer could have initiated a unit clarification proceeding under Chapter 391-35 WAC, but it never did so. Unit determination is a matter delegated by the Legislature to the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981), and a party which takes a strident position on inclusion or exclusion of positions from a bargaining unit does so at its peril if its position proves to be incorrect.

[18] See, City of Centralia, Decision 1534-A (PECB, 1983) and cases cited therein, and North Franklin School District, Decision 3980-A (PECB, 1993).

[19] See, Spokane School District, Decision 310-B (EDUC, 1978).

In determining whether a party engaged in bad faith bargaining, the Commission reviews the totality of conduct or circumstances surrounding the negotiations.[20]

At the beginning of negotiations for a successor collective bargaining agreement, the employer proposed economic take-aways and deletion of certain language protections, but did not fully explain its reasons for those proposals. In addition, the employer wrote memos to employees which denigrated the union and questioned the employees' need for bargaining representation. On the whole, the final proposal made by the employer six months later showed no genuine accommodation to the main issues of concern revolving around pay. Those facts support a finding that the employer made and refused to budge from predictably unacceptable proposals.

The employer's contentions that it was the union which refused to meet, are belied by the facts. A thorough review of the record shows that for several months the employer expressed a desire not to meet with the union because of a belief it would not produce "fruitful results". Several times during the overall course of events, the employer wrote memos to and dealt with employees directly on issues of wages, hours, and working conditions of bargaining unit employees.

The employer refused to bargain the removal of the clinic work from the bargaining unit, never wavering from its unfounded position that the clinic nurses were not included in the bargaining unit. Its intransigent position on that issue tainted the entire negotiations. Good faith bargaining in the context of totality of circumstances could not and did not survive.[21]

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[20] See, Mansfield School District, Decision 4552-B (EDUC, 1995), and cases cited therein.

[21] We note a typographical error on page 23 of the Examiner's decision, in the second full paragraph under "Course of Conduct" Analysis, beginning on the eighth

Motion to Dismiss Amended Complaint

The employer argues that the parties reached a new collective bargaining agreement before the Examiner's decision was issued, and that the new contract fully addressed all the issues, so that the complaints should have been dismissed.

We have thoroughly reviewed the collective bargaining agreement in effect on April 1, 1995, and do not find that it remedied all of the issues. It may have addressed the issues arising between the employer and those whom the employer considered to be a part of the bargaining unit, but it did not resolve the issues surrounding the clinic nurses. Those issues included whether those nurses were part of the bargaining unit, whether the parties should bargain about their removal, and the like.[22]

Even though a collective bargaining agreement is negotiated and agreed upon by the parties, that agreement does not resolve the allegations concerning improper bargaining conduct.[23] The Examiner properly denied the employer's motion to dismiss.

Remedy

The Examiner ordered restoration of "the status quo ante that existed prior to the employer's unlawful actions" and maintenance of those wages, hours and working conditions until changes, if any,

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line from the bottom. The sentence should read, "Such bargaining positions or tactics do constitute an unfair labor practice, however, if the employer takes the position that it has no flexibility, whatsoever, on most, if not all issues critical to final settlement."

[22] We do note that under 16.3.1.1 and 16.3.1.2 of the contract cited by the employer, nurses in the clinics are specifically listed within provisions on training.

[23] See, City of Olympia, Decision 2629-A (PECB, 1988).

are reached through good faith collective bargaining with the union. She also ordered the employer to make whole any member of the bargaining unit who suffered changes in his/her wages, hours or working conditions by the employer's unlawful actions.

The employer first asserts that no remedy is required. In the alternative, it argues that it is only the two clinic nurses who elected to remain with the clinic as of November 1, 1994, who are due a remedy, and that they are only due pay lost from November 1, 1994 until January 1, 1995. The employer claims that the contract negotiated and in effect April 1, 1995, fully addressed all the contract wage and benefit issues, and that the contract should be applied to define the parameters of any remedy required. The employer also argues remedies should be limited since it was prevented from putting on any testimony as to events which occurred after August 9, 1994, the date of the last unfair labor practice charge. It also alludes to confusion as to the remedy ordered by the Examiner.

The contract subsequently negotiated by the parties does not suffice to eradicate the unfair labor practice violations themselves, so the employer's arguments based on that contract must be rejected. The purpose of a remedial order issued by the Commission is to place the parties back in the same position had no violation been committed. The union is entitled to have the clock rolled back to the situation which existed when the employer embarked on its unlawful conduct.

Under the conditions that existed prior to the employer's unlawful course of conduct in bargaining, all nurses working 12-hour shifts received a contractual premium. The employer must make the affected employees whole from the date they suffered changes, to the date the status quo ante is restored by the employer. Once the status quo ante is restored, the employer must maintain those

wages, hours and working conditions until changes, if any, are reached through good faith collective bargaining with the union.

Under the conditions that existed prior to the employer's unlawful refusal to bargain the removal of the clinic work from the bargaining unit, the clinic nurses were members of the bargaining unit and were covered by the parties' collective bargaining agreement. The work performed by nurses at the clinics must be restored to the bargaining unit represented by the union. All transfers of employees made in connection with the unlawful transfer of clinic operations will have to be reversed, so that former clinic nurses who took other jobs in anticipation of the change must be offered reinstatement to the positions they held, so that they can resume working in the clinics if they prefer to do so. Once the transfers are sorted out, all bargaining unit employees who were affected by the unlawful unilateral change, including both those who accepted transfer to NPM and those who declined to stay with the clinics in 1994, must be made whole for lost wages and benefits, as if no transfer had occurred.[24]

If the parties are unable to agree on the remedies due under our order, either party can request a compliance hearing.

NOW, THEREFORE, it is

ORDERED

1. The Findings of Fact, Conclusions of Law, and Order issued in this matter by Katrina I. Boedecker are affirmed and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission, except that the typographical error on page 23 of

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[24] Under WAC 391-45-410, which is applicable in this case, back pay calculations include an offset for interim earnings.

the Examiner's decision, in the second full paragraph under "Course of Conduct" Analysis, beginning on the eighth line from the bottom, as noted above, is hereby corrected to read: "Such bargaining positions or tactics do constitute an unfair labor practice, however, if the employer takes the position that it has no flexibility, whatsoever, on most, if not all issues critical to final settlement."

2. Kennewick Public Hospital District 1 d/b/a Kennewick General Hospital, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

a. CEASE AND DESIST from:

1) Refusing to bargain in good faith with the United Staff Nurses Union, Local 141 as the exclusive bargaining representative of the registered nurses of the employer including the registered nurses working in the clinics.

2) Engaging in a course of conduct which frustrates the collective bargaining process with the United Staff Nurses Union, Local 141.

3) In any other manner interfering with, restraining or coercing its certificated employees in the exercise of their right to organize and bargain collectively under Chapter 41.56 RCW.

b. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

1) Upon request, meet with the authorized representatives of the exclusive bargaining representative of its registered nurses, including the nurses at

the clinics, at reasonable times and places, and bargain in good faith.

2) Restore the status quo ante that existed prior to the employer's unlawful actions and maintain those wages, hours and working conditions until changes, if any, are reached through good faith collective bargaining with the union.

3) Make whole any member of the bargaining unit who suffered changes in his/her wages, hours or working conditions by the employer's unlawful actions.

4) Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced or covered by other material.

5) Notify the above-named complainant, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

6) Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this order, as to what steps have been taken to comply with this order,

and at the same time provide the Executive Director with a signed copy of the notice required by this order.

Issued at Olympia, Washington, on the 19th day of November, 1996.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARILYN GLENN SAYAN, Chairperson

SAM KINVILLE, Commissioner

JOSEPH W. DUFFY, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

APPENDIX

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL NOT fail or refuse to bargain with the United Staff Nurses, Local 141, as the exclusive bargaining representative of our registered nurses, including registered nurses assigned to the Women and Children's Clinic and the Columbia Center Clinic.

WE WILL NOT engage in a course of conduct which frustrates the collective bargaining process with the United Staff Nurses Union, Local 141.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

WE WILL, upon request, meet with the authorized representatives of the United Staff Nurses Union, Local 141, at reasonable times and places, and bargain in good faith.

WE WILL make whole any member of the bargaining unit who suffered changes in his or her wages, hours or working conditions by our unlawful actions.

WE WILL restore the status quo ante that existed prior to our unlawful actions and maintain those wages, hours and working conditions until changes, if any, are reached through good faith collective bargaining with the United Staff Nurses Union, Local 141.

DATED: _____

KENNEWICK PUBLIC HOSPITAL DISTRICT 1
d/b/a KENNEWICK GENERAL HOSPITAL

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P.O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.